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SMALL BUSINESS ADMINISTRATION

13 CFR Part 130

[Docket No. SBA–2015–0005]

RIN 3245–AE05

Small Business Development Centers

AGENCY: U.S. Small Business Administration.

ACTION: Final rule.

SUMMARY: The U.S. Small Business Administration (SBA or the Agency) issues this final rule to update its regulations for the Small Business Development Centers Program (the SBDC Program or the Program). The Office of Small Business Development Centers has not comprehensively updated its regulations since 1995. This final rule updates and clarifies the regulations, making them more efficient, effective, transparent, and comprehensive, and puts them in alignment with current SBA policy and guidance. This final rule also includes policy and procedural changes identified by the Agency as necessary to preserve the integrity and legislative intent of the Program. Finally, it incorporates updates to conform with administrative requirements, cost principles, and audit requirements for Federal awards (Uniform Guidance).

DATES: *Effective date:* December 7, 2023.

FOR FURTHER INFORMATION CONTACT: Rachel Karton, Program Manager for the SBDC Program, at 202–205–6766 or *rachel.newman-karton@sba.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

A. Statutory

The SBDC Program was authorized in 1980 by the Small Business Development Centers Act of 1980 (Pub. L. 96–302, 94 Stat. 833) and is currently codified in section 21 of the Small Business Act, 15 U.S.C. 648 (the Act). According to the Act, the purpose of the Program is to assist in establishing SBDCs explicitly to provide ''management and technical assistance'' to small businesses. Section 21(a)(3)(A) requires SBA to consult with the recognized association of SBDCs in any rulemaking action for the Program.

B. History

Title II of the Small Business Development Act of 1980 authorized the SBDC Program at an initial annual funding level of $8.5 million. The new law specifically provided for Federal funding to be matched one-for-one with non-Federal funds and required an evaluation of the Program to be submitted to Congress by January 31, 1983.

SBA's Associate Administrator, Small Business Development Centers (AA/SBDC) holds statutory responsibility for the general management and oversight of the SBDC Program by means of a cooperative agreement with each recipient organization. A recipient organization is an institution of higher education or a state agency which receive Federal funds to operate an SBDC. Recipient organizations administer the SBDC Program to provide small businesses and aspiring entrepreneurs with a wide array of technical assistance, help strengthen business performance and sustainability, and enable the creation of new business entities.

The SBDC Program regulations were revised in 1995, *see* 60 FR 31504 (June 13, 1995). The statute authorizing the SBDC Program has since been amended numerous times. The annual notice of funding opportunity has become, for all practical purposes, the document which interprets statutory requirements of the Program and aligns them with current policies and procedures. To maintain consistency in Program administration and implementation, it is necessary to revise the regulations to outline current policies and procedures. Many of the proposed changes are enforced through the current notice of funding opportunity. Therefore, SBA revised Program regulations to incorporate those changes for efficiency and transparency of the SBDC Program.

1. Summary of Advanced Notice of Proposed Rulemaking

SBA published an advanced notice of proposed rulemaking (ANPRM) on April 2, 2015, at 80 FR 17708, seeking comments on the development of new definitions, clarification of existing program requirements, and the renewal or termination of the notice of award. The ANPRM also solicited comments on international trade counselor certification requirements, required steps for the selection of Lead Center Directors, procedures for international travel, and procedures regarding the determination to effect suspension, termination or nonrenewal of an SBDC's cooperative agreement.

SBA received 133 comments on this ANPRM, which were considered during the development of the proposed rule. Comments received generally fell into four categories: the role of the District Office, definitions/clarifications, client confidentiality, and the Lead Center Director hiring process. SBA took these comments under advisement when writing the proposed rule.

2. Summary of the Notice of Proposed Rulemaking

The notice of proposed rulemaking was published on December 13, 2022, at 87 FR 76127, with a comment period of 60 days. Following the publication of the NPRM, SBA received approximately 350 comments from a broad range of stakeholders on a diversity of issues relating to the proposed rule. These included comments from the Association of Small Business Development Centers, several Small Business Development Centers, Chambers of Commerce, banking and lending institutions and other economic development organizations.

First, SBA proposed to clarify and define the role of the District Office regarding grant oversight activities by proposing new definitions and procedures throughout program regulations. Second, SBA proposed the addition of 23 new definitions and the revision of existing definitions to explicitly define and clarify the various roles, procedures, documents, and categories of funding. Third, a new section was proposed to codify SBDC client confidentiality requirements under the Act. Finally, the proposed rule added the current process of hiring a Lead Center Director, as outlined in the cooperative agreement. The intent of the proposed rule changes was to make Program operations more streamlined and less onerous for recipient organizations and the Agency and to

align with current practices in the notice of funding opportunity and cooperative agreement. Many of the proposed changes made, which were discussed in comments received through the ANPRM are already required and implemented by the SBDCs; however, these final regulations will codify existing requirements to ensure consistency in Program regulations.

Through the NPRM, the Agency also sought feedback on its existing collection and use of individual SBDC client data.

3. Summary of Final Rule

In this final rule SBA incorporates the Uniform Guidance at 2 CFR part 200, which streamlined and consolidated government requirements for receiving and using Federal awards to reduce administrative burden and improve outcomes; makes various revisions to align the regulations with the text of the SBDC statute; and adopts the proposed rule with changes from the comments received from the publication of the NPRM.

C. Discussion of Comments

SBA received approximately 350 comments on the proposed rule, 50 of which pertained to SBA's new section regarding client confidentiality; 12 regarding the new definition of the accreditation process; 31 comments on the definition of program income; 13 comments on the definition of SBDC Director; 30 comments on new § 130.310(c), Area of service; 20 comments on new § 130.320(e), Operating requirements; 34 comments on § 130.330(b)(5), SBDC services and restrictions on services; 14 comments on revised § 130.350(a)(3) and 6 comments on § 130.350(a)(6) regarding SBDC advisory boards; 15 comments regarding new § 130.370(b), Contracts with other Federal agencies; 11 comments regarding new § 130.460(g)(1) regarding the salaries of the State Directors; and other as stated below. SBA also received comments from The National Center for American Indian Enterprise Development requesting (1) to include ''tribal'' in § 130.100, Introduction, which SBA has accepted and (2) changes to § 130.200, Eligible entities, to include tribal communities and to add a new paragraph which states, ''including a recipient organization that teams with a tribal government, Native American private or non-profit business assistance center or Native American community development financial institution that provides entrepreneurial development counseling to small businesses and entrepreneurs in native communities.'' SBA is unable to change this request as eligible entities are outlined in the Small Business Act, 15 U.S.C. 656 and 648. However, SBA supports tribal governments and entities to collaborate with SBDC Lead Center Directors and their networks of Service Centers.

Comments Opposing SBA's Proposed Changes to Various Definitions in § 130.110

a. SBA received 12 comments on the proposed definition of accreditation process. The commenters expressed that the accreditation process evaluates SBDC programs based on standards derived from the Baldrige Performance Excellence Program. The commenters further stated that the accreditation process focuses on overall program improvement that is consistent with the standards providing conditions and recommendations on how to work toward continuous improvement based on observations during the review. The commenters request that SBA revise the definition of accreditation process to include such information.

SBA Response: SBA revised the definition of accreditation process that reflects the commenters suggestions and current use of the term. The new definition states that it's the process by which evaluation and assessment occurs to assist an SBDC with assessing its processes and outlining areas needing improvement by providing recommendations to strengthen delivery of services and assistance.

b. SBA received three comments on the definition of application. The commenters stated that this definition needs to include the term ''renewal application.''

SBA Response: SBA took these comments under consideration and revised the definition of application to include the term ''renewal application.''

c. SBA received one comment on the definition of cash match requesting to include waived indirect costs (IDC) in the definition. The commenter further stated that when it states that IDC is not allowed as cash match, adding the verbiage of the waived IDC may be important to include here. Currently, waived indirect costs are included as cash match after 50 percent of actual cash are acknowledged in the agreement.

SBA Response: SBA rejects this comment. As defined in 2 CFR part 200, waived indirect cost is the difference between the total amount of indirect costs charged to a Federal award and the total amount of indirect costs that could have been charged to a Federal award. The regulation in 2 CFR part 200 refers to this as unrecovered indirect costs.

d. SBA received six comments on the new proposed definition of clearinghouse. The comments state that the definition should be reflected as a collection of management information and a source of market and industrial information that all SBDC programs have access to assist clients. It also collects management information for SBDC networks.

SBA Response: SBA revised the definition of clearinghouse to define the term more clearly and accurately as requested by the commenters. The definition now states that the clearinghouse is a source of market and industry information made available to all SBDC networks to assist clients and supports the exchange of information between SBDCs.

e. SBA received eight comments on the definition of client. The commenters state that there should be a qualifier before the word ''entrepreneur'' such as ''nascent'' or ''emerging'' or ''developing'' to clarify that this applies to both established business owners and those who plan to start a business.

SBA Response: SBA revised the definition of client to include the word ''nascent'' before the word ''entrepreneur.''

f. SBA received 31 comments on the definition of program income. Commenters stated that this revised definition would make almost all funds and not just training registration fees into program income funds and ineligible for use as match. Commenters also stated that if the intent of ''sponsorship agreement'' was meant to be a co-sponsorship agreement that has been traditionally used with SBDC resource partners when hosting a training event, the language would need to be changed to define ''sponsorship agreement.''

SBA Response: SBA accepts the comments and refers the reader to the definition of program income as defined in 2 CFR part 200.

g. SBA received 13 comments on the definition of SBDC Director. Commenters stated that the definition should read ''at least 75 percent of whose time is allocated to'' or at least ''100 percent of the individual's time and effort is allocated to the SBDC grant OR other grant programs . . .'' An alternative definition that was suggested was a minor grammar change ''100 percent of the individual's time and effort is allocated to the SBDC grant or other grant programs . . .''

SBA Response: SBA agrees with the commenters and revised the definition of SBDC Director to state that no less

than 75 percent of the individual's time and effort is allocated to the SBDC grant.

h. SBA received three comments on the definition of specialized services. The commenters stated that this is a vague definition and that it seems to imply that the SBDC must hire an outside consultant for a client which makes no sense.

SBA Response: SBA agrees with the commenters and deleted the words ''hiring outside consultants for a client'' from the definition.

Comments Opposing SBA's Proposed Changes to Eligible Entities in § 130.200

a. SBA received one comment opposing the proposed change to the eligible entities' requirements of the recipient organization in § 130.200(2)(c). The commenters stated that currently SBDC hosts are colleges or state offices. Instead of restricting SBDC hosts, it would be better to expand hosts to non-governmental entities such as Economic Development offices that may not be a state office. Colleges may not be a good fit for SBDC since they have different missions, and some colleges believe the SBDC they host to conflict with the college's need to increase student enrollment for state funding by head count.

SBA Response: SBA is unable to change this requirement as it required in the Small Business Act, 15 U.S.C. 656 and 648(a)(1), which states, in part, that after December 31, 1990, the Administration shall not make a grant to any applicant other than an institution of higher education or a women's business center operating pursuant to section 656 of the title as a Small Business Development Center unless the applicant was receiving a grant (including a contract or cooperative agreement) on such date. The previous sentence shall not apply to an applicant that has its principal office located in the Commonwealth of the Northern Mariana Islands. Therefore, SBA is rejecting this comment.

b. SBA received five comments on new proposed paragraphs (e) and (f) stating that there is a concern that this new requirement will inherently restrict the ability of the SBDC Lead Center to engage partners that are not housed within higher education and that this will limit the ability of the SBDC to reach and serve rural and under-represented populations.

SBA Response: SBA is unable to change this requirement as it required in the Small Business Act, 15 U.S.C. 656 and 648(a)(1), which states, in part, that after December 31, 1990, the Administration shall not make a grant to any applicant other than an institution of higher education or a women's business center operating pursuant to section 656 of the title as a Small Business Development Center unless the applicant was receiving a grant (including a contract or cooperative agreement) on such date. The previous sentence shall not apply to an applicant that has its principal office located in the Commonwealth of the Northern Mariana Islands. Therefore, SBA rejected this comment.

Comments Opposed to § 130.310—Area of Service

SBA received 30 comments regarding the new proposed paragraph (c) stating that there is a concern that this new requirement will inherently restrict the ability of the SBDC Lead Center to engage partners that are not housed within higher education and that this will limit the ability of the SBDC to reach and serve rural and under-represented populations.

SBA Response: SBA accepts these comments and revised the paragraph to provide that for any applicant commencing after January 1, 1992, the recipient organization must ensure that any new SBDC service centers established within its area of service, to the extent practicable, are primarily housed within institutions of higher education or a Women's Business Center (WBC), operating pursuant to section 29 of the Small Business Act (15 U.S.C. 656) as stated in section 21(a)(1) of the Small Business Act (15 U.S.C. 648(a)(1)).

Comments Opposing SBA's Proposed Changes to § 130.320—SBDC Operating Requirements (Formerly § 130.330)

a. There is one comment opposing the proposed revision to paragraph (a) which states that full time is more than 75 percent. The proposed paragraph states that the Lead Center must be an independent department within the recipient organization, having its own staff, including a full-time SBDC Director.

SBA Response: SBA accepts this comment and revises the paragraph to delete the reference to ''full-time.''

b. SBA received 20 comments opposing the proposed new paragraph (e) stating that this new paragraph will severely limit the ability of SBDCs to coordinate and collaborate with outside entities. If ''any type of organization'' can be considered an ''SBDC service center'' then literally anybody SBDCs work with becomes an SBDC service centers. If the point is to track SBDC performance than this will lead to overcounting, double-counting and taking credit for other people's efforts. Also, ''any funds'' could lead to serious problems with outside organizations that have no wish to submit to SBA scrutiny.

SBA Response: SBA accepts this comment and revised the paragraph to narrow the scope of the requirement to read as follows: ''Any entity that is using the term 'Small Business Development Center' and under contract with the Lead Center and receiving program funds, whether . . .'' and at the end of the paragraph replaces the word ''entity'' with the words ''Service Center.''

c. SBA received one comment opposing new paragraph (f) which refers to the technology designation for an SBDC stating that the America's Small Business Development Centers (ASBDC) voted to and did delete the Technology Development Center Designation under the accreditation program in 2022 in response to the growth and availability of technology services in all SBDCs.

SBA Response: SBA deleted paragraph (f) since the new accreditation standards no longer address the technology designation.

Comments Opposing SBA's Proposed Revisions to § 130.330—SBDC Services and Restrictions on Services (Formerly § 130.340)

a. SBA received six comments on newly revised paragraph (a) stating that not all SBDCs provide either training or specialized services. This should be corrected to read ''with counseling, and whenever practicable, training and specialized services.'' An SBDC Lead Center should use and compensate qualified small business vendors as one of its resources. Another commenter stated that this language is unclear and probably a holdover from old statutory language.

SBA Response: SBA accepts the comments and revised the paragraph to include, ''to the extent practicable.''

b. SBA received one comment on new § 130.330(b)(4) stating that this would be a new requirement and that should the Agency consider this a priority, the Agency should include this information on SBA Form 641.

SBA Response: SBA deleted this paragraph. The remaining paragraphs are redesignated from paragraphs (b)(5) and (6) to paragraphs (b)(4) and (5) in this final rule.

c. SBA received one comment on newly revised § 130.330(b)(3) requesting that SBA define ''direct or indirect role.''

SBA Response: SBA agrees that an SBDC should not act as an agent for the client. SBA inserted after ''however'' ''SBDCs may not attest to a client's

readiness or creditworthiness to the lending institution either verbally or in writing''. Further SBA deleted ''neither SBDC staff nor their agents may take a direct or indirect role in representing clients in loan negotiations.''

d. SBA received 34 comments on newly revised § 130.330(b)(5) (now § 130.330(b)(4)) stating first, that currently SBDC personnel are asked to participate in many panels that provide input concerning loan applicants. In some states, the State Economic Development Departments rely on SBDC personnel to assist them in evaluating numerous applicants for state assistance. Second, why is one SBA Resource Partner allowed to make loans (Women's Business Centers) while the others are not. According to several studies the biggest challenge faced by minority entrepreneurs is access to capital. Eighty-three percent of minority entrepreneurs have difficulties accessing capital and 76 percent rely on personal and family savings. By servings on panels or board that review loan applications, SBDC personnel become more knowledgeable about the financing trends in their communities and better understand the advising needs of minority owned business. Finally, some SBDC counselors have been members of loan committees of Black and Latino associations and instrumental in widening access to capital for minority entrepreneurs and learning of their technical assistance (advising) needs.

Another commenter stated that SBDC personnel participate on Loan Evaluation Boards where SBDC personnel routinely serve on boards, panels, etc. and that SBDC personnel are covered by SBA's conflict of interest codified at 2 CFR 200.112.

SBA Response: SBA agrees with the commenters and revised the language to state ''SBDCs may participate on boards and panels of financial institutions and with outside organizations but may not be involved in any final credit decisions involving SBDC clients or in making or servicing loans.''

e. SBA received one comment regarding newly revised § 130.330(b)(6) (now § 130.330(b)(5)) requesting that SBA define the word ''advocate,'' noting the current rules also mention the words ''may not advocate'' but fails to define it for better universal understanding.

SBA Response: SBA agrees with the commenter and revises the language to include ''. . . but may not advocate for, promote, recommend approval . . .'' to the paragraph.

f. SBA received seven comments on revised § 130.340(c). Some comments requested that SBA not codify specific focus areas which are likely to change, and other commenters requested that specific focus areas, such as the ''employee-owned business concern, be included in this paragraph.

SBA Response: SBA agrees not to include specific focus areas in the regulations as they could change which is now reflected in the regulation. Focus areas will be included in the notice of funding opportunity (NOFO) each year.

Comments Opposing § 130.340—Specific Program Responsibilities (Formerly § 130.350)

SBA received two comments on the proposed language stating that not all service centers provide training. The District Office and/or program manager may construe this to mean that all centers must provide training and that this would be a new requirement and could place a substantial financial burden on individual service centers.

SBA Response: SBA agrees with the commenters and revises the language in new § 130.340(c)(5) to state that service centers should provide access to training.

Comments Opposing § 130.350—SBDC Advisory Boards (Formerly § 130.360)

a. SBA received 14 comments on proposed § 130.350(a)(3) stating that the proposed language is not supported by sec. 21(j)(1) of the Small Business Act, and may restrict advisory board membership from including local leaders, non-profit organization supporting underserved communities, etc. Further, these advisory boards should consist primarily of representatives from small businesses or associations representing small businesses, as well as local economic development and community organizations. Some SBDCs have small business champions, community development experts, and others with expert skills and experience that the SBDC would like to include as members. The commenters stated that it seems that SBDCs should have the flexibility to make this decision if they do indeed ensure that most of our members are from small businesses or associations representing small businesses.

SBA Response: SBA accepts these comments and did not revise this paragraph.

b. SBA received six comments on proposed § 130.350(a)(6) stating that this language precludes the possibility of advisory boards paying their own costs. Advisory board members are volunteers and often pay their own costs.

SBA Response: SBA accepts this comment and agrees that the proposed language should be changed so that the Board members can pay for their own costs if they choose to do so. The paragraph now states that the reasonable cost of travel of any Board member for official Board activities may be paid out of the SBDC's budget funds, and Federal and program funds are not to be used to compensate advisory board members for non-travel related expenses such as time and effort.

Comments Opposed to § 130.370—Contracts With Other Federal Agencies

SBA received 15 comments regarding proposed new § 130.370(b) stating that this requirement does not provide any responsibility for SBA to respond. The commenter requests that a five business-day response time from SBA be incorporated into the rule so that SBDCs are not precluded from participating in grant opportunities consistent with their mission.

SBA Response: SBA accepts these comments and adds language to the end of the paragraph with a five-business day response timeframe.

Comments Opposed to § 130.380—Client Privacy

SBA received 50 comments regarding this new section stating they believe that this section compromises the intent of the privacy guidelines currently in practice without outlining specific practices the Agency must comply with to ensure that client data is not unduly disregarded. The commenters want to know who is responsible for the data. Currently, the SBDC controls the client identifying data and submits downloads that contain anonymized information for program performance monitoring. The commenter raises several questions regarding broadening access to the data including how it will impact client privacy and who will be responsible for the making these decisions. Further, the commenter has questions regarding responsibility for granting access to the client data.

Finally, the commenter states that it seems as though Congress included a catch-all provision in the Small Business Act (section 21(a)(7)(C)(ii)) requiring that regulations regarding client privacy ''shall, to the extent practicable, provide for the maximum amount of privacy protection.'' Therefore, any lessening of that amount of privacy requires the SBA to take significant steps to limit disclosure. The proposed rule works in the opposite direction—towards more exposure, not less. The SBA might consider prescribing steps to protect that privacy.

SBA response: SBA rejects these comments. The SBA complies with the statute protecting client privacy. First,

SBA allows clients to opt-in to obtain their contact data for the purpose of communication and surveys. SBDCs cannot refuse service for those who do not opt in; therefore, the client has the right to not disclose the information in most cases excluding the three exceptions. With regards to surveys, SBA will consult with the Recognized Organization prior to implementing a survey to coordinate any timing, minimizing duplicating any surveys that are currently being done, and protect the client's privacy to the maximum extent possible.

SBA believes that the language in the regulation does not compromise the intent of the privacy guidelines currently in place.

The language states that the 641 has an opt-in clause for clients. Clients do not have to provide their information on the form.

Comments Opposed to § 130.410—New Applications

SBA received three comments regarding § 130.410(b) stating that while this paragraph only applies to new applicants to the SBDC program, it does raise issues surrounding foreign campuses, and relationships with other institutions outside the area of operation.

SBA Response: SBA agrees with the comments received and removed the word ''region'' from the paragraph.

Comments Opposed to § 130.420—Renewal Applications

a. SBA received two comments on § 130.420(c)(2) stating that this appears to be a subjective measure. The commenters asked how will the Agency define how quality is evaluated, or is the intent of this statement that the Agency will review the performance of a program relative to programmatic goals, and relative to prevailing economic conditions during that prior performance period? How will the Agency measure and assess quality of prior performance?

SBA Response: SBA agrees with the commenters and added language to the paragraph that incorporates client satisfaction rates as a deciding factor.

b. SBA received three comments on proposed new § 130.420(c)(5) stating that accreditation recommendations do not require action, they are simply recommendations for consideration and suggests this paragraph be rephrased to cite the current accreditation report, rather than recommendations.

SBA Response: SBA accepts the comment. SBA replaces the word ''recommendations'' with the word ''conditions.''

Comments Opposing § 130.450—Matching Funds

a. SBA received three comments on the revision of § 130.450(a) stating that the new language appears to contradict the funding requirement defined in the statute.

SBA Response: SBA accepts this comment and revised the language in this paragraph to state that no more than 50 percent of cash match may be provided through any allowable combination of additional cash, in-kind contributions, or indirect costs.

b. SBA received seven comments regarding revised § 130.450(b) stating that this appears to be an overstep by the Agency that increases the reporting burden of the SBDC, with no discernable benefit to the Agency or the SBDC. Further, different hosts and partners have different requirements and expectations, and it is the responsibility of the SBDC to ensure that these needs are in alignment with the mission and vision of the program and to ensure that the needs are being met, should they wish to continue to receive that match funding.

SBA Response: SBA rejects this comment but clarified the language by adding that only the additional requirements from SBA will need to be identified. Further, SBA requests this information to ensure that the Non-Federal Entity's (NFE) cost sharing and matching are not paid by Federal Government under another Federal award or by other Federal sources. Additionally, the SF424 requires the sources of match. Further, if match sources are not known, SBA could unknowingly approve those funds through the Notice of Award.

c. SBA received one comment on proposed § 130.450(e) stating that matching funds includes in-kind which by definition is not under the direct management of the State Director.

SBA Response: SBA rejects this comment as all funds are and should be under the authority of the State Director. When the SBDC accepts an in-kind donation the management of the SBDC is accountable for accurate reporting. SBA added the following sentence for clarity: ''If in-kind contributions are utilized by the SBDC, the State Director or an SBDC Service Center Director is then considered to be in control of those contributions.''

d. SBA received one comment on new proposed § 130.450(f) stating that this paragraph is objective and questioning why SBA is vesting special authority in the Grants Management Specialist (GMS). A program either meets the cash match or not. There is no determination to be made by the GMS or others.

SBA Response: SBA rejects this comment. SBA needs to determine if there is sufficient cash match and has oversight responsibility of that match amount. Additionally, the GMS must determine and evaluate the proposal that proper cash match has been provided.

e. SBA received five comments regarding proposed new § 130.450(g) stating that identifying overmatched funds is problematic. The policy of the university is to not report overmatch so that these funds can be used for leveraging other grants and opportunities. There are also concerns as to how this funding may be spent. This is problematic to the university and the SBDC organization. A benefit of the current SBDC model is that innovative and additional business services complement base SBDC services. Since SBA's funds are limited, SBDCs must seek other sources of capital and should not be limited by this proposed requirement.

SBA Response: SBA accepts this comment and revises the language to include that overmatching expenditures are those which are derived from eligible matching sources; are reasonable, allowable, and allocable to the SBDC program; are over and above the minimum match required to the Federal expenditures; and are included on the required SBDC financial reporting to SBA for the project period.

Comments Opposed to § 130.460—Budget Justification

a. SBA received seven comments regarding new proposed § 130.460(f) about lobbying. The commenter stated that the new paragraph seems to be a gratuitous restatement of current Office of Management and Budget (OMB) guidance. It is also confusing as state lobbying efforts are permitted as the purpose is to ''reduce program costs'' by obtaining matching funds. Another commenter states that this creates a problem with hosts, regarding state activities. There is an OMB exception regarding state activities ''to reduce the cost or avoid material impairment''. Also, this violates section 21(a)(3)(B) of Small Business Act (''Circulars shall be incorporated by reference and shall not be set forth in summary or other form in regulations.''). The commenter requests that the first sentence should be stricken. Also, lobbying definition is far more complex than this which gives a false impression of ''any legislative contact.'' Finally, another commenter suggests that this section should clearly state, as permitted by OMB, that SBDCs

can engage in lobbying in order to secure adequate public match funding. This will reduce ambiguity among Federal and state stakeholders.

SBA Response: SBA accepts these comments and deleted the paragraph.

b. SBA received 11 comments on revised proposed new § 130.460(f) regarding salaries of the State Directors. The commenters state that this language hasn't been useful in the past when examining host institutions' human resources departments on pay equality issues. The section is neither helpful nor enforceable and should be removed. Basing Center Director salaries on professor salaries does not make sense, particularly for Centers that are not based in higher education institutions. Furthermore, Centers and their Hosts must be able to stay competitive in the marketplace to hire top quality employees. Another commenter stated that if a recipient organization is not an educational institution, the salaries of the SBDC Lead Center Director and the subcenter Directors must approximate the average salaries of parallel positions within the recipient organization. In both cases, the recipient organization should consider the Director's longevity in the Program, the number of subcenters, the size of the SBDC budget, the number of service centers, and the individual's experience and background.

SBA Response: SBA accepts these comments and deleted the reference to the salary but is keeping the rank in the organization and revising the text to state that where the recipient organization is an educational institution, the SBDC Lead Center Director and the SBDC Service Center Director at a minimum must be equivalent to a full professor and an assistant professor, respectively, in the school or department in which the SBDC is located.

c. SBA received two comments on revised § 130.460(i) regarding travel. The commenter states that this entire section is covered by the omni-circular; the organizations and institutions that host SBDC programs have very clear guidelines on allowable versus unallowable travel expenses.

SBA Response: SBA accepts these comments and will reference 2 CFR 200.475 and NOFO for out-of-state and international travel.

d. SBA received two comments on revised § 130.460(i)(2) regarding coach class travel. The commenter questions what is meant by coach class and how is this different than the omni-circular.

SBA Response: SBA accepts these comments and deleted this paragraph.

e. SBA received one comment on revised § 130.460(j) regarding dues stating that 2 CFR 200.454(a) Costs of the non-Federal entity's membership in business, technical, and professional organizations are allowable.

SBA Response: SBA accepts this comment and deleted this paragraph.

Comments Opposing 13 CFR 130.480—Program Income

a. SBA received one comment on revised paragraph (b) regarding the use of program income. The commenter stated that this is a legacy rule that should be reviewed by the Agency and that the CFR sets forth no such limitations. Given the Agency's historical backlog for issuing notices of award along with the difficult Federal budget process, program income can be a valuable resource to provide services to clients during shutdowns or during the time when programs do not have an active Notice of Award due to Agency delays.

SBA Response: SBA rejects this comment based on the Small Business Act section 21(a)(4)(A) which requires the recipient to match 100 percent Federal grant funding not less than 50 percent cash and not more than 50 percent of indirect costs and in-kind contributions. SBA interprets this paragraph to mean that program income, which are fees collected from recipients of assistance, is excluded to be used as matching funds. Further, SBA requests the sources of match to ensure that the NFE's cost sharing and matching are not paid by the Federal Government under another Federal award or by other Federal sources. Additionally, forms submitted to the SBA require the NFE to provide the source of the matching funds. If the funding sources are not provided to the SBA, SBA could unknowingly approve an award with unallowable sources of matching funds.

b. SBA received one comment on proposed new paragraph (e) regarding program income and SBDC sponsored activities. The commenter stated that they do not believe that funds received under a sponsorship agreement should be considered program income and that the requirement is not in 2 CFR 200.80.

SBA Response: SBA accepts this comment and deleted this paragraph.

Comments Opposing 13 CFR 130.490—Property Standard

SBA received one comment opposing this section as it repeats guidelines outlined in 2 CFR part 200.

SBA Response: SBA agrees with this comment and will delete this section from the regulation.

Comments Opposing 13 CFR 130.500—Advances and Reimbursements

SBA received one comment regarding this section stating that this is a restatement of what is in 2 CFR part 200.

SBA Response: SBA accepts this comment and removed the section as it is a restatement of what is in 2 CFR part 200.

Comments Opposing 13 CFR 130.600—Cooperative Agreement

a. SBA received one comment opposing proposed paragraph (b) stating that it is in direct conflict with the Agency's requirement to grant prior approval for contracts in § 130.620.

SBA Response: SBA agrees with the commenter and revised the paragraph to state that SBA reserves the right to disapprove any sub-agreement entered into the by recipient organization with SBDC service center organizations, vendors, or contractors.

b. SBA received one comment opposing proposed paragraph (d) stating that this paragraph is already covered by 2 CFR part 200.

SBA Response: SBA agree with the commenter and deleted this paragraph.

Comments Opposing 13 CFR 130.610—Grant Administration and Cost Principles

a. SBA received one comment regarding the new proposed paragraph (b) stating that this paragraph is already covered by 2 CFR part 200.

SBA Response: SBA agree with the commenter and deleted this paragraph.

b. SBA received one comment regarding the new proposed paragraph (c) stating that there is nothing to preclude SBA to propose additional requirements beyond 2 CFR part 200.

SBA Response: SBA accepts the comments and deleted this paragraph.

Comments Opposing 13 CFR 130.620—Revisions and Amendment to Cooperative Agreements

a. SBA received two comments regarding revised paragraph (a)(2) questioning whether this paragraph is regarding sub-awards or contracts. Additionally, the comments state that this requirement is already covered by 2 CFR part 200.

SBA Response: SBA agrees with the commenters and deleted paragraph (a)(2).

b. SBA received two comments on proposed new paragraph (a)(3) stating that they encourage the regulations to include language describing how SBA will publicize and distribute any supplemental funds it may have and to seek input from SBDCs regarding

distribution of these funds in a way that supports the overall program and/or individual SBDCs. The summary mentions supplemental funds but there is no language regarding those funds and how they would be distributed.

SBA Response: SBA accepts this comment and revises the paragraph to add the following language, ''If supplemental funds are available for distribution, SBA will publish a notice of funding opportunity in consultation with the Recognized Organization.''

c. SBA received two comments regarding new paragraph (b) asking if SBA will amend a cooperative agreement with one SBDC decreasing its award in order to increase another SBDC's cooperative agreement award to authorize unanticipated out-of-state travel?

SBA Response: SBA accepts this comment and adds the following language at the beginning of paragraph (b)(1), ''In consultation with the Recognized Organization . . .''

Comments Opposed to § 130.630—Dispute Resolution Procedures

SBA received three comments regarding revised paragraph (a)(1). The comments question why the District Office needs to be involved in the process of a financial dispute resolution since the District Office in not involved in the financial oversight process.

SBA Response: SBA accepts this comment and replaces the District Office reference with the Grants Management Officer.

Comments Opposed to § 130.700—Suspension, Termination, and Non-Renewal

a. SBA received two comments regarding paragraph (a)(1) stating that this paragraph vests broad authority to terminate and contradicts guidance in the renewal application section and that this is concerning as it gives the Agency authority to terminate without cause.

SBA Response: SBA accepts these comments and is removing this paragraph. Further, the SBA acknowledges that the causes for termination are outlined in 2 CFR 200.340.

b. SBA received three comments regarding revised paragraph (b) stating that this paragraph does not accurately reflect the accreditation process. The recommendations are for continuous improvement of the program and are at the discretion of the Lead Center to act upon.

SBA Response: SBA accepts the comments and is replacing the word ''recommendations'' with the word ''conditions.''

Comments Opposed to § 130.800—Oversight of the SBDC Program

SBA received one comment regarding new paragraph (c) regarding a change in the SBA primary contact and notification of the recipient organization. The commenter is questioning why this included in the regulations and if it is final.

SBA Response: SBA rejects this comment and believes that it is necessary to keep this paragraph for notification purposes.

Comments Opposing § 130.810—SBA Review Authority

SBA received one comment regarding paragraph (a), Site visits. The commenter states that this paragraph is repeating what is already stated in 2 CFR part 200.

SBA Response: SBA is rejecting this comment. SBA believes that more information is needed to provide to the recipient organization regarding site visits. Additionally, section 21 (k)(2) of the Small Business Act states that the Administration will develop and implement a biennial programmatic and financial examination of each small business development center established pursuant to this section.

Comments Opposed to § 130.820—Records and Recordkeeping

SBA received four comments stating that annual physical site visits are not necessary to conduct required subrecipient monitoring. Lead centers should be allowed flexibility in determining whether a physical or virtual visit will meet the needs of its required subrecipient monitoring. In cases where there have been no changes in leadership at the subrecipient and no problems exist, a virtual visit may suffice. Further, the comments state that this appears to unnecessarily restrict the method (in-person vs virtual) by which centers are reviewed and it is in contradiction to any risk-based approach that a Lead Center may deploy.

SBA Response: SBA accepts the comments. However, SBA revised paragraph (a)(2)(ii) to include: (1) that a physical on-site visit must be conducted at least once every four years by the recipient organization; (2) or when SBA deems it necessary, such as, when there is a change in leadership, either at the Service Center or the Lead Center, or the SBA has or receives concerns regarding a Service Center.

Comments Opposed to § 130.825—Reports

a. SBA received two comments on new paragraph (b)(3) requesting that SBA provide a timeline for delivering final reports in the regulations rather than referring to the NOFO.

SBA Response: SBA rejects this comment as the dates and times may change. Additionally, the Agency should have the flexibility to do this in the NOFO.

b. SBA received two comments regarding newly revised paragraph (d) stating that including specific reporting formats in the regulations limits ongoing improvements to narrative reporting and that simplified reporting may make the content more useful for the Agency.

SBA Response: SBA accepts the comments and revises paragraph (b) to add an introductory sentence which states, ''Performance reports must include the data specified below, along with any other information the SBDC feels may be relevant to a full appraisal of its performance.''

c. SBA received one comment on newly revised paragraph (e) stating that this paragraph does not vest any new authority within the Agency nor does it further the Agency's stated goal of providing more specific and clear instructions. The Uniform Guidance provides for a certification statement to be included. This is redundant to existing guidance provided by the Uniform Guidance.

SBA Response: SBA accepts that comments and deleted this paragraph.

Comments Opposed to § 130.830—Audits and Investigations

SBA received one comment stating that this section does not vest any new authority within the Agency nor does further the Agency's stated goal of providing more specific and clear instructions.

SBA Response: SBA accepts this comment and revises this section to reference 2 CFR part 200.

g. Section-By-Section Analysis

Section 130.100—Introduction

SBA proposed to add a paragraph providing a broad overview of the Program and purpose. SBA believes that this will provide clarity. SBA did not receive any comments on this section and is moving forward with the paragraph as proposed.

Section 130.110—Definitions

This section proposed adding 23 new definitions to clarify and codify current District Office responsibilities, State/Lead Center Director responsibilities, and define other terms already in use in the notice of funding opportunity. If the revised or new definition is not listed below, SBA did not receive any

comments for them and moves forward with those definitions as proposed.

a. Due to the comments received, SBA revised the definition of accreditation process that reflects the commenters suggestions and current use of the term. The new definition states that it's the process by which evaluation and assessment occurs to assist an SBDC with assessing its processes and outlining areas needing improvement by providing recommendations to strengthen delivery of services and assistance.

b. Due to comments received, SBA revised the definition of application to include the term ''renewal application.''

c. After reviewing the comments, SBA will not change the definition of cash match. As defined in 2 CFR part 200, waived indirect cost is the difference between the total amount of indirect costs charged to a Federal award and the total amount of indirect costs that could have been charged to a Federal award. The regulation at 2 CFR part 200 refers to this as unrecovered indirect costs.

d. SBA took the comments under consideration and revised the definition of clearinghouse to define the term more clearly and accurately as requested by the commenters. The definition now states that the clearinghouse is a source of market and industry information made available to all SBDC networks to assist clients and supports the exchange of information between SBDCs.

e. SBA took the comments submitted under consideration and revised the definition of client to include the word ''nascent'' before the word ''entrepreneur.''

f. SBA accepts the comments submitted and refers the reader to the definition of program income as defined in 2 CFR part 200.

g. After some consideration, SBA agrees with the commenters and revised the definition of SBDC Director to state that at least 75 percent of the individual's time and effort is allocated to the SBDC grant.

h. SBA agrees with the comments submitted and deleted the words ''hiring outside consultants for a client'' from the definition.

Section 130.200—Eligible Entities

As required in the Small Business Act, 15 U.S.C. 656 and 648(a)(1), this section adds a Women's Business Center operating pursuant to section 29 of the Small Business Act as an entity eligible to apply to be a Lead Center SBDC. This section also proposed to add eligibility criteria for the Commonwealth of the Northern Mariana Islands. SBA is unable to change this requirement, as the Small Business Act, 15 U.S.C. 656 and 648(a)(1) states, in part, that after December 31, 1990, the Administration shall not make a grant to any applicant other than an institution of higher education or a women's business center operating pursuant to section 656 of the title as a Small Business Development Center unless the applicant was receiving a grant (including a contract or cooperative agreement) on such date. The previous sentence shall not apply to an applicant that has its principal office located in the Commonwealth of the Northern Mariana Islands.

Section 130.300—Small Business Development Centers (SBDCs)

This section codifies the statutory authority for the Administrator to operate and administer the SBDC Program through cooperative agreements issued to recipient organizations, as established under the Small Business Act. SBA did not receive any comments on this section and is moving forward with the rule as proposed.

Section 130.310—Area of Service

This section requires service centers to be primarily housed within institutions of higher education or a Women's Business Center operating pursuant to section 29 of the Small Business Act, under paragraph (c). SBA is revising the paragraph to provide that for any applicant commencing after January 1, 1992, the recipient organization must ensure that any new SBDC service centers established within its area of service, to the extent practicable, are primarily housed within institutions of higher education or a WBC, operating pursuant to section 29 of the Small Business Act (15 U.S.C. 656) as stated in section 21(a)(1) of the Small Business Act (15 U.S.C. 648(a)(1)).

Section 130.320—Operating Requirements

This section adds five requirements already in use in the notice of funding opportunity as paragraphs (d) through (g) of the section to standardize SBDC naming/branding nationwide and enhance the current conflict of interest policy as follows:

- The name of the Lead SBDC must contain the official identification of ''Small Business Development Center'' and that, unless waived by the AA/SBDC, the SBDC has one year from the date of promulgation to make any necessary changes.
- Any entity operating as an SBDC service center, whether receiving Federal funding or not, is now considered a part of the recipient organization's network and is required to report its goals, achievements, etc. as any other service center.
- The process to obtain the minimum number of required staff members for international trade assistance as required by the Act.
- The requirement for every SBDC to annually sign the conflict-of-interest form and to have a policy, which addresses how the recipient organization will deal with competing and conflicting issues.

a. SBA accepts a comment and revises the paragraph (a) to delete the reference to ''full-time.''

b. SBA accepts the comments regarding new paragraph (e) stating that this is new and revises the paragraph to narrow the scope of the requirement to read as follows: ''Any entity that is using the term 'Small Business Development Center' and under contract with the Lead Center and receiving program funds, whether . . .'' and at the end of the paragraph will replace the word ''entity'' with the words ''Service Center.''

c. SBA deleted paragraph (f) since the new accreditation standards no longer address the technology designation.

Section 130.330—SBDC Services and Restrictions on Services

SBA provides an overview of the services that an SBDC must provide to prospective entrepreneurs and existing small businesses and the related reporting requirements. Further,

SBA requires the SBDC network to collaborate with other state and local government programs providing assistance to small businesses and potential small business. This change will provide clarity and transparency to the regulations and is consistent with the notice of funding opportunity.

a. SBA accepts the comments and revised paragraph (a) to include, ''to the extent practicable.''

b. SBA agrees with the comment received and deleted § 130.330(b)(4). The remaining paragraphs are redesignated from paragraphs (b)(5) and (6) to paragraphs (b)(4) and (5) in this final rule.

c. SBA addresses a comment on newly revised § 130.330(b)(3) and agrees that an SBDC counselor should not act as an agent for the client. SBA inserted after ''however'' ''SBDCs may not attest to a client's readiness or creditworthiness to the lending institution either verbally or in writing''. Further SBA deleted ''neither SBDC staff nor their agents may take a direct or indirect role in representing clients in loan negotiations.''

d. SBA revised the language in § 130.330(b)(5) (now § 130.330(b)(4)) to state ''SBDCs may participate on boards and panels of financial institutions and with outside organizations but may not be involved in any final credit decisions involving SBDC clients or in making or servicing loans.''

e. SBA revises the language in § 130.330(b)(6) (now § 133.330(b)(5)) to include ''. . . but may not advocate for, promote, recommend approval. . .'' to the paragraph.

f. SBA revises § 130.340(c) to not include specific focus areas in the regulations as they could change and revised the language in the regulation to reflect this change. The focus areas will be included in the NOFO each year.

Section 130.340—Specific Program Responsibilities

This section clarifies the responsibilities of the AA/SBDC and the SBDC Lead Center Director (Lead Center Director). Currently, this section refers to SBA as the entity making decisions or determinations. The final rule distinguishes between AA/SBDC and the District Director to provide for more transparent identification of roles and responsibilities for the public. SBA revises the language in new § 130.340(c)(5) to state that service centers should provide access to training.

Section 130.350—SBDC Advisory Boards

This section would replace the words ''shall'' and ''may'' with ''must'' and ''will'' and imposes term limits and language to provide guidance to the boards, consistent with the cooperative agreement.

a. After reviewing comments submitted from the public, SBA will no longer revise § 130.350(a)(3).

b. SBA revised § 130.350(a)(6) stating that the Board members can pay for their own costs if they choose to do so.

Section 130.360—Selection of the SBDC Lead Center Director

This section codifies the current selection process, for SBDC Lead Center Director utilized by SBDCs. SBA did not receive any comments on this section and is moving forward with the rule as proposed.

Section 130.370—Contracts With Other Federal Agencies

This section codifies the requirements process for an SBDC to enter a contract with another Federal agency and adds language to the end of the paragraph with a five-business day response timeframe for SBA.

Section 130.380—Client Privacy

Section 21(a)(7) of the Act requires SBDCs and the Administration to protect the privacy of any individual or small business receiving assistance in the Program. Under this final rule, an SBDC, including its contractors and other agents, would not be permitted to disclose to an entity outside the individual SBDC, the name, address, email address, or telephone number, referred to as ''client contact data'' of any individual or small business without the consent of such individual or small business, unless such disclosure meets on the three exceptions discussed below.

The three exceptions, as authorized by the Act, would permit disclosure if: (1) A court orders the Administrator to disclose the information in any civil or criminal enforcement action initiated by a Federal or state agency; or (2) the Administrator considers such a disclosure to be necessary for the purpose of conducting a financial audit of a center, not including those required under § 130.830, as determined on a case-by-case basis when formal requests are made by a Federal or state agency. Such formal requests must justify and document the need for individual client contact and/or Program activity data to the satisfaction of the Administrator; or (3) SBA requires client contact data to directly survey SBDC clients.

This rule would require SBDCs to provide an opportunity for clients to opt in to allow SBA to obtain their contact data. SBA's use of client contact data would be restricted only to conduct survey and studies that help stakeholders better understand how the services the client received affect their business outcomes over time. These surveys or studies would include, but are not limited to, program evaluation and performance management studies.

Under this final rule, the Agency would not allow use of client contact data for any other purpose beyond program surveys or studies.

This final rule prohibits the denial of services to clients solely based on a client's refusal to provide consent to use their contact data for study purposes.

Section 21(a)(7)(C) of the Act directs the Agency to publish standards for requiring disclosures of client information during a financial audit. Other Federal or state agencies making such disclosure requests are required to submit formal requests, in writing, including a justification for the need for individual client contact and/or Program activity data for the Administrator's review on a case-by-case basis.

This final rule codifies the current privacy protections in place in the Program employed by the Agency. Any reports on the Program produced by an SBDC, including its contractors and other agents, and the Agency, could not disclose individual client information without consent from the client. Any such reports could only report activity data in the aggregate, unless given consent, to protect the individual privacy of clients.

SBA believes that the language in the regulation does not compromise the intent of the privacy guidelines currently in place. The language states that the 641 has an opt-in clause for clients. Clients do not have to provide their information on the form.

Section 130.400—Application Procedure

Currently, this section is not used. This section requires all SBDC applicants to comply with the current annual notice of funding opportunity procedures for their new or renewal applications to receive consideration. This final rule reinforces that an SBDC applicant must follow procedures for submitting a new or renewal application, and to clarify the application procedures. SBA did not receive any comments on this section and is moving forward with the rule as proposed.

Section 130.410—New Applications

Currently, this section outlines outdated procedures that are no longer enforced. This final rule codifies the current new application procedures utilized by SBDCs, which require applicants to be located in the same state/region where the SBDC is located. This section also codifies new recruitment and selection procedures for new recipient organizations. As a result of submitted comments, SBA will remove the word ''region'' from the § 130.410(b).

Section 130.420—Renewal Applications

Currently, this section outlines outdated procedures that are no longer enforced. This final rule revises the existing renewal and nonrenewal process to reflect the process currently utilized by SBDCs. Factors of consideration in the renewal application under paragraph (c) are expanded to include corrective measures implemented as a result of examinations conducted; and the accreditation provision of § 130.810(c), including any conditions from the accreditation report, and corrective measures implemented, affecting the recipient organization and the SBDC network.

SBA added language to § 130.420(c)(2) which incorporates client satisfaction rates as a deciding factor.

Additionally, SBA revised § 130.420(c)(5) citing the current accreditation report, rather than recommendations.

Section 130.430—Application Decisions

This final rule clarifies and makes transparent the existing approval process of an application by outlining the options to grant approval, conditional approval, or denial of an application. SBA did not receive any comments on this section and is moving forward with the rule as proposed.

Section 130.440—Maximum Grant

This final rule codifies the limitations on grant funding set forth in section 21(a)(6)(C) of the Act and the exceptions set forth under paragraph (b). The legislative language was revised in this codification to be clear and transparent. SBA did not receive any comments on this section and is moving forward with the rule as proposed.

Section 130.450—Matching Funds

This final rule expands and clarifies the requirements on matching funds for cash, in-kind, or authorized indirect funds so that it is clearer and more transparent.

As a result of comments received, SBA revised the language § 130.450(a) to state that cash match must be equal to or greater than 50 percent of the SBA funds used by the SBDC.

Further, because of comments received, SBA revises § 130.450(b) by adding that only the additional requirements from SBA will need to be identified.

Under this final rule, paragraph (c) is added to clarify matching requirements for insular territories.

Paragraph (d) codifies the requirement for all applicants to submit a certification of cash match and program income, currently required by the notice of funding opportunity.

Paragraph (e) requires all matching funds, in addition to the Federal and program income funds, to be under the direct management of the SBDC State/Region Director. As a result of comments received, SBA adds the following sentence to § 130.450(e) for clarity: ''If in-kind contributions are utilized by the SBDC, the State Director or an SBDC Service Center Director is then considered to be in control of those contributions.''

Paragraph (g) expands the list of unallowable sources of matching funds and as a result of comments received to the proposed rule, SBA revises the language in § 130.450(g) to include language that defines overmatching expenditures as those that are derived from eligible matching sources; are reasonable, allowable, and allocable to the SBDC program; are over and above the minimum match required to the Federal expenditures; and are included on the required SBDC financial reporting to SBA for the project period.

Section 130.460—Budget Justification

This section codifies current budget justification procedures used by SBDCs, as required by the notice of funding opportunity. In accordance with 2 CFR part 200, the SBDC is required to have the prior approval from the Agency for the purchase of equipment, either through a specific disclosure in an annual cost proposal or through an approved amendment to an existing cooperative agreement.

This final rule outlines procedures for foreign travel requests. Specifically, all foreign travel requests are required to be submitted to the appropriate District Director and the Office of Small Business Development Centers (OSBDCs) Program Manager for review and then to the AA/SBDC for final approval.

Paragraph (i) is revised to allow dues to the recognized organization to be charged to the cooperative agreement.

As a result of comments received, SBA deleted proposed § 130.460(f).

As a result of the comments received on proposed § 130.460(g) (now § 130.460(f)) SBA revised the language by deleting the reference to the salary but keeping the rank in the organization. SBA received two comments on proposed § 130.460(i) (now § 130.460(h)) regarding travel stating that this entire section is covered by the omni-circular. However, SBA will keep this paragraph as stated in the proposed rule because it includes details and information not found in 2 CFR part 200.

As a result of comments received, SBA deleted proposed § 130.460(i)(2). Proposed paragraph (i) was redesignated as paragraph (h) in this rule, so proposed paragraphs (i)(3) through (5) are redesignated as paragraphs (h)(2) through (4).

As a result of comments received, SBA deleted proposed § 130.460(j).

Section 130.465—Restricted and Prohibited Costs

Under this final rule, this new section prohibits the use of Federal funds, matching funds and program income as required under the cooperative agreement for the purposes identified as unallowable in applicable sections of 2 CFR part 200. Currently regulations do not restrict the use of these above cited funds. These changes, in accordance with 2 CFR part 200, ensure that program funds are not used by recipient organizations for the purpose of sub-grants, or as seed money for venture capital, or for other purposes outside the scope of authorized SBDC activities. SBA did not receive any comments on this section and is moving forward with the rule as proposed.

Section 130.470—Fees

This section prohibits SBDC network entities, staff, consultants, or volunteers to solicit or accept fees or other compensation for counseling services, including, but not limited to, business or marketing plan development, loan packaging or credit application assistance, or other advisory services described in the Act. SBA adds a second paragraph to codify, clarify and make more transparent the intent of the section. SBA did not receive any comments on this section and is moving forward with the rule as proposed.

Section 130.480—Program Income

This section codifies the existing requirement that SBDCs may not report program income as a matching resource. Additionally, unused program income is permitted to be carried over to the subsequent budget period by the SBDC network; however, the aggregate amount of network program income cannot exceed 25 percent of the total SBDC budget (Federal and matching expenditures). The intent of the section remains the same; however, it is revised to make it clearer and more transparent.

Based upon comments received, SBA will not revise or change paragraph (b) regarding the use of program income based on the Small Business Act section 21(a)(4)(A) which requires the recipient to match 100 percent Federal grant funding not less than 50 percent cash and not more than 50 percent of indirect costs and in-kind contributions. SBA interprets this paragraph to mean that program income, which are fees collected from recipients of assistance, is excluded to be used as matching funds. Further, SBA requests the sources of match to ensure that the NFE's cost sharing and matching are not paid by the Federal Government under another Federal award or by other Federal sources. Additionally, forms submitted to the SBA require the NFE to provide the source of the matching funds. If the funding sources are not provided to the SBA, SBA could unknowingly approve an award with unallowable sources of matching funds. However, SBA deleted new paragraph

(e) regarding program income and SBDC sponsored activities based upon comments received.

Section 130.490—Property Standard

The proposed rule created a new section to require the SBDCs to adopt and implement the respective Office of Management and Budget (OMB) guidelines for property standards. SBA received one comment opposing this section as it repeats guidelines outlined in 2 CFR part 200. Based upon the comment received, SBA deleted this section from the final rule.

Section 130.500—Advances and Reimbursements.

Current regulations outline the process for SBDC submission of reimbursement requests and advancements. Based upon comments received, SBA will delete this section.

Section 130.600—Cooperative Agreement

Currently, this section is not used. This section codifies program requirements currently enforced through the notice of funding opportunity and followed by the SBDCs. Under this final rule, paragraph (a) requires a recipient organization to incorporate the cooperative agreement into its SBDC sub-agreements and contracts, which is already being done by the SBDCs.

As a result of comments, paragraph (b) now states that SBA reserves the right to disapprove any sub-agreement entered into the by recipient organization with SBDC service center organizations, vendors, or contractors.

Paragraph (c) outlines procedures for developing performance goals and measurements, negotiating the goals and measurements, and consequences of not meeting those goals and measurements. Also, SBA loan goals are not negotiated or incorporated into the cooperative agreement without the written approval of the AA/SBDC.

As a result of comments submitted, paragraph (d) is deleted.

Section 130.610—Grant Administration and Cost Principles

As a result of comments received, SBA will delete both the last sentence in the current paragraph and newly designated paragraphs (b) and (c).

Section 130.620—Revisions and Amendment to Cooperative Agreements

This section revises paragraph (a) by outlining required prior approval requests by SBDCs for revisions to the cooperative agreement. However, due to comments received, SBA will delete paragraph (a)(2). Additionally, due to comments received, SBA revised paragraph (a)(3) to add the following language, ''If supplemental funds are available for distribution, SBA will publish a notice of funding opportunity in consultation with the Recognized Organization.''

SBA will also add new paragraph (b) for clarity and transparency. As is current practice, paragraph (b) would authorize the AA/SBDC to amend one or more cooperative agreements to authorize unanticipated out-of-state travel by SBDC personnel responding to a need for services in a Presidentially Declared Major Disaster Area and to address how travel costs are to be handled. Paragraph (b) authorizes SBA to provide financial assistance to SBDCs, or any proposed consortium of such individuals or entities, to spur disaster recovery and growth of small business concerns located in an area for which the President or SBA Administrator has declared a major disaster.

Due to comments received, SBA added the following language at the beginning of paragraph (b)(1), ''In consultation with the Recognized Organization . . .''

Section 130.630—Dispute Resolution Procedures

This section clarifies the existing procedures for a financial dispute or a programmatic or nonfinancial dispute for clarity and transparency. The intent of this section remains the same. As a result of comments received, SBA replaces the District Office reference with the Grants Management Officer.

Section 130.700—Suspension, Termination, and Non-Renewal

This section revises and clarifies the procedures for suspension, termination or non-renewal for clarity and transparency.

Proposed paragraph (a)(1) is deleted in this final rule due to comments received and SBA acknowledges that the causes for termination are outlined in 2 CFR 200.340. Proposed paragraph (a)(2) (now paragraph (a)(1)) allows the recipient organization to continue to conduct project activities and incur allowable expenses until the end of the current budget period in instances when the SBA has elected to not to renew a cooperative agreement. Under this final rule, if a recipient organization does not seek to renew the grant, it must notify the District Office and send a letter of intent to withdraw to the AA/SBDC.

Paragraph (a)(2) of this final rule (proposed paragraph (a)(3)) adds the sentence, ''A decision to suspend a cooperative agreement is effective immediately.'' Additionally, the notice of suspension recommends that the recipient organization cease work on the project immediately and places SBA under no obligation to reimburse any expenses incurred by a recipient organization while it is under suspension.

Under this final rule, paragraphs (b)(11) through (15) would be added for clarity and transparency on the causes for termination or suspension.

Currently, the administrative procedures for suspension, termination, and non-renewal are found in the cooperative agreement. Under this final rule, the new administrative procedures are outlined under paragraph (c) as well as the responsibilities of the AA/SBDC in these circumstances.

Under this final rule, paragraph (d) is added to outline the administrative review of suspension, termination, and non-renewal actions as well as the required process for SBDCs to submit the request for administrative review. Further, due to comments received on the proposed rule, SBA is revising paragraph (d) by replacing the word ''recommendations'' with the word ''conditions.''

Section 130.800—Oversight of the SBDC Program

This section is revised to clarify the existing broad language used to outline program oversight requirements by adding three new paragraphs. SBA received one comment concerning new paragraph (c) regarding a change in the SBA primary contact and notification of the recipient organization. The commenter is questioning why this included in the regulations and if it is final. SBA is not changing this paragraph and believes that it is necessary to keep this paragraph for notification purposes.

Section 130.810—SBA Review Authority

This final rule revises paragraph (c) to reiterate 15 U.S.C. 648(k)(2) of the Small Business Act and to state that SBA may not renew or extend any cooperative agreement with an SBDC unless the center has been approved under the accreditation program, except that the AA/SBDC may waive such accreditation requirement, at their discretion, upon showing that the center is making a good faith effort to obtain accreditation. This section clarifies and provides more detail on the review authority provided to SBA regarding the SBDC Program. SBA received one comment regarding paragraph (a) (Site visits). However, SBA is keeping the paragraph in this

final rule as the SBA believes that more information is needed to provide to the recipient organization regarding site visits. Section 21(k)(2) of the Small Business Act states that the Administration will develop and implement a biennial programmatic and financial examination of each small business development center established pursuant to this section.

Section 130.820—Records and Recordkeeping

This final rule revises the existing broad instructions on records and recordkeeping requirements for an SBDC to provide clarity and transparency. The revisions include more narrow instructions to clarify each required step in the current process.

SBA received four comments stating that annual physical site visits are not necessary to conduct required subrecipient monitoring. Lead centers should be allowed flexibility in determining whether a physical or virtual visit will meet the needs of its required subrecipient monitoring. In cases where there have been no changes in leadership at the subrecipient and no problems exist, a virtual visit may suffice. Further, the comments state that this appears to unnecessarily restrict the method (in-person vs virtual) by which centers are reviewed and it is in contradiction to any risk-based approach that a Lead Center may deploy.

SBA Response: SBA accepts these comments and revises the paragraph to state that the Lead Center must annually conduct monitoring of its Service Centers either in-person or virtually. Moreover, a physical on-site visit must be conducted at least once every four years by the recipient organization; or when SBA deems it necessary, such as, when there is a change in leadership, either at the Service Center or the Lead Center, or the SBA has or receives concerns regarding a Service Center.

Section 130.825—Reports

This final rule requires SBDCs to submit performance and financial reports to SBA for review, as currently required by the notice of funding opportunity. The proposed revisions outline the frequency of the reporting, electronic data reporting which includes counseling and training records, and specific details for each of the performance reports and financial reports. SBA is not changing paragraph (b)(3) as the dates and times may change and the Agency should have the flexibility to do put the dates and times in the NOFO.

Due to comments received on the proposed rule, SBA revises paragraph (d) in this final rule to add an introductory sentence which states, ''Performance reports must include the data specified below, along with any other information the SBDC feels may be relevant to a full appraisal of its performance.''

Further, SBA deletes paragraph (e) due to comments received on the proposed rule.

Section 130.830—Audits and Investigations

Current regulations provide general but outdated, compliance instructions to the SBDCs regarding audits and investigations performed by SBA's Office of Inspector General. This section would be updated and revised with more specific and clear instructions. However, due to comments received on this proposed section, SBA refers to 2 CFR part 200.

Section 130.840—Closeout Procedures

Current regulations do not include closeout procedures; rather, these are found in the cooperative agreement. Under this final rule, this new section outlines closeout procedures for the recipient organization to ensure that program funds and property acquired or developed under the SBDC cooperative agreement are fully reconciled and transferred seamlessly between recipient organizations, service centers, or other Federal programs. SBA did not receive any comments on this section and is moving forward with the rule as proposed.

Compliance With Executive Orders 12866, 12988, 13132, and 13563, the Paperwork Reduction Act (44 U.S.C. Ch. 35), the Congressional Review Act (5 U.S.C. 801–808), 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 a ''significant'' regulatory action for the purposes of Executive Order (E.O.) 12866. Accordingly, the next section contains SBA's Regulatory Impact Analysis.

Regulatory Impact Analysis

1. Is there a need for this regulatory action?

The SBDC rules were last revised in 1995 (*see* 60 FR 31504) (June 13, 1995). However, the statute authorizing the SBDC Program has been amended numerous times since the last rulemaking (for a full listing of amending legislation, see the history notes at 15 U.S.C. 648). For example, SBA updates the regulation as required by section 21(a)(7) of the Small Business Act to protect the privacy of any individual or small business receiving assistance in the Program.

SBA believes it is now necessary to revise the regulations to outline current policies and procedures for the SBDC Program for consistency. This regulation also incorporates the changes required by the 2 CFR part 200 and other grant changes that have taken place over the last 25 years. Additionally, the America's Small Business Development Centers (ASBDC), the recognized association as established in section 21(a)(3)(A), has requested changes that are consistent with the revisions made in the notice of funding opportunity and cooperative agreement. Furthermore, the SBA received 133 comments to the ANPRM that was published on April 2, 2015, some of which are incorporated in this rule.

In the absence of this rule, there are discrepancies between the regulations and Program governing documents, including the notice of funding opportunity and the cooperative agreement. Currently, SBA and the SBDCs reference three or more documents to find guidance on the Program, and the annual notice of funding opportunity and cooperative agreement have become, for all practical purposes, documents which interpret the statute. Also, SBA has limited authority to hold SBDCs accountable for low or non-performance. While low or non-performance is a rare occurrence, SBA's only current recourse is to write conditions into the SBDC notice of award. The rule strengthens SBA's oversight and accountability, as intended by Congress, and reduces burden by consolidating programmatic guidance to one document.

2. What are the potential benefits and costs of this regulatory action?

The benefits of this rule are based on incorporating all the changes that have been made with the publication of 2 CFR part 200, other grant changes over the past 20 years, and a streamlining of both the notice of funding opportunity and the cooperative agreement. Specifically, the rule provides guidance on:

- The determination of the official name of the SBDC.
- Directing minimum reporting for, and hiring of, State Directors.
- Applying for other grants/other sources of funds.
- Clarifying Project Officer responsibilities.

• Clarifying matching funds, such as in-kind funds, funding expenditures, and eligible entities budget justification.

• The collection and use of individual SBDC client data.

• Adding new sections regarding suspension, termination, and non-renewal, payments and reimbursements, property standards, confidential information—among others.

The new regulations will simplify and streamline notice of funding opportunity language to contain only that information that the applicant organization must submit and not all the other information that will now be written into the regulations. Moreover, having the regulations in one document would make administering the Program by the SBDCs much easier by not having to reference three or more different documents. The estimated reduction in burden hours to this consolidation is presented in the table below:

TABLE 1—ESTIMATE OF SAVINGS TO SBDCS

Outcomes	Number of expected occurrence per year (A)	Average time or money saved per occurrence (B)	Total annual savings (A × B)
Provision of better information leading to better choices	63 SBDCs	4 hours at $120.22 [1]/hr = $480.88.	252 hours; $30,295.44.
Increased efficiency from clarity and agreement with other related documents.	63 SBDCs	2 hours at $120.22 [1]/hr = $240.44.	126 hours; $15,147.72.
Total Savings			378 hours; $45,443.16.

[1] Based on the most recently available data, from *2019 Salary Survey of America's SBDC,* hourly wage of a State Director ($60.11) plus 100% for benefits. Salary Survey (*americassbdc.org*), p. 3.

There are currently 63 SBDCs that benefit from this new regulation. We estimate the changes to the rule will create a four-hour benefit per SBDC from better information leading to better SBDC choices because the revisions will clarify definitions and provide guidance on various issues. We estimate a two-hour increase in efficiency per SBDC due to the clarity that the revisions to the rule will provide because the rule will align with the notice of funding opportunity and the cooperative agreement. Using the average hourly wage of an SBDC State Director, the total annual benefit of these revisions comes to $45,443.16 for all the 63 SBDCs. We anticipate that these benefits will be realized over perpetuity in that SBDCs will continue to experience better decision-making from the clarification and additional guidance provided and increased efficiency from only having to reference one document.

There are also several benefits that cannot be quantified. One of these benefits is the increased security that the rule provides SBDCs through its requirements to protect the privacy of an individual or small business receiving assistance in the Program. Another benefit to revising and updating the regulations is that it would give SBA more authority to enforce the requirements as written in the regulations which is something currently lacking in the Program.

There are some costs incurred by the SBDCs in initially reading and interpreting the new regulation. There is an additional requirement for application procedures which currently only exists in the notice of funding opportunity. We estimate that this will add approximately two hours of burden for SBDCs. The SBDCs also must provide a certification of cash match and program income for which a requirement currently exists only in the notice of funding opportunity. Additionally, the rule would require SBDCs to submit performance and financial reports to SBA for review, as currently required by the notice of funding opportunity. These requirements are reflected in the most recent Information Collection Requests for the reporting requirements for SBDCs, so while reflected here, these requirements do not change the Paperwork Reduction Act cost burden. SBA staff must review these reporting requirements which we estimate will take SBA staff 30 minutes twice a year to review. These costs are summarized below:

TABLE 2—ESTIMATE OF COSTS TO SBDCS/SBA

	Amount of time required hours (A)	Value of time (B)	Frequency per year (C)	Number of businesses or individuals affected (D)	Total annual cost (A × B × C × D)
Read and interpret the regulation	2	$120.22 [1]/hr	1	63 SBDCs	126 hours; $15,147.72.
Reporting	2	$58.90 [2]/hr	2	63 SBDCs	252 hours; $14,842.80.
Reviewing Reports (SBA)	0.5	$137.10 [3]/hr	2	For 63 SBDCs	63 hours; $8,637.30.
Total Administrative Costs					441 hours; $38,627.82.

[2] Based on the most recently available data, from *2019 Salary Survey* of America's SBDC, hourly wage of an Accounting, Grants, and Finance Position of ($29.45) plus 100 percent for benefits. Salary Survey (*americassbdc.org*), p. 12.

[3] Based on the 2022 salary of a GS–14 step 5 analyst in the DC area plus 100 percent for benefits. SALARY TABLE 2022–DCB (*opm.gov*).

The undiscounted schedule of benefits and costs over the first three years of the rule (with the values in year three to continue in perpetuity) are presented in the following table:

TABLE 3—SCHEDULE OF COSTS/(SAVINGS) OVER 3-YEAR HORIZON

	Benefits	Costs
Year 1	378 hours; $45,443.16	441 hours; $38,627.82.
Year 2	378 hours; $45,443.16	310 hours; $23,107.
Year 3	378 hours; $45,443.16	310 hours; $23,107.

The annualized net savings of this rule is $20,640 with a seven percent discount rate, assuming annual savings of $44,722 in perpetuity and costs in the first year of $38,015 and afterwards costs of $23,107, in perpetuity.

3. What alternatives have been considered?

SBA considered two alternatives to this rulemaking. First would be using internal SBA guidance, such as Standard Operating Procedures (SOPs), to interpret existing rules. SBA also considered continued interpretation of program requirements through the cooperative agreement negotiation process. However, under the applicable statute, SBA must consult with the ASBDC when developing documents as set forth in the statute (15 U.S.C. 648(a)(3)(A)).

In addition to this consolidation requirement, SBA values the input of the public. The rulemaking process would provide an opportunity for both the ASBDC and the public to comment on changes made to the Program. SBA also identified a need to streamline changes made to the notice of funding opportunity and cooperative agreement, and any changes in Federal grant procedures, since the Program regulations were last revised. Since this rule is an all-encompassing revision of the current regulations, SBA does not believe that more extreme changes could be made at this time. Also, this statute specifically includes a direction for SBA to develop regulations for the SBDC Program with the ASBDC and SBDCs. For these reasons, SBA believes that proceeding with a rulemaking is the best approach to revise SBDC Program requirements currently.

Summary

The changes proposed for this rule will not negatively affect access to the Program for small businesses or nascent entrepreneurs. Each small business and nascent entrepreneur will continue to have access to the full array of services provided by the SBDCs. In fact, there will be a de minimis cost savings realized by SBDCs because they will not have to reference multiple documents for guidance. There are also some non-quantifiable benefits such as increased privacy and the ability for SBA to enforce the requirements laid out in the rule.

Executive Orders 12866 and 13563

Executive Orders (E.O.s) 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). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. It is anticipated that this rule will not be a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993.

Congressional Review Act

As required by the Congressional Review Act (5 U.S.C. 801–808) before an interim or final rule takes effect, Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA) will send the rule and the ''Submission of Federal Rules Under the Congressional Review Act'' form to each House of the Congress and to 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 rule is not anticipated to be a major rule under 5 U.S.C. 804.

Executive Order 12988

This action meets applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden. The action does not have retroactive or preemptive effect.

Executive Order 13132

Seven recipients (States) are grantees of SBDC Programs hosted by State economic development organizations. They are Colorado, Illinois, Indiana, Minnesota, Montana, Ohio, and West Virginia. All other grantees are hosted by institutions of higher education. This rule imposes no additional or special burdens on the State-based SBDCs. As mentioned above the grantees are currently abiding by these regulations and 2 CFR part 200 as the requirements are already in the notice of funding opportunity and cooperative agreement. The recipient organizations apply or volunteer to participate in the Program and can withdraw at any time.

SBA determined that this rule will not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, for the purposes of Executive Order 13132, SBA has determined that this rule has no federalism implications warranting preparation of a federalism assessment. However, SBA invites comments on issues relating to the federalism aspects of this rule.

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

SBA determined that this rule would not impose additional reporting and recordkeeping requirements under the Paperwork Reduction Act (PRA). Currently, there are two PRA submissions associated specifically with the SBDC Program: (1) OMB control number 3245–0140 Cooperative Agreement; and (2) OMB control number 3245–0169, Federal Cash Transaction Report, Financial Status Report, Program Income Report, and Narrative Program Report. These will not change, and no new requirements are required in the rule.

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

When an agency issues a rulemaking proposal, the Regulatory Flexibility Act (RFA) requires the Agency to prepare an

Initial Regulatory Flexibility Analysis (IRFA) describing the economic impact that the rulemaking may have on small entities. 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 rule revises regulations to outline current policies and procedures for the SBDC Program. Specifically, the rule clarifies and defines the role of the District Office regarding cooperative agreement oversight activities by adding definitions and procedures throughout the regulations. Second, SBA adds 23 definitions that refine and explain various roles, procedures, documents, and categories of funding and revises other definitions for clarification. Third, a section is added to codify SBDC client confidentiality. Finally, the current process of hiring a State/Region Director is outlined in an SBA policy notice; however, the regulation codifies and refines this process. Most of these changes are already implemented by the SBDCs, and these regulations are codifying them.

The rule impacts 62 SBDCs that primarily fall into the North American Industry Classification System (NAICS) codes 611210 (junior colleges) and 611310 (colleges, universities, and professional schools). In addition, seven SBDCs are hosted by state economic development organizations, such as state Departments of Trade or Commerce.

A junior college is considered small if its annual receipts are $28.5 million [4] or less while colleges, universities, and professional schools are considered small if annual receipts are $30.5 million or less. As shown in Table 2, only one SBDC can be considered small under both size standards. Note that these size standards do not apply to the seven SBDCs hosted by state organizations. However, state organizations under NAICS 92 (public administration) do not have applicable small business size standards but would not be considered small using the standards of NAICS codes 611210 or 611310.

TABLE 5—SBDC SIZE STANDARD BY NAICS CODE

NAICS code	SBA Small business size standard: annual Receipts threshold	Count
Junior Colleges (611210)	Less than or equal to $28.5 million	1
	Greater than $28.5 million	7
Colleges, Universities, and Professional Schools (611310)	Less than or equal to $30.5 million	0
	Greater than $30.5 million	47
Public Administration (92)	No standard established	7
Total		62

The purpose of the rule is to codify existing practices and to provide consistency between regulations and the Program's governing documents and practices. The Regulatory Impact Analysis presented earlier describes the costs and savings of the rule and the small net savings relative to the number of entities. Accordingly, the Administrator of the SBA, hereby certifies to the Chief Counsel of Advocacy of SBA that this rule will not have a significant economic impact on a substantial number of small entities. SBA invites comment from the public on this certification.

RISE Act (Research Investment To Spark the Economy Act of 2021, H.R. 7308)

The Administrator may authorize an SBDC to provide advice, information, and assistance, as described in subsection (c) of the Small Business Act, to a small business concern located outside of the state, without regard to geographic proximity to the small business development center, if the small business concern is located in an area for which the President has declared a major disaster.

The Administrator may provide financial assistance to an SBDC, a Women's Business Center described in section 29 of the Small Business Act, SCORE, or any proposed consortium of such individuals or entities to spur disaster recovery and growth of small business concerns located in an area for which the President has declared a major disaster.

List of Subjects in 13 CFR Part 130

Grant programs-business, Small businesses, Technical assistance.

For the reasons stated in the preamble, the Small Business Administration amends 13 CFR part 130 as follows:

PART 130—SMALL BUSINESS DEVELOPMENT CENTERS

■ 1. The authority citation for part 130 is revised to read as follows:

Authority: 15 U.S.C. 634(b)(6), 648, and 648 note.

■ 2. Revise § 130.100 to read as follows:

§ 130.100 Introduction.

(a) *Objective.* The Small Business Development Centers (SBDC) Program creates a broad-based system of assistance for the small business community by linking the resources of Federal, state, tribal, and local governments with the resources of the educational community and the private sector. The Program provides small businesses and aspiring entrepreneurs with a wide array of technical assistance and support to strengthen performance and sustainability of existing small businesses, and to enable the creation of new business entities. The Small Business Administration (SBA or the Agency) articulates its responsibilities for the general management and oversight of the SBDC Program by means of a cooperative agreement with the recipient organization.

(b) *Adoption of amended references.* All references in this part to Standard Operating Procedures, SBA official policies and procedures, and award documents adopt all ensuing changes or amendments to such sources.

■ 3. Amend § 130.110 by:

■ a. Adding the definition ''Accreditation process'' in alphabetical order;

■ b. Revising the definitions ''Applicant organization'' and ''Application'';

■ c. Removing the definition ''Area of Service'' and adding the definition ''Area of service'' in its place;

■ d. Adding the definitions ''Associate Administrator/Entrepreneurial Development (AA/ED)'' and ''Associate Administrator/Small Business Development Centers (AA/SBDC)'' in alphabetical order;

[4] SBA Table of Size Standards.

■ e. Removing the definition ''Cash Match'' and adding the definition ''Cash match'' in its place;
■ f. Adding the definitions ''Clearinghouse'' and ''Client'' in alphabetical order;
■ g. Removing the definitions ''Cognizant Agency'' and ''Cooperative Agreement'' and adding the definitions ''Cognizant agency'' and ''Cooperative agreement'' in their places, respectively;
■ h. Revising the definition of ''Counseling'';
■ i. Adding the definition ''Counseling record'' in alphabetical order;
■ j. Revising the definitions ''Direct costs'' and ''Dispute'';
■ k. Adding the definition ''District Office'' in alphabetical order;
■ l. Revising the definitions ''Grants Management Specialist'', ''In-kind contributions'', and ''Indirect costs'';
■ m. Adding the definitions ''Insular areas'' and ''Key personnel'' in alphabetical order;
■ n. Revising the definitions ''Lead Center'' and ''Lobbying'';
■ o. Adding the definitions ''Matching funds'', ''Notice of funding opportunity'', ''Notice of non-renewal'', ''Notice of suspension'', ''Notice of termination'', and ''Office of Small Business Development Centers (OSBDC)'' in alphabetical order;
■ p. Removing the definition ''Overmatched Amount'' and adding the definition ''Overmatched amount'' in its place;
■ q. Adding the definitions ''Prior approval'' and ''Program funds'' in alphabetical order;
■ r. Revising the definition ''Program income'';
■ s. Removing the definition ''Program manager'' and adding ''Program Manager'' in its place;
■ t. Adding the definition ''Program performance data'' in alphabetical order;
■ u. Removing the definition ''Project officer'' and adding the definition ''Project Officer'' in its place;
■ v. Revising the definition ''Project period'';
■ w. Adding the definition ''Proposal'' in alphabetical order;
■ x. Revising the definition ''Recipient organization'';
■ y. Adding the definition ''SBDC Lead Center Director'' in alphabetical order;
■ z. Revising the definition ''SBDC network'';
■ aa. Adding the definitions ''SBDC satellite location'', ''SBDC service center'', and ''SBDC Service Center Director'' in alphabetical order;
■ bb. Removing the definition ''Specialized Services'' and adding the definition ''Specialized services'' in its place;
■ cc. Revising the definition ''Training''; and
■ dd. Adding the definition ''Training record'' in alphabetical order.

The additions and revisions read as follows:

§ 130.110 Definitions.

Accreditation process. An evaluation process to assist an SBDC with assessing its processes and outlining areas needing improvement by providing recommendations to strengthen delivery of services and assistance.

Applicant organization. A qualified eligible entity that applies for Federal financial assistance to establish, administer, and operate an SBDC network under a new or renewed cooperative agreement.

Application. Also referred to as the proposal or the renewal application, the written submission by a new applicant organization or an existing recipient organization describing its projected SBDC activities for the upcoming budget period and requesting SBA funding for use in its operations.

Area of service. As designated in the cooperative agreement, the state or region in which an applicant organization proposes to provide services, or in which a recipient organization currently provides services.

Associate Administrator/Entrepreneurial Development (*AA/ED*). The individual who is appointed by the SBA Administrator to oversee the Office of Entrepreneurial Development (OED), where the SBDC Program is located.

Associate Administrator/Small Business Development Centers (*AA/SBDC*). The individual who is statutorily mandated to administer the SBDC Program.

* * * * *

Cash match. Non-Federal funds budgeted and expended by the recipient organization and/or sponsoring SBDC organization for direct costs of the project. Cash match excludes indirect costs, overhead costs, in-kind contributions, and program income. See 2 CFR 200.306.

Clearinghouse. A source of market and industry information made available to all SBDC networks to assist clients and supports the exchange of information between SBDCs.

Client. A nascent entrepreneur or existing small business seeking services provided by the SBDC.

Cognizant agency. The Federal awarding agency that provides the predominant amount of direct funding to a recipient. See 29 CFR 99.105.

Cooperative agreement. A legal instrument of financial assistance between a Federal awarding agency or pass-through entity and a non-Federal entity that, consistent with 31 U.S.C. 6302–6305:

(1) Is used to enter into a relationship the principal purpose of which is to transfer anything of value from the Federal awarding agency or passthrough entity to the non-Federal entity to carry out a public purpose authorized by a law of the United States (see 31 U.S.C. 6101(3)); and not to acquire property or services for the Federal Government or pass-through entity's direct benefit or use.

(2) Is distinguished from a grant in that it provides for substantial involvement between the Federal awarding agency or pass-through entity and the non-Federal entity in carrying out the activity contemplated by the Federal award.

(3) The term does not include:

(i) A cooperative research and development agreement as defined in 15 U.S.C. 3710a; or

(ii) An agreement that provides only:

(A) Direct United States Government cash assistance to an individual;

(B) A subsidy;

(C) A loan;

(D) A loan guarantee; or

(E) Insurance.

(4) Is a negotiated legal agreement between SBA and a recipient organization containing the terms and conditions under which SBA provides Federal funds for the performance of SBDC activities.

* * * * *

Counseling. Qualifying technical or management assistance, as defined in the cooperative agreement, provided through the SBDC Program to clients on an individual basis, as established by policy.

Counseling record. A record that provides individual client contact information, demographics about the client/business and data on the counseling provided.

Direct costs. Expenditures that can be identified specifically with a final cost objective and are further defined in 2 CFR part 200.

Dispute. A programmatic or financial disagreement that the recipient organization requests be handled in accordance with the dispute resolution procedures set forth at § 130.630.

District Office. The local SBA office, in collaboration with the OSBDC, is charged with: ensuring that small business market needs are met by the SBDC; conducting the regularly scheduled compliance reviews; monitoring statements as required; and

collaborating with the SBDC to perform joint events and trainings.

* * * * *

Grants Management Specialist. An SBA employee within the Office of SBDC, designated by the AA/SBDC, who meets the Office of Management and Budget (OMB) standards and certifications and is responsible for the budgetary review, award, and administration of one or more SBDC cooperative agreements.

In-kind contributions. Property, facilities, services, or other nonmonetary contributions from non-Federal sources. See 2 CFR part 215 (OMB Circular A–110) and part 143 of this chapter, as applicable.

Indirect costs. Costs generally incurred for a common or joint purpose. See 2 CFR part 220 (OMB Circular A–21), 225 (OMB Circular A– 87), and/or 230 (OMB Circular A–122).

Insular areas. Territories include the Virgin Islands, Guam, American Samoa, the Trust Territory of the Pacific Islands, and the Government of the Northern Mariana Islands. See 48 U.S.C. 1469a.

Key personnel. Principal staff of the Lead Center and SBDC service centers, including SBDC Lead Center Directors, SBDC Service Center Directors, or managers of International Trade Centers, Technology Program Centers, and directors of other SBDC specialty programs and any other leadership positions identified by the SBDC network.

Lead Center. The administrative office of the recipient organization that operates and manages an SBDC network.

Lobbying. ''Lobbying'' as described in 2 CFR parts 220 (OMB Circular A–21), 225 (OMB Circular A–87), and 230 (OMB Circular A–122) and Public Law 101–121, section 319, which discuss the limitations on use of appropriated funds to influence decisions of certain of Federal officials, including Members of Congress, Federal contracting, and financial transactions.

Matching funds. The combined amounts of non-Federal cash and noncash resources proposed for the cooperative agreement or claimed to fulfill statutory match requirements.

Notice of funding opportunity. The annual solicitation that an applicant organization or recipient organization must respond to in its initial or renewal application.

Notice of non-renewal. A notice provided to an SBDC stating that the SBA will not renew the cooperative agreement with the current recipient organization.

Notice of suspension. A notice provided to an SBDC stating that the SBDC is under suspension.

Notice of termination. A notice provided to an SBDC stating that the SBDC is terminated.

Office of Small Business Development Centers (OSBDC). The SBA program office providing leadership and program oversight, managing the funding formula, program budget, and the establishment and maintenance of all program policy over the national SBDC network.

Overmatched amount. Contributions of non-Federal cash and of non-cash resources for authorized SBDC activities in excess of the statutorily required match.

Prior approval. The written concurrence from the appropriate SBA AA/SBDC, Deputy Associate Administrator for the Office of Small Business Development Centers, Grants Management Officer, Grants Management Specialist, or Program Manager for a proposed action or amendment to the SBDC cooperative agreement.

* * * * *

Program funds. Also referred to as project funds and defined as all funds authorized under the cooperative agreement including, but not limited to, Federal funds, cash match, non-cash match from indirect costs, in-kind contributions, and program income revenues.

Program income. Gross income earned as a result of the Federal award during the period of performance, including funds received under a sponsorship agreement, as defined in 2 CFR 200.80.

Program Manager. An SBA employee designated by the AA/SBDC who oversees and monitors the SBDC network operations, including meeting the statutorily required programmatic reviews.

Program performance data. Any anonymous data or information that captures the outputs of the SBDC service center and outcomes of services provided to clients.

Project Officer. The individual who serves as the primary local contact for the SBDC, conducts regular compliance oversight as required by AA/SBDC, and works in conjunction with the Program Manager.

Project period. The total annual period of performance for an award made under the notice of funding opportunity.

Proposal. Also known as the application, the written submission by a new applicant organization or an existing recipient organization describing its projected SBDC activities for the upcoming budget period and requesting Federal funding for use in its operations.

Recipient organization. The selected applicant organization receiving Federal funding to deliver SBDC services under a cooperative agreement.

* * * * *

SBDC Lead Center Director. Also referred to as the State/Region Director, an individual or position whose time is allocated to the SBDC grant program or other related small business grant programs that provide comparable management and technical assistance to the small business community in accordance with the cooperative agreement. For the purposes of meeting the Program requirements, no less than 75 percent of the SBDC Lead Center Director's time and effort must be devoted specifically to the SBDC grant. The SBDC Lead Center Director has clear and complete control of all SBDC Program funds.

SBDC network. The Lead Center, SBDC service centers, and SBDC satellite locations funded and affiliated by sub-agreements and comprising a single service delivery network administered by a recipient organization.

SBDC satellite location. A geographic point of service delivery that operates on a full- or part-time basis under direct management of an SBDC Lead Center Director or SBDC Service Center Director.

SBDC service center. An entity operating full-time authorized by the Lead Center to perform SBDC counseling and training services. Any applicant commencing after January 1, 1992, establishing service centers within its area of service, to the extent practicable, should be primarily housed within institutions of higher education or a Women's Business Center (WBC) operating pursuant to section 29 of the Small Business Act (15 U.S.C. 656) as stated in section 21(a)(1) of the Small Business Act (15 U.S.C. 648(a)(1)).

SBDC Service Center Director. The individual responsible for SBDC Program implementation and management at an SBDC service center within an SBDC network.

* * * * *

Specialized services. SBDC services other than counseling or training, *e.g.,* extensive research, hiring outside consultants for a client, translation services, etc.

* * * * *

Training. An educational activity or event presented by an SBDC that

delivers a structured program of knowledge on an entrepreneurial or business-related subject, as established in the cooperative agreement.

Training record. A record that provides aggregate data about a training event to include training topic and program format.

■ 4. Amend § 130.200 by:
■ a. Removing the paragraph designation and heading from paragraph (a) introductory text;
■ b. Removing paragraph (b);
■ c. Redesignating paragraphs (1) through (4) as paragraphs (a) through (d);
■ d. Redesignating paragraphs (5) and (6) as paragraph (h) and (g), respectively;
■ e. Adding paragraphs (e) and (f);
■ f. In newly redesignated paragraph (g), removing the period and adding ''; or'' in its place; and
■ g. Revising newly redesignated paragraph (h).

The additions and revision read as follows:

§ 130.200 Eligible entities.

* * * * *

(e) A Women's Business Center operating pursuant to section 29 of the Small Business Act (15 U.S.C. 656);

(f) The Commonwealth of the Northern Mariana Islands SBDC must have its principal office located in the Commonwealth of the Northern Mariana Islands (CNMI) and must:

(1) Be a CNMI government or agency;

(2) Be a regional entity;

(3) Be a CNMI-chartered development, credit, or finance corporation;

(4) Be an institution of higher education (including but not limited to any land-grant college or university, any college or school of business, engineering, commerce, or agriculture, community college or junior college);

(5) Be a current SBA Women's Business Center (WBC); or

(6) Be any entity formed by two or more of the entities in paragraphs (f)(1) through (5) of this section;

* * * * *

(h) Any entity operating continually as a recipient organization on or before December 31, 1990.

■ 5. Revise § 130.300 to read as follows:

§ 130.300 Small Business Development Centers (SBDCs).

The Small Business Development Center Program is established under the statutory authority of the Small Business Act (15 U.S.C. 648) and administered through cooperative agreements issued to recipient organizations.

■ 6. Revise § 130.310 to read as follows:

§ 130.310 Area of service.

(a) The AA/SBDC will designate, in the cooperative agreement, the geographic area of service of each recipient organization. Generally, no more than one recipient organization may be located in a state.

(1) The AA/SBDC may determine that making awards to multiple recipient organizations in a state is necessary to more effectively implement the Program and provide services to all interested small businesses.

(2) Once the Administration has entered into a cooperative agreement, a subsequent decision to change the recipient organization's area of service will be considered a non-renewal or termination. This decision will be subject to the procedures outlined in § 130.700.

(b) The recipient organization must locate its Lead Center and SBDC service centers in the designated area of service to ensure that services are readily accessible to all small businesses within the designated area of service.

(c) Any applicant commencing after January 1, 1992, must ensure that any new SBDC service centers established within its area of service, to the extent practicable, are primarily housed within institutions of higher education or a WBC operating pursuant to section 29 of the Small Business Act (15 U.S.C. 656) as stated in section 21(a)(1) of the Small Business Act (15 U.S.C. 648(a)(1)).

(d) The allocation of resources, including site locations of the Lead Center and the SBDC service centers, will be reviewed for adequacy of coverage by SBA as part of the application review process for each budget period.

§ 130.320 [Removed]

■ 7. Remove § 130.320.

§§ 130.330, 130.340, 130.350, and 130.360 [Redesignated as §§ 130.320, 130.330, 130.340, and 130.350]

■ 8. Redesignate §§ 130.330, 130.340, 130.350, and 130.360 as §§ 130.320, 130.330, 130.340, and 130.350.

■ 9. Amend newly redesignated § 130.320 by:
■ a. Revising paragraph (a);
■ b. Adding a sentence at the end of paragraph (b);
■ c. Revising paragraph (c);
■ d. Redesignating paragraphs (d) and (e) as paragraphs (g) and (h);
■ e. Adding new paragraphs (d) and (e) and paragraph (f); and
■ f. Revising newly redesignated paragraphs (g) and (h).

The revisions and additions read as follows:

§ 130.320 Operating requirements.

(a) The recipient organization has the contractual responsibility for performing the duties of the Lead Center in accordance with the cooperative agreement. The Lead Center must be an independent department within the recipient organization, having its own staff, including a full-time SBDC Director.

(b) * * * The Lead Center must conduct and document annual financial and programmatic reviews and evaluations of its SBDC service centers consistent with § 130.820(a).

(c) The Lead Center's and SBDC service center's services will be available to the public throughout the year during the normal hours of the business community. In addition, every effort should be made to provide assistance, including during nonbusiness hours, both in-person and virtually, as appropriate, to meet local community business demands and needs. Variations from these schedules or other anticipated closures will be included in the new or annual renewal application. Emergency closures will be reported to the SBA District Office as soon as is feasible.

(d) The specific identification ''Small Business Development Center'' must be a part of the official name of every SBDC Lead Center and SBDC service center within the SBDC network, unless waived by the AA/SBDC.

(e) Any entity that is using the term ''Small Business Development Center'' and under contract with the Lead Center and receiving program funds, whether receiving Federal funding or not, is considered a part of the recipient organization's network and as such the recipient organization is required to report to the OSBDC each SBDC service center's performance as well as any funds or program income generated by the activities of that Service Center.

(f) Each SBDC must maintain a minimum number of export and trade certified counselors to assist clients develop export and international trade opportunities. The standard for establishing the number of counselors required to have this certification is based on the total number of full-time equivalent (FTE) counseling employees in an SBDC's network. The minimum number of certified counselors for an SBDC network is the *lesser* of:

(1) Five counselors; or

(2) Ten percent of the total number of FTE counselors in the network.

(g) The Lead Center and all its SBDC service centers must implement and have in effect at all times, a uniform and enforceable conflict of interest policy applicable to all SBDC employees,

contractors, consultants, and volunteers and must be signed annually. At a minimum, this policy must be consistent with the conflict of interest principles set forth in 2 CFR 2701.112.

(h) The SBDC network will comply with 13 CFR parts 112, 113, 117, and 136 requiring that no person, on the grounds of race, color, handicap, marital status, national origin, race, religion, or gender, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity conducted by the SBDC network.

■ 10. Amend newly redesignated § 130.330 by:
■ a. Revising paragraph (a);
■ b. Removing the words ''are encouraged to'' from paragraph (b)(1) and adding in their place the word ''must'';
■ c. Revising paragraphs (b)(2) through (5) and (c);
■ d. Adding paragraph (d).

The revisions and addition read as follows:

§ 130.330 SBDC services and restrictions on service.

(a) *Services.* The SBDC network, to the extent practicable, must provide prospective entrepreneurs and existing small businesses, known as clients, with counseling, access to training, and specialized services. The SBDC must create counseling records for clients when required by the cooperative agreement. The services provided must relate to the formation, financing, management, and operation of small business enterprises. The network must provide services that meet local needs as determined through periodic needs assessments, which are continually improved to keep pace with changing local small business needs. It is the responsibility of the recipient organization to change local SBDC service centers, as necessary, to meet the needs of the communities it serves in accordance with §§ 130.310 and 130.620. See section 21(c)(3) of the Small Business Act (15 U.S.C. 648(c)(36)) for the full list of compulsory services. To the extent possible, SBDCs will work in collaboration with other Federal, state, tribal, and local government programs that assist small businesses and will coordinate and cooperate, to the extent practicable, with other local public and private providers of small business assistance. An SBDC Lead Center should use and compensate qualified small business vendors as one of its resources.

(b) * * *

(2) SBDCs may provide assistance and guidance with the necessary documentation required for applications for capital assistance; including assistance for SBA loan products and services, including small dollar loans, free of charge as stated in § 130.470.

(3) SBDCs should prepare their clients to represent themselves to lending institutions. SBDCs may attend meetings with lenders to assist clients in preparing financial packages; however, SBDCs may not attest to a client's readiness or creditworthiness to the lending institution either verbally or in writing.

(4) SBDCs may participate on boards and panels of financial institutions and with outside organizations but may not be involved in any final credit decisions involving SBDC clients or in making or servicing loans.

(5) With respect to SBA loan guaranty programs, SBDCs may accompany an applicant organization appearing before SBA or a lender but may not advocate for, promote, recommend approval or otherwise attempt in any manner to influence SBA or a lender to provide financial assistance to any of its clients.

(c) *Special emphasis initiatives.* Periodically, SBA may identify, and include in the cooperative agreement, portions of the general population to be targeted for assistance by SBDCs and specific focus areas including, but not limited to: base closure assistance; cybersecurity and preparedness; employee ownership program; and intellectual property protections. (Refer to current cooperative agreement.)

(d) *Portable assistance.* The current cooperative agreement is a startup and sustainability non-matching program to be conducted by eligible SBDCs in communities that are economically challenged as a result of a business or government facility downsizing or closing, which has resulted in the loss of jobs or small business instability. The funds will be used for small business development center personnel expenses and related small business programs and services.

■ 11. Revise newly redesignated § 130.340 to read as follows:

§ 130.340 Specific program responsibilities.

(a) *Policy development.* The AA/SBDC will establish program policies and procedures to improve the delivery of services by SBDCs to the small business community, and to enhance compliance with applicable laws, regulations, OMB guidelines, and Executive orders. The AA/SBDC will, to the extent practicable, consult with the recognized association.

(b) *Program administration.* The AA/SBDC or designee will recommend the annual program budget, establish appropriate funding levels in compliance with the statute, and review the annual budgets submitted by each applicant. The AA/SBDC will also select applicants to participate in the Program, to maintain a clearinghouse to provide for the dissemination and exchange of information between SBDCs, and to conduct audits of recipients of SBDC grants.

(c) *Responsibilities of SBDC Lead Center Directors.* (1) The SBDC Lead Center Director must be an individual dedicating not less than 75 percent of their time to the supervision and control of the SBDC on behalf of the recipient organization. The position may not be held by a company or contractor.

(2) The SBDC Lead Center Director position must have direct reporting authority, at a minimum, equivalent to that of a college dean in a university setting or the third level of management or administration within a state agency.

(3) The Lead Center Director will direct and monitor program activities and financial affairs of the SBDC network to ensure effective delivery of services to the small business community, and compliance with applicable laws, regulations, 2 CFR part 200, and the terms and conditions of the cooperative agreement.

(4) The SBDC Lead Center Director must have the authority necessary to control all personnel, budgets, and expenditures under the cooperative agreement.

(5) The SBDC Lead Center Director will serve as the SBA's principal contact for all matters involving the SBDC network including, but not limited to, ensuring that state and local needs are addressed; financial and programmatic reporting are submitted; service centers are providing access to training; employees have experience necessary to conduct meaningful counseling; etc.

■ 12. Amend newly redesignated § 130.350 by:
■ a. Removing the word ''must'' from paragraph (a)(1) and adding in its place the word ''will'';
■ b. Revising paragraph (a)(2);
■ c. Removing ''Area of Service'' from paragraph (a)(3) and adding in its place ''area of service'';
■ d. Revising paragraphs (a)(4) and (6) and (b)(1); and
■ e. Adding paragraphs (b)(3) through (5).

The revisions and additions read as follows:

§ 130.350 SBDC advisory boards.

(a) * * *

(2) This advisory board will be referred to as a State SBDC Advisory Board in a state/territory having only one recipient organization, and a Regional SBDC Advisory Board in a state having more than one recipient organization.

* * * * *

(4) New Lead Centers must establish a State or Regional SBDC Advisory Board by the beginning of the second project period.

* * * * *

(6) The reasonable cost of travel of any Board member for official Board activities may be paid out of the SBDC's budgeted funds. Federal and program funds are not to be used to compensate advisory board members for non-travel related expenses such as time and effort.

(b) * * *

(1) The SBA will establish a National SBDC Advisory Board, appointed by the SBA Administrator, and comprised of members who are not Federal employees. The Board will elect a chairperson. Three members of the Board will be from universities, or their affiliates and the remainder will be from small businesses or associations representing small businesses. Board members will serve staggered three-year terms. The SBA Administrator may appoint successors to fill unexpired terms.

* * * * *

(3) The reasonable cost of travel of any National SBDC Advisory Board member for official Board activities will be paid by SBA out of SBDC line-item program funds.

(4) Each member of the Board will be entitled to be reimbursed for expenses as a member of the Board.

(5) The Board will meet at least semiannually and at the call of the Chairman of the Board.

■ 13. Add a new § 130.360 to read as follows:

§ 130.360 Selection of the SBDC Lead Center Director.

(a) *Selection.* Selection of an SBDC Lead Center Director must be accomplished in accordance with the guidelines set forth in the notice of funding opportunity and cooperative agreement.

(b) *Vacancy.* (1) The recipient organization must notify the appropriate SBA District Director (DD), Regional Administrator, and AA/SBDC within ten business days of either:

(i) Being notified by the incumbent SBDC Lead Center Director of their intent to vacate the position; or

(ii) Its formal decision to remove the incumbent SBDC Lead Center Director.

(2) If the position will be vacated prior to the selection of a replacement, the recipient organization must appoint an interim SBDC Lead Center Director, prior to the vacancy, who will serve in that capacity until a permanent SBDC Lead Center Director is in position.

(3) The recipient organization must inform the SBA District Director, Regional Administrator, and the AA/SBDC within ten business days of the appointment of the interim SBDC Lead Center Director and provide that individual's contact information.

(4) An interim Lead Center Director must allocate at least 75 percent of their time and effort to the SBDC Program until a permanent SBDC Lead Center Director is in position. This must be documented in accordance with the policies of the recipient organization. An interim SBDC Lead Center Director must be knowledgeable about sponsored programs. The appointment period for such interim SBDC Lead Center Director will not exceed 120 days. Should more time be needed the recipient organization must obtain prior approval from the AA/SBDC for an extension.

■ 14. Add § 130.370 to read as follows:

§ 130.370 Contracts with other Federal agencies.

(a) An SBDC Lead Center or SBDC service center organization may enter into a contract or grant with a Federal department or agency to provide specific assistance to small business concerns in accordance with paragraphs (b) and (c) of this section.

(b) Prior to bidding on a non-SBA Federal award or contract, the SBDC Lead Center or service center must obtain written consent from the AA/SBDC or designee regarding the subject and general scope of the award or contract to ensure that performance under the award or contract does not represent a conflict with the SBA's cooperative agreement. The AA/OSBDC or designee shall respond to any written request within five business days.

(c) Federal funds from other Federal programs (except for certain Community Development Block Grant program funds) may not be counted as match for purposes of the SBDC Program. In addition, match expenditures reported to the SBA under the cooperative agreement may not be used or reported as match for another Federal program.

■ 15. Add § 130.380 to read as follows:

§ 130.380 Client privacy.

(a) SBDCs, including their contractors and other agents, are not permitted to disclose the Client's name, address, email address, or telephone number, hereafter referred to as ''client contact data,'' of individuals or small businesses that obtain any type of assistance from the Program to any person or entity other than the SBDC, without the consent of the client, except in instances where:

(1) Court orders require the SBA Administrator to do so in any civil or criminal enforcement action initiated by a Federal or state agency; or

(2) The Administrator considers such a disclosure to be necessary for the purpose of conducting a financial audit of a center, not including those required under § 130.830, as determined on a case-by-case basis when formal requests are made by a Federal or state agency. Such formal requests must justify and document the need for individual client contact and/or program activity data to the satisfaction of the Administrator; or

(3) SBA requires client contact data to directly survey SBDC clients.

(b) SBDCs must provide an opportunity for a client to opt-in to allow the SBA to obtain client contact data. The SBA may use the permitted client contact data only to conduct surveys or studies that help stakeholders better understand how the services the client received affect their business outcomes over time. These surveys or studies would include, but not be limited to:

(1) Studying evaluation and performance management;

(2) Measuring the effect and economic or other impact of Agency programs;

(3) Assessing public and SBDC partner needs;

(4) Measuring customer satisfaction;

(5) Guiding program policy development;

(6) Improving grant-making processes; and

(7) Other areas SBA determines would be valuable to strengthen the SBDC Programs and/or enhance support for SBDC clients.

(c) SBDCs may not deny access to services to clients solely based on their refusal to provide consent as referenced in this section.

(d) Any reports or studies on program activity produced by SBDC and/or the Administrator, including their contractors and other agents, may not disseminate client contact data and must only report data in the aggregate. Individual client contact data will not be disclosed in any way that could individually identify a client.

(e) SBDCs and the Administrator, including their contractors and other agents, must obtain consent from the client prior to publishing media or reports that identify an individual client.

(f) This section does not restrict the Agency in any way from access and use of program performance data.

■ 16. Revise § 130.400 to read as follows:

§ 130.400 Application procedures.

All SBDC applicants must comply with the annual notice of funding opportunity, including format, conditions, submission requirements, and due dates, for their new or renewal application to receive consideration.

■ 17. Revise § 130.410 to read as follows:

§ 130.410 New applications.

(a) *New applicants.* New applicants must comply with the requirements set forth in the applicable notice of funding opportunity, including format, conditions, and due dates for their applications to receive consideration.

(b) *Consideration.* Except in cases involving insular areas, only those applicants operating under § 130.200 and incorporated solely within the state where the new SBDC is to be located will receive consideration.

(c) *Recruiting and selecting new recipient organizations.* (1) SBA will use a fair, open and competitive procurement process to solicit proposals for new SBDC Program awards.

(2) After completion of an objective review process, the AA/SBDC will make the final selection and notify the successful applicant.

(3) The newly selected recipient organization may, with prior written approval from the SBA, incur qualified pre-award matching expenditures for the establishment of the Lead Center office, to recruit Lead Center staff, and to cover other related start-up expenditures to the extent permitted under 2 CFR 215.25(e)(1).

■ 18. Revise § 130.420 to read as follows:

§ 130.420 Renewal applications.

(a) The recipient organization will submit the renewal application to the OSBDC using the submission process outlined in the annual notice of funding opportunity.

(b) If the OSBDC chooses to not renew the award of an existing recipient organization or the recipient organization elects not to reapply, the OSBDC will award a cooperative agreement for the conduct of an SBDC project to a new recipient organization in the same area of service using a competitive process. If the OSBDC has initiated a non-renewal or termination action, the Agency will not issue the new award until all administrative remedies have been exhausted. For further information regarding the termination and non-renewal procedures, see § 130.700.

(c) Significant factors considered in the renewal application review will include:

(1) The applicant's ability to obtain matching funds;

(2) The quality of prior performance under the cooperative agreement as measured by client satisfaction rate;

(3) The results of any examination conducted pursuant to § 130.810(b);

(4) Corrective measures implemented as a result of examinations conducted; and

(5) The accreditation provisions of § 130.810(c) including any conditions, the most current accreditation report, and corrective measures implemented, affecting the recipient organization and the SBDC network.

(d) The OSBDC will review the renewal application for conformity with the notice of funding opportunity. The AA/SBDC may request additional information and documentation prior to issuing the cooperative agreement.

■ 19. Revise § 130.430 to read as follows:

§ 130.430 Application decisions.

(a) New applications will either be accepted or rejected in accordance with the evaluation criteria set forth in the applicable notice of funding opportunity. The AA/SBDC may approve, or conditionally approve, or deny any new application. The AA/SBDC may approve or conditionally approve or deny a renewal application. The AA/SBDC may also reject a renewal application after following due process in accordance with the procedures set forth in § 130.700. If a renewal application is conditionally approved, the requirements that the recipient organization must meet in order to obtain full and unconditional approval, will be specified as special terms and conditions in the cooperative agreement.

(b) In the event of a conditional approval, the SBA may fund a recipient organization for one or more specified periods of time up to a maximum of one budget period. If the recipient organization fails to comply with the special terms and conditions of the award to the satisfaction of the AA/SBDC within the allotted time period, the AA/SBDC may suspend, non-renew, or terminate the cooperative agreement with the SBDC, in accordance with the procedures set forth in § 130.700.

■ 20. Revise § 130.440 to read as follows:

§ 130.440 Maximum grant.

(a) No recipient organization will receive an SBDC grant, in any fiscal year under a cooperative agreement, exceeding the greater of the minimum statutory amount, or its pro rata share of all SBDC grants as determined by the statutory formula set forth in section 21(a)(4)(C) of the Small Business Act (15 U.S.C. 648(a)(4)(C)). This limit does not apply to the distribution of supplemental funds, or to grants provided pursuant to sections 21(a)(4)(C)(viii) and 21(a)(6) of the Small Business Act (15 U.S.C. 648(a)(6)).

(b) Additional grants are subject to the limitations set forth in section 21(a)(6) of the Small Business Act unless the statute providing for the additional grant states otherwise.

■ 21. Amend § 130.450 by:

■ a. Revising the second and third sentences of paragraph (a);

■ b. In paragraph (b):

■ i. Revising the third sentence and removing the fourth sentence; and

■ ii. Removing ''Cooperative Agreement'' and adding in its place ''cooperative agreement'';

■ c. Revising paragraphs (c) through (e); and

■ d. Adding new paragraphs (f) through (h).

The additions and revisions read as follows:

§ 130.450 Matching funds.

(a) * * * Cash match must be equal to or greater than 50 percent of the SBA funds used by the SBDC. The remaining match required to equal the one-to-one match requirement may be provided through any allowable combination of additional cash, in-kind contributions or indirect costs.

(b) * * * Any additional SBA requirements, specifications, or deliverables must be clearly identified in the budget narrative. * * *

(c) Under the authority of 48 U.S.C. 1469a(d), the AA/SBDC may, at his/her discretion, waive any requirement of matching funds for an insular territory otherwise required by law to be provided. Notwithstanding any other provision of law, in the case of American Samoa, Guam, the Virgin Islands, and the Commonwealth of the Northern Mariana Islands, any department or agency shall waive any requirements for local matching funds under $200,000, including in-kind contributions, required by law to be provided by American Samoa, Guam, the Virgin Islands, and the Commonwealth of the Northern Mariana Islands.

(d) All applicants must submit a certification of cash match and program

income. This certification must be executed by an authorized official of the recipient organization and must identify any SBDC service center organization(s) providing cash match under a subcontract or other agreement.

(e) In addition to the Federal and program income funds, all matching funds must be under the direct management of either the SBDC Lead Center Director or an SBDC Service Center Director, when budgeted under an SBDC service center organization. If in-kind contributions are utilized by the SBDC, the State Director or an SBDC Service Center Director is then considered to be in control of those contributions.

(f) The Grants Management Specialist will determine whether matching funds and cash match set forth in the budget proposal are sufficient to issue the cooperative agreement.

(g) Recipient organizations are not required but encouraged to identify overmatched amounts as part of the cooperative agreement. Overmatching expenditures are those which are derived from eligible matching sources; are reasonable, allowable, and allocable to the SBDC program; are over and above the minimum match required to the Federal expenditures; and are included on the required SBDC financial reporting to SBA for the project period.

(1) Recipient organizations are encouraged to identify overmatched amounts as part of the cooperative agreement. The recipient organization must fully identify the amount and sources of claimed overmatched amounts. If overmatched amounts are reported, they are subject to the provisions of the cooperative agreement and SBA biennial programmatic and financial examinations.

(2) An overmatched amount can be applied as matching funds for any funding increase (*i.e.,* supplemental funds) received by the SBDC during the budget period, as long as the total cash match contributed by the SBDC is 50 percent or more of the total SBA funds tendered during the budget period and provided that the total match is still 100 percent.

(3) Allowable overmatched amounts which have not been used in the manner described in this section may, with the approval of the AA/SBDC, be used as a credit to offset any confirmed audit disallowances applicable only to the budget period in which the overmatched amount exists and the two previous budget periods. Such offsetting funds will be considered matching funds.

(h) The following sources cannot be used as matching funds for the SBDC network:

(1) Uncompensated student labor;

(2) SCORE, SBA, Women's Business Centers, or other SBA resource partners;

(3) Program income or fees collected from individuals or small businesses receiving assistance;

(4) Federal funds other than Community Development Block Grant (CDBG) funds;

(5) In-kind contributions, or indirect costs not solely dedicated to the SBDC Program, or under its control;

(6) Any resource allocated and claimed as a matching cost to another federally funded program; or

(7) Funds or other resources provided for an agreed upon scope of work inconsistent with the authorized activities of the SBDC Program.

■ 22. Revise § 130.460 to read as follows:

§ 130.460 Budget justification.

(a) *General.* The SBDC Lead Center Director, as a part of the annual renewal proposal, or the applicant organization's authorized representative, in the case of a new SBDC application, shall prepare and submit to the SBA Project Officer the budget justification for the upcoming budget period. The budget will be reviewed annually upon submission of a renewal application.

(b) *Direct costs.* At least 80 percent of SBA funding must be allocated to the direct cost of program delivery.

(c) *Indirect costs.* If the applicant organization or recipient organization waives all indirect costs, then 100 percent of SBA funding must be allocated to program delivery. If the reimbursements of some, but not all, indirect costs are waived to meet the matching funds requirement, the lesser of the following may be allocated as reimbursed indirect costs of the Program and charged against the Federal contribution:

(1) Twenty percent of Federal contribution; or

(2) The amount remaining after the waived portion of indirect costs is deducted from the total indirect costs allowed by the SBA.

(d) *Separate SBDC service provider budgets.* The applicant organization shall include separate budgets for all SBDC service providers in conformity with 2 CFR part 220, appendix A. Applicable direct cost categories and indirect cost base/rate agreements will be included for the Lead Center and all SBDC service providers, using a rate equal to or less than the negotiated predetermined rate. If no such rate exists, the sponsoring SBDC organization or SBDC service provider will negotiate a rate with its cognizant agency. In the event the sponsoring SBDC organization or SBDC service provider does not have a cognizant agency, the rate shall be, in accordance with OMB guidelines:

(1) Negotiated with the SBA Project Officer; or

(2) Apply the OMB de minimis rate.

(e) *Cost principles.* Principles for determining allowable costs are contained in 2 CFR part 200, subpart E.

(f) *Salaries.* (1) Where the recipient organization is an educational institution, the salaries of the SBDC Lead Center Director and the SBDC Service Center Director at a minimum must approximate the average annualized salary of a full professor and an assistant professor, respectively, in the school or department in which the SBDC is located. If a recipient organization is not an educational institution, the salaries of the SBDC Lead Center Director and the subcenter Directors must approximate the average salaries of parallel positions within the recipient organization. In both cases, the recipient organization should consider the Director's longevity in the Program, the number of subcenters, the size of the SBDC budget, the number of service centers, and the individual's experience and background when determining the salary.

(2) Salaries for Lead Center Directors should be comparable to salaries paid Lead Center Directors in other states or regions with comparably sized programs, responsibilities, and authority.

(3) Salaries for all other positions within the SBDC should be based upon level of responsibility and be comparable to salaries for similar positions in the area served by the SBDC.

(g) *Equipment.* In accordance with 2 CFR part 200, capital expenditures for equipment must have the prior approval of the Program Manager of the OSBDC, either through a specific disclosure in an annual cost proposal or through an approved amendment to an existing cooperative agreement.

(h) *Travel.* (1) All travel must be separately identified in the proposed budget under the categories of: planned in-state/region, planned out-of-state/region, unanticipated in-state/region, or unanticipated out-of-state/region. Unplanned travel estimates may be based on the SBDC's experience.

(2) Transportation costs must be justified in writing, including the estimated cost, number of persons traveling, and the benefit to be derived

by the small business community from the proposed travel.

(3) Any proposed unplanned out-of-state/region travel exceeding the approved amount budgeted for this category must be submitted to the SBA for approval on a case-by-case basis prior to traveling.

(4) All foreign travel requests must be submitted to the appropriate District Director and the SBDC Program Manager for review and provided to the AA/SBDC for final approval in accordance with the notice of funding opportunity. Foreign travel charged to the SBDC cooperative agreement or performed by SBDC staff, while on duty for the recipient organization, must be approved in advance.

(i) Planned foreign travel costs allocable to the SBDC cooperative agreement for SBDC network staff may be approved by AA/SBDC through the annual proposal process, but such planned costs must be fully disclosed and justified in the budget narrative for Agency review. Prior approval should be obtained from the AA/SBDC prior to travel in accordance with 2 CFR part 200.

(ii) Unanticipated foreign travel must be approved using the process set forth in this paragraph (h).

■ 23. Add § 130.465 to read as follows:

§ 130.465 Restricted and prohibited costs.

(a) SBA prohibitions are consistent with those outlined in 2 CFR part 200.

(b) An SBDC must not use project funds as collateral for a loan or other such monetary purpose.

(c) An SBDC must not use project funds for memorabilia, gifts, prizes, souvenirs, entertainment, alcoholic beverages, amusement, social activities, or any other such costs.

(d) Prior written approval from the AA/SBDC is need for SBDC project funds to be used for the purpose of fundraising activities and costs. SBDCs may include in initial applications and renewal applications proposed fundraising activities. After issuance of an approved cooperative agreement, an SBDC wishing to seek prior approval for new fundraising activities not already approved should follow the prior approval guidance in the cooperative agreement. Prohibited fundraising activities include, but are not limited to:

(1) Costs of organized fundraising, endowment drives;

(2) Financial or capital campaigns; or

(3) Solicitation of gifts and bequests.

(e) Project funds found to be used in violation of the restrictions in this section may be cause for termination, suspension, or non-renewal of the cooperative agreement.

■ 24. Revise § 130.470 to read as follows:

§ 130.470 Fees.

(a) An SBDC may charge clients a reasonable fee to cover the costs of training (sponsored or cosponsored) by the SBDC, the sale of books, the rental of equipment or space, research work, hiring outside consultants for a particular client, or other specialized services.

(b) SBDC network entities, staff, consultants, or volunteers must not solicit or accept fees or other compensation for counseling services, including, but not limited to, business or marketing plan development, loan packaging or credit application assistance, or other advisory services described in section 21 of the Small Business Act.

■ 25. Revise § 130.480 to read as follows:

§ 130.480 Program income.

(a) Program income and interest earned on program income, may only be used for authorized purposes, in accordance with 2 CFR 200.307 and the cooperative agreement, such as to expand the quantity or quality of services, resources or outreach provided by the SBDC network.

(b) Program income may not be reported or used as a matching resource. Unused program income must be carried over to the subsequent budget period by the SBDC network; however, the aggregate amount of network program income cannot exceed 25 percent of the total SBDC budget (Federal and matching expenditures).

(c) Program income exceeding 25 percent of the total approved SBDC budget must be expended by the SBDC network prior to the end of the budget/project period in which the excess occurs.

(d) The Lead Center must report the consolidated program income sources and uses as an attachment to the financial status report for the SBDC network during the budget period. The SBDC must provide a narrative describing how program income was used to further program objectives.

■ 26. Add § 130.490 to read as follows:

§ 130.490 Property standard.

See 2 CFR part 200, subpart D.

■ 27. Revise § 130.500 to read as follows:

§ 130.500 Funding.

See 2 CFR 200.305.

■ 28. Revise § 130.600 to read as follows:

§ 130.600 Cooperative agreement.

(a) *Cooperative agreement provisions.* A recipient organization will incorporate into its SBDC sub-agreements and contracts the provisions of the cooperative agreement.

(b) *Sub-agreements.* SBA reserves the right to disapprove any sub-agreement entered into by recipient organizations with SBDC service center organizations, vendors, or contractors.

(c) *Goals and milestones.* (1) The AA/SBDC or designee will develop performance measurements for SBDC networks and include provisions for their achievement in the cooperative agreement.

(2) The AA/SBDC or designee will negotiate with the designated association and Lead Center to establish the annual goals, milestones, and activities for the cooperative agreement.

(3) Failure to meet the goals and milestones of the cooperative agreement may be considered in part of the determination for suspension, termination, or non-renewal in accordance with the dispute resolution procedures set forth in § 130.630.

(4) Agency loan goals may not be negotiated or incorporated into the cooperative agreement without the prior written approval of the AA/SBDC.

(d) *Procurement policies and procedures.* (1) Contracts and sub-agreements supported with funds provided under the cooperative agreement must comply with the procurement procedures of the recipient organization.

(2) Contracting procedures must encourage open competition among qualified vendors and promote the effective, efficient, and responsible use of program resources and OMB guidance.

(3) Contracting procedures should provide for domestic sourcing preferences to the greatest extent practicable, showing preference for the purchase, acquisition, or use of goods, products, or materials produced in the United States.

§ 130.610 [Amended]

■ 29. Amend § 130.610 by:

■ a. Removing ''Cooperative Agreement'' and adding ''cooperative agreement'' in its place; and

■ b. Removing the last sentence in the paragraph.

■ 30. Revise § 130.620 to read as follows:

§ 130.620 Revisions and amendments to cooperative agreements.

(a) *Requests for revisions.* The cooperative agreement may not be

unilaterally amended, modified, or revised by the recipient organization. Rather, a recipient organization must submit a written request to AA/SBDC along with a copy to the appropriate District Office when it wants to make one or more revisions to the cooperative agreement. Written approval from the AA/SBDC is required prior to the implementation of a proposed revision. Revisions that require amendment of the cooperative agreement include:

(1) Any change in project scope or objectives that will substantially change outcomes described in the cooperative agreement;

(2) Budget revisions exceeding the limit established in the cooperative agreement; and

(3) Any proposed sole-source or one-bid contracts exceeding the limits established by applicable administrative regulations or OMB.

(b) *Emergency authorizations.* (1) In consultation with the Recognized Organization, the AA/SBDC may amend one or more cooperative agreements to authorize unanticipated out-of-state travel by SBDC personnel responding to a need for services in a presidentially or SBA Administrator declared major disaster area. Notification of this type of authorization will be accomplished through the publication of an SBA Notice in the **Federal Register**.

(2) Proposed and actual travel costs incurred under an emergency authorization must comply with the requirements of § 130.460(h), as well as the relevant notice of funding opportunity and OMB guidelines.

(c) *Supplemental funding.* If supplemental funds are available for distribution, SBA will publish a notice of funding opportunity in consultation with the Recognized Organization.

■ 31. Revise § 130.630 to read as follows:

§ 130.630 Dispute resolution procedures.

(a) *Financial disputes.* (1) A recipient organization wishing to resolve a financial dispute must submit a written statement to the appropriate Grants Management Officer with copies to the Project Officer describing the subject of the dispute, along with any relevant documentation. The Grants Management Officer will respond in writing to the recipient organization within 30 calendar days of receipt of the descriptive statement.

(2) If the recipient organization receives an unfavorable decision from the SBA, it may file an appeal with the AA/SBDC within 30 calendar days of the date of receipt of the unfavorable decision.

(3) The AA/SBDC may request additional information or documentation from the recipient organization at any stage of the proceedings. The response to the request for additional information must be provided in writing to the AA/SBDC within 15 calendar days of receipt of the request. The AA/SBDC will transmit a written decision to the recipient organization within 15 calendar days of receipt of the appeal or within 15 calendar days of receipt of additional information requested.

(4) If the recipient organization receives an unfavorable decision from the AA/SBDC, it may make a final appeal to the SBA Grants and cooperative agreements Appeals Committee (the ''Committee''). The final appeal to the Committee must be filed within 30 calendar days of the date of receipt of the AA/SBDC's written decision. Copies of the appeal must also be sent to the Grants Management Specialist and the Program Manager. If the recipient organization elects not to file an appeal with the Committee, the decision of the AA/SBDC becomes the final Agency decision on the matter.

(5) A recipient organization may request a hearing before the Committee, but such requests will not be granted, unless material facts are substantially in dispute. Legal briefs and other technical forms of pleading are not required. However, appeals to the Committee must be in writing and contain at least the following information and supporting documentation:

(i) Name and address of the recipient organization;

(ii) Name and address of the appropriate SBA District Office(s);

(iii) A copy of the underlying cooperative agreement, including all amendments;

(iv) A statement of the grounds for appeal, with reasons why the appeal should be sustained;

(v) A statement of the specific relief desired on appeal; and

(vi) If a hearing is requested, a statement of the material facts the recipient organization believes are substantially in dispute. In the event a recipient organization fails to provide any of the information specified in paragraphs (a)(5)(i) through (v) of this section, the Committee may dismiss the appeal.

(6) The Committee may request additional information or documentation from the recipient organization at any stage in the proceedings. The recipient organization's response to the Committee must be submitted, in writing, within 15 calendar days of receipt of the request.

(7) If a request for a hearing is granted, the Committee will provide the recipient organization with written instructions and will afford the parties the opportunity to present their respective positions to the Committee.

(8) The Chairperson of the Committee, with the advice of the SBA's Office of General Counsel (OGC), will issue a final written decision within 30 calendar days of receipt of all information or within 30 calendar days of the completion of the hearing. Copies of the decision will be provided to the recipient organization, the AA/SBDC, the Grants Management Specialist, and the SBA Project Officer.

(9) Where a recipient organization's appeal to the Committee commences or is pending within 120 days of the end of the current budget period, the recipient organization has the right to request, in writing, that the matter be handled under an expedited appeal process. In such circumstances, the Committee, by an affirmative vote of its membership, may expedite the appeals process to attain final resolution of a dispute before the anticipated issuance date of a new cooperative agreement.

(b) *Programmatic (non-financial) disputes.* (1) The SBDC Lead Center and the SBA District Office must make every effort to resolve any disputes that arise between the SBDC network and SBA involving non-financial, programmatic issues. If the recipient organization is not satisfied with the resolution, it may, by written request to the AA/SBDC, seek reconsideration of the programmatic dispute within 30 calendar days. When a recipient organization requests reconsideration of a programmatic dispute, the appropriate Program Manager will forward a written summary of the dispute, including comments from the SBDC Lead Center Director, the SBA District Office, and all other pertinent background information to the AA/SBDC within 15 calendar days of SBA's receipt of the request.

(2) The AA/SBDC will transmit a final, written decision to the recipient organization, the Lead Center Director, the SBA Project Officer, and the SBA District Office within 30 calendar days of the receipt of such documentation, unless the recipient organization agrees to an extension of time.

■ 32. Revise § 130.700 to read as follows:

§ 130.700 Suspension, termination, and non-renewal.

(a) *General.* After entering into a cooperative agreement with a recipient organization, the SBA may take, as it

determines appropriate, any of the following actions based upon one or more of the circumstances listed in paragraph (b) of this section.

(1) *Non-renewal.* The AA/SBDC may elect not to renew a cooperative agreement with a recipient organization at any point. In undertaking a nonrenewal action, the AA/SBDC may either choose not to accept or consider any application for renewal from the recipient organization or the Agency may choose not to exercise option years remaining under the cooperative agreement. When a cooperative agreement is not renewed, the recipient organization may continue to conduct project activities and incur allowable expenses until the end of the current budget period. If a recipient organization decides to not seek to renew its grant, it must notify the District Office and send a letter of intent to withdraw to the AA/SBDC as soon as it is feasible.

(2) *Suspension.* (i) The AA/SBDC may suspend a cooperative agreement with a recipient organization at any point. A decision to suspend a cooperative agreement is effective immediately. The suspension of a recipient organization begins on the date the notice of suspension is issued, and the period of suspension will last no longer than six months. At the end of the period of suspension or at any point during that period, the AA/SBDC will either reinstate the cooperative agreement or commence an action for termination or non-renewal.

(ii) The notice of suspension will recommend that the recipient organization cease work on the project immediately. The SBA is under no obligation to reimburse any expenses incurred by a recipient organization while its cooperative agreement is under suspension. Where AA/SBDC decides to lift a suspension and reinstate a recipient organization's cooperative agreement, the Agency may, at its discretion, choose to reimburse a recipient organization for some or all of the expenses it incurred in furtherance of project objectives during the period of suspension. However, there is no guarantee that the Agency will elect to accept such expenses, and recipient organizations incurring expenses while under suspension do so at their own risk.

(b) *Cause.* The AA/SBDC may terminate, elect not to renew, or suspend a cooperative agreement with a recipient organization for cause. The cause may include, but is not limited to the following:

(1) Non-performance;

(2) Poor performance;

(3) Unwillingness or inability to implement changes to improve performance;

(4) Disregard or material violation of regulations;

(5) Willful or material failure to comply with the terms of the cooperative agreement, including relevant OMB Circulars;

(6) Conduct of the SBDC Lead Center Director or other key personnel, reflecting a lack of business integrity or honesty, which is not properly addressed on the part of the recipient organization or sponsoring SBDC organizations;

(7) A conflict of interest on the part of the recipient organization, the SBDC service centers, the SBDC Lead Center Director, other key personnel, contractors or volunteers that causes a real or perceived detriment to a small business concern, a contractor, the SBDC network, including but not limited to, SBDC service centers, or SBA;

(8) Improper use of Federal funds;

(9) Failure of a Lead Center or its service centers to consent to audits, examinations, certification reviews, or to maintain required documents or records;

(10) Failure to implement recommendations from the audits or examinations within one year of notification of deficiencies;

(11) Failure to implement conditions from accreditation reviews within the time frame recommended by the accreditation committee and established by the AA/SBDC;

(12) Failure of the SBDC Lead Center Director to work at the SBDC Lead Center on a full-time basis;

(13) Failure to promptly suspend or terminate the employment of an SBDC Lead Center Director, Service Center Director, or other key personnel, contractors, or volunteers upon receipt of knowledge or written information by the recipient organization and/or SBA indicating that such individual has engaged in conduct which may result or has resulted in a criminal conviction or civil judgment that would cause the public to question the SBDC's integrity. The SBDC Lead Center Director (or other appropriate official in the SBDC network), when making the decision to suspend or terminate such an employee, must consider the magnitude of the behavior, the repetitiveness of the conduct, and the remoteness in time of the behavior underlying any conviction or judgment;

(14) Failure to maintain adequate client service facilities or service hours; and

(15) Any other action that materially and adversely affects the operation or integrity of an SBDC or the SBDC Program.

(c) *Administrative procedure for suspension, termination, and nonrenewal.* These procedures apply to termination, non-renewal, and suspension of cooperative agreements with recipient organizations.

(1) *Taking action.* When the Program Manager has reason to believe that there is cause to suspend, terminate, or non-renew a cooperative agreement with a recipient organization, either based on their own knowledge or upon information provided by other parties, the AA/SBDC may undertake an enforcement action by issuing a written notice of suspension, termination, or non-renewal to the recipient organization. The effects of such notice are addressed in paragraph (a) of this section.

(2) *Notice requirements.* Each notice of suspension, termination, or non-renewal will set forth the specific facts and reasons for the AA/SBDC's decision and will include reference to the appropriate legal authority. The notice will also advise the recipient organization that it has the right to request an administrative review of the decision to suspend, terminate, or non-renew its cooperative agreement in accordance with the procedures set forth in paragraph (d) of this section. The notice will be transmitted electronically, via email, to the recipient organization on the same date it is issued by mail.

(3) *Relationship to Government-wide suspension and debarment.* A decision by the AA/SBDC to suspend, terminate, or not renew an SBDC cooperative agreement does not constitute a non-procurement suspension or debarment of a recipient organization under Executive Order 12549, *Debarment and Suspension,* and SBA's implementation of OMB regulations at 2 CFR part 2700. However, a decision by the AA/SBDC to undertake a suspension, termination, or non-renewal enforcement action with regard to a particular SBDC cooperative agreement does not preclude or preempt the Agency from also taking action to suspend or debar a recipient organization for purposes of all Federal procurement and/or non-procurement opportunities.

(d) *Administrative review of suspension, termination and nonrenewal actions.* When the AA/SBDC has suspended, terminated, or elected not to renew a cooperative agreement, the recipient organization has the right to request an administrative review of the

enforcement action. Administrative review of the AA/SBDC's enforcement actions will be conducted by the Associate Administrator for Entrepreneurial Development (AA/ED).

(1) *Format.* There is no prescribed format for a request for an administrative review of an SBA enforcement action. While a recipient organization has the right to retain legal counsel to represent its interests in connection with an administrative review, it is under no obligation to do so. Formal briefs and other technical forms of pleading are not required. However, a request for an administrative review of an SBA enforcement action must be in writing, should be concise and logically arranged, and must at a minimum include the following information:

(i) Name and address of the recipient organization;

(ii) Identification of the relevant SBA office/program (*i.e.,* Office of Small Business Development Centers/Small Business Development Center Program);

(iii) Cooperative agreement number;

(iv) Copy of the notice of suspension, termination, or non-renewal;

(v) Statement discussing why the recipient organization believes the SBA's actions were arbitrary, capricious, an abuse of discretion, and/or otherwise not in accordance with the law or governing regulations;

(vi) Identification of the specific relief being sought (*e.g.,* lifting of the suspension);

(vii) Statement as to whether the recipient organization is requesting a hearing, and if so, the reasons why it believes a hearing is necessary; and

(viii) Copies of any documents or other evidence the recipient organization believes support its position.

(2) *Service.* Any recipient organization requesting an administrative review of an SBA enforcement action must submit copies of its request (including any attachments) to:

(i) AA/SBDC; and

(ii) the Associate General Counsel for Procurement Law.

(3) *Timeliness.* To be considered timely, the AA/ED must receive a request for an administrative review from the recipient organization within 30 days of the date of the notice of termination, non-renewal, or suspension. Any request for administrative review received by the AA/ED more than 30 days after the date of the notice of suspension, termination, or non-renewal will be considered untimely and will be rejected without being considered.

(i) In addition, if the AA/ED does not receive a request for an administrative review within the 30-day deadline, then the decision by the AA/SBDC to suspend, terminate, or non-renew a recipient organization's cooperative agreement will become the final Agency decision on the matter.

(ii) [Reserved]

(4) *Standard of review.* In order to have the suspension, termination, or non-renewal of a cooperative agreement reversed on an administrative review, a recipient organization must successfully demonstrate that the SBA enforcement action was arbitrary, capricious, an abuse of discretion, and/or otherwise not in accordance with the law or governing regulations.

(5) *Conduct of the proceeding.* Each party must serve the opposing party with copies of all requests, arguments, evidence, and any other filings it submits pursuant to the administrative review. Within 30 days of the AA/ED receiving a request for an administrative review, the AA/ED must also receive the SBA's arguments and evidence in defense of its decision to suspend, terminate, or non-renew a recipient organization's cooperative agreement. If the SBA fails to provide its arguments and evidence in a timely manner, the administrative review will be conducted solely on the basis of the information provided by the recipient organization. After receiving the SBA's response to the request for an administrative review or after the passage of the 30-day deadline for filing such a response, the AA/ED will take one or more of the following actions, as applicable:

(i) Notify the parties whether the AA/ED has decided to grant a request for a hearing.

(ii) Direct the parties to submit further arguments and/or evidence on any issues, that she/he believes require clarification.

(iii) Notify the parties that the AA/ED has declared the record to be closed and therefore will refuse to admit any further evidence or argument.

(iv) Within ten calendar days of declaring the record to be closed, provide all parties with a copy of the AA/ED's written decision on the merits of the administrative review.

(6) *Request for hearing.* The AA/ED will only grant a request for a hearing if she/he concludes that there is a genuine dispute as to a material fact that cannot be resolved except by the taking of testimony and the confrontation of witnesses. If the AA/ED grants a request for a hearing, they will set the time and place for the hearing, determine whether the hearing will be conducted in person, via telephone or virtually, and identify which witnesses will be permitted to give testimony.

(7) *Evidence.* The recipient organization and SBA each have the right to submit whatever evidence they believe is relevant to the matter in dispute. No form of evidence will be permitted unless a party has made a substantial showing, based upon credible evidence and not mere allegation, that the other party has acted in bad faith or engaged in improper behavior.

(8) *Decision.* The decision of the AA/ED will be effective immediately as of the date it is issued. The decision of the AA/ED will represent the final Agency decision on all matters in dispute on administrative review. No further relief may be sought from or granted by the Agency. If the AA/ED determines that the SBA's decision to suspend, terminate, or non-renew a cooperative agreement was arbitrary, capricious, an abuse of discretion, and/or otherwise not in accordance with the law, she/he will reverse the Agency's enforcement action and direct the SBA to reinstate the recipient organization's cooperative agreement.

(i) Where an enforcement action has been reversed on administrative review, the SBA will have no more than ten calendar days to implement the AA/ED's decision. However, to the extent permitted under the applicable OMB Circulars, the SBA reserves the right to impose such special conditions in the recipient organization's cooperative agreement as it deems necessary to protect the Government's interests.

(ii) [Reserved]

■ 33. Revise § 130.800 to read as follows:

§ 130.800 Oversight of the SBDC Program.

(a) The AA/SBDC and designees will monitor the SBDC's performance and its ongoing operations under the cooperative agreement to determine if the SBDC is making effective and efficient use of program funds for the benefit of the small business community.

(b) The District Office is the primary contact for the coordination of the delivery of services to the small businesses in each area of service.

(c) The AA/SBDC may change the primary contact for coordination at any time and will notify the recipient organization of such a change in a timely manner.

■ 34. Revise § 130.810 to read as follows:

§ 130.810 SBA review authority.

(a) *Site visits.* The AA/SBDC and designees will coordinate with, and

provide written advance notice to, the SBDC Lead Center Director when conducting periodic programmatic visits to the recipient organization, Lead Center, SBDC service center organizations, and other service locations.

(1) The programmatic reviews will incorporate District Office oversight which will include conducting yearly reviews.

(2) Site visits may be incorporated into oversight and monitoring activities of the SBA program office or the SBA District Office.

(b) *SBA examinations.* The SBA designees shall perform a biennial programmatic and financial examination of each SBDC network. The purpose of these visits is to verify compliance with the cooperative agreement, analyze, assess, and evaluate performance management regarding its SBDC activities, and if necessary, make recommendations for improved service delivery. See 15 U.S.C. 648(k)(1).

(c) *Accreditation program.* (1) When extending or renewing a cooperative agreement of an SBDC, SBA shall consider the results of the examinations and accreditation reviews. See 15 U.S.C. 648(k)(3)(A).

(i) The Small Business Act provides that the Administration may provide financial support, by contract or otherwise, to the association for the purpose of developing a SBDCs accreditation program. See 15 U.S.C. 648(k)(2).

(ii) SBDC networks must be reviewed for accreditation purposes and receive accreditation periodically, as negotiated between the AA/SBDC and the accreditation committee of the recognized association.

(iii) If an SBDC does not receive accreditation, the SBA may initiate the non-renewal or termination procedure pursuant to § 130.700.

(iv) The statue at 15 U.S.C. 648(k)(3)(B) states the SBA may not renew or extend any cooperative agreement with a SBDC unless the center has been approved under the accreditation program conducted pursuant to this section, except that the AA/SBDC may waive such accreditation requirement, at their discretion, upon a showing that the center is making a good faith effort to obtain accreditation.

(2) The AA/SBDC and/or designee will participate in the deliberations of the accreditation committee.

(d) *Audits.* The examinations by the SBA will not serve as a substitute for audits required of Federal recipients under the Single Audit Act of 1984 (31 U.S.C. 7501) or applicable OMB guidelines (see 2 CFR part 200, subpart F) nor will such internal review substitute for investigations conducted by the SBA Office of Inspector General under the authority of the Inspector General Act of 1978 (Pub. L. 95–452, 92 Stat. 1101) as amended (see § 130.830).

■ 35. Revise § 130.820 to read as follows:

§ 130.820 Records and recordkeeping.

(a) *Records.* (1) The recipient organization will ensure that all financial and programmatic records, whether prepared by itself or another entity, are adequately maintained in accordance with Federal regulations in order to corroborate its performance and financial reports to the SBA, as well as to support SBA examinations or other audits. These records must include adequate documentation to support the expenditures claimed and activities performed under the cooperative agreement. The documentation should provide the means to verify proper separation of costs among various Federal awards and non-Federal spending. See also 2 CFR 200.333 through 200.337.

(2) The recipient organization will ensure complete and accurate detailed financial and programmatic documentation by all SBDC service center organizations and service centers. The recipient organization will monitor and oversee its SBDC service center organizations and SBDC service centers each budget period to ensure compliance with the OMB guidelines and regulations. See 2 CFR part 200, subpart D.

(i) The recipient organization and Lead Center will ensure that:

(A) All funds received throughout the SBDC network, both Federal and non-Federal, including program income, are properly accounted for, adequately safeguarded, accurately reported, and properly used to further program objectives.

(B) Each SBDC service center organization has reviewed all charges made to its SBDC accounts, including program income, to ensure that they are allowable.

(ii) The recipient organization's Lead Center monitoring and oversight activities must include annual on-site or virtual visits to all its SBDC service center organizations.

(A) These review procedures must ensure that SBDCs are in compliance with the terms and conditions of the cooperative agreement.

(B) The Lead Center will document the results of annual reviews of the financial and program records of its SBDC service center organizations.

(C) An in-person monitoring review must be conducted the same year that there is a change in leadership or a record of problems in that year and must be conducted not less than every 4 years.

(3) The recipient organization must keep records on the amount, source, and purpose of all funding under the overall management of the SBDC network, including Federal programs.

(b) *Availability of records.* (1) All SBDC network records must be made available to the SBA for review upon request.

(2) All SBDC network records, financial and programmatic, must be maintained for a period of three years following the date SBA accepted the annual performance report and final financial status report from the recipient organization.

(3) The recipient organization will maintain sufficiently detailed program and financial documentation to facilitate transition and provide continuous SBDC services when changes occur in SBDC service center organizations, as well as to support reviews and audits authorized by the SBA.

■ 36. Add § 130.825 to read as follows:

§ 130.825 Reports.

(a) *General.* The recipient organization will submit consolidated performance and financial reports for the SBDC network to the SBA for review. These reports will reflect actual SBDC network activity and accomplishments pertinent to the funding periods. Report formats will be specified in the annual notice of funding opportunity. See also 2 CFR 200.327 through 200.329.

(b) *Frequency.* (1) Recipient organizations that have been in the Program for more than three years must submit financial and programmatic performance reports 30 calendar days after completion of six months of operation each budget year.

(2) Recipient organizations that have been in the Program for fewer than three years must submit financial and programmatic performance reports 30 calendar days after completion of each quarter for the first three years.

(3) The final report from recipient organizations must be submitted in accordance with the notice of funding opportunity and terms and conditions.

(c) *Electronic data reports.* Lead Centers are responsible for reporting their consolidated network performance data quarterly to the SBA. The format of the reports will be designated in the notice of funding opportunity. Lead

Centers must ensure that the data is submitted to the SBA within the timeframe stipulated and that the data is accurate and complete.

(d) *Performance reports.* Performance reports must include the data specified in paragraphs (d)(1) and (2) of this section, along with any other information the SBDC feels may be relevant to a full appraisal of its performance.

(1) The quarterly and semiannual performance reports will address, in a brief narrative, the SBDC's major activities and objectives. The reports should include a discussion on the progress toward achieving those objectives.

(2) Final performance reports should include an overall summary of effort expended to deliver the core services described in the cooperative agreement for the full budget period. A discussion of performance measurements achieved and an explanation of those objectives or measurements not met should be included. Performance reports should be a summary of the activities, events or achievements by reportable category with an accompanying management analysis.

■ 37. Revise § 130.830 to read as follows:

§ 130.830 Audits and investigations.

See 2 CFR part 200, subpart F.

■ 38. Add § 130.840 to read as follows:

§ 130.840 Closeout procedures.

(a) *General.* The purpose of closeout procedures is to ensure that the program funds and property acquired or developed under the SBDC cooperative agreement are fully reconciled and transferred seamlessly between recipient organizations, SBDC service center organizations, or other Federal programs. The responsibility of conducting closeout procedures is vested with the recipient organization whose cooperative agreement is not being renewed. The procedures should be documented and accomplished in accordance with the applicable property standards and the provisions of this part.

(b) *Supplies and equipment.* Supplies and equipment acquired with funds under the cooperative agreement must be accounted for at closeout.

(c) *Intellectual property.* (1) In accordance with 2 CFR part 200, subpart D, intangible property and items subject to copyright that are purchased or developed under the cooperative agreement must be accounted for at closeout.

(2) Inventory and documentation of intellectual property must be collected by the Lead Center for close out. In circumstances where SBA is not renewing the cooperative agreement, the recipient organization must provide an intellectual property inventory and the support documentation to the SBDC clearinghouse and to the District Office for disposition instructions.

(d) *Responsibilities*—(1) *Recipient organizations.* When an SBDC cooperative agreement is not being renewed, regardless of cause, the recipient organization will ensure the following steps are taken in their closeout process and perform the necessary inventories and reconciliations prior to submitting the final annual financial report.

(i) An inventory of the SBDC property must be compiled and evaluated. An asset evaluation final report accounting for the property, equipment, and the aggregate of usable supplies and materials must be provided to the Program Manager.

(ii) Program income balances must be reconciled, and unused program income transferred to the Lead Center from SBDC service center organization accounts.

(iii) Client counseling and training records, paper and electronic, must be compiled to facilitate an SBA program closeout review.

(iv) Financial records will be compiled to facilitate an SBA closeout financial examination.

(2) *Close out actions.* Recipient organizations that terminate SBDC service center organization agreements will perform the close out actions in paragraphs (d)(1)(i) through (iv) of this section to ensure the safeguard of program resources under the cooperative agreement.

(3) *SBA.* Upon receipt of the final financial report from a non-renewing recipient organization, the AA/SBDC will issue disposition instructions to the former recipient organization as described in paragraph (e) of this section.

(e) *Final disposition.* (1) The final financial status report from the recipient organization must include the information identified in the inventory process and identify any program income collected from the SBDC network.

(2) The AA/SBDC will issue written disposition instructions to the recipient organization providing:

(i) The name and address of the entity or agency to which property and program income must be transferred;

(ii) A date by which the transfer must be completed;

(iii) Actions to be taken regarding property and program income;

(iv) Actions to be taken regarding program records such as client and training files; and

(v) Authorization to incur costs for accomplishing the transfer. Such costs may, when authorized, be applied to residual program income or Federal or matching funds.

Isabella Casillas Guzman,

Administrator.

[FR Doc. 2023–22164 Filed 11–6–23; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2023–1716; Project Identifier MCAI–2022–00168–Q; Amendment 39–22577; AD 2023–21–05]

RIN 2120–AA64

Airworthiness Directives; Thales AVS France SAS Flight Management Computer Navigation Modules

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain Thales AVS France SAS (Thales) flight management computer navigation modules (FMC2 NAVM) installed on, but not limited to, airplanes. This AD was prompted by reports that, due to software issues, certain FMC2 NAVM navigation modules provide erroneous data to the flight management computer, compromising safe flight of the airplane. This AD requires revising the existing aircraft flight manual (AFM) for your airplane and updating the navigation database. This AD also prohibits installing a database unless certain procedures were removed. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective December 12, 2023.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of December 12, 2023.

ADDRESSES:

AD Docket: You may examine the AD docket at *regulations.gov* under Docket No. FAA–2023–1716; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, the mandatory continuing airworthiness information (MCAI), any comments received, and

other information. The address for Docket Operations is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

Material Incorporated by Reference:

• For service information identified in this final rule, contact Thales AVS France SAS, 75–77 Avenue Marcel Dassault, 33700 Merignac, France; phone: +33 7 86 33 59 20; email: *continued.airworthiness@thalesgroup.com.*

• You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 901 Locust, Kansas City, MO 64106. For information on the availability of this material at the FAA, call (817) 222–5110. It is also available at *regulations.gov* under Docket No. FAA–2023–1716.

FOR FURTHER INFORMATION CONTACT: Nicholas Rediess, Aviation Safety Engineer, FAA, 1701 Columbia Avenue, College Park, GA 30337; phone: (781) 238–7159; email: *9-AVS-AIR-BACO-COS@faa.gov*.

SUPPLEMENTARY INFORMATION:

Background

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to Thales FMC2 NAVM, part number (P/N) C13084CA03, installed on, but not limited to, airplanes. The NPRM published in the **Federal Register** on August 24, 2023 (88 FR 57904). The NPRM was prompted by AD 2022–0024, dated February 4, 2022, issued by the European Union Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Union (referred to after this as the MCAI). The MCAI states that Thales FMC2 NAVM, P/N C13084CA03, provides erroneous guidance for navigation procedures of the flight management system due to issues with the software. This condition, if not addressed, could compromise the safety margins of the airplane. To address the unsafe condition, the MCAI requires revising the AFM with operational instructions for the affected airborne navigation procedures of the AFM. The MCAI also requires updating the navigation database software, and prohibits installing a database for the Thales FMC2 NAVM, P/N C13084CA03, unless it does not include the procedures specified in section II of Thales Service Information Letter F9111–J70859DN–00, issued January 18, 2022 (Thales SIL F9111–J70859DN–00).

In the NPRM, the FAA proposed to require revising the existing AFM for your airplane and updating the navigation database. The FAA also proposed to prohibit installing a database unless certain procedures were not included. The FAA is issuing this AD to address the unsafe condition on these products.

You may examine the MCAI in the AD docket at *regulations.gov* under Docket No. FAA–2023–1716.

Discussion of Final Airworthiness Directive

Comments

The FAA received no comments on the NPRM or on the determination of the costs.

Conclusion

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

Related Service Information Under 1 CFR Part 51

The FAA reviewed Thales SIL F9111–J70859DN–00. This service information specifies updating the Thales FMC2 NAVM, P/N C13084CA03, navigation database.

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

Differences Between This AD and the MCAI

The MCAI applies to all Thales FMC2 NAVMs, P/N C13084CA03, installed on, but not limited to Dassault (formerly Bréguet) Br.1150 Atlantique 2 (ATL2) maritime patrol airplanes, and this AD does not apply to those airplanes because those airplanes do not have an FAA type certificate. Currently, no airplanes on the U.S. registry incorporate the navigation equipment affected by this AD.

Costs of Compliance

There are currently no affected airplanes on the U.S. registry with a Thales FMC2 NAVM, P/N C13084CA03, installed. In the event a U.S.-registered airplane would have this equipment installed, the following is an estimate of the costs to comply with this AD.

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Revise AFM and update navigation database	2 work-hours × $85 per hour = $170	$0	$170	$0

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2023–21–05 Thales AVS France SAS: Amendment 39–22577; Docket No. FAA–2023–1716; Project Identifier MCAI–2022–00168–Q.

(a) Effective Date

This airworthiness directive (AD) is effective December 12, 2023.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Thales AVS France SAS flight management computer navigation modules (FMC2 NAVM), part number (P/N) C13084CA03, installed on, but not limited to airplanes, certificated in any category.

(d) Subject

Joint Aircraft System Component (JASC) Code 3400, Navigation System.

(e) Unsafe Condition

This AD was prompted by reports that, due to software issues, certain FMC2 NAVM navigation modules provide erroneous data to the flight management computer, compromising safe flight of the airplane. This condition, if not addressed, could compromise the safety margins of the airplane and result in controlled flight into terrain.

(f) Compliance

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

(g) Required Actions

(1) Within 30 days after the effective date of this AD, revise the Limitations Section of the existing airplane flight manual (AFM) for your airplane by adding the information in Table 1 to the introductory text of paragraph (g)(1) of this AD and Table 2 to the introductory text of paragraph (g)(1) of this AD.

TABLE 1 TO THE INTRODUCTORY TEXT OF PARAGRAPH (g)(1)—LIMITATIONS TO OPERATE THE FLIGHT MANAGEMENT SYSTEM (FMS) OF THE AIRPLANE

[Formulated as instructions to the Flight Crew]

Limitation No.	Limitation/instruction
1	For Procedure Turn, Tear Drop trajectory, specified turn direction or arc to fix leg in published navigation procedure, disengage FMS Navigation mode and engage Track mode with the expected Track target.
2	When coupled to the AFCS, do not perform a Direct To while established in Turn.
3	Do not revise the flight plan until GO AROUND safe altitude (as per Standard Operating Procedure) has been reached.
4	Initialize the flight plan with at least an intermediate waypoint between departure and destination.
5	Before flying a procedure (including associated missed approach) that requires to fly over a waypoint, check that the fly-over flag is displayed on MCDU FPLN page beside the constrained fix, as expected in the published chart. If the fly-over is missing, it shall be set manually.
6	Do not use Vertical Step function.
7	Do not activate the data save command.
8	Do not use Offset function.

TABLE 2 TO THE INTRODUCTORY TEXT OF PARAGRAPH (g)(1)—FMS USER MANUAL LIMITATIONS

Limitation No.	FMS user manual limitations
1	Operate the FMS respecting the limitations.
2	Only operate the FMS of the airplane with a specifically trained crew, as defined in the FMS User Manual, for awareness and training on the mitigation means to recover from the issue ''straight leg bypassing following arc to fix leg.''

(i) Inserting a copy of this AD into the Limitations Section of the existing AFM for your airplane satisfies the requirement of the introductory text of paragraph (g)(1) of this AD.

(ii) The actions required by the introductory text of paragraph (g)(1) of this AD may be performed by the owner/operator (pilot) holding at least a private pilot certificate and must be entered into the aircraft records showing compliance with this AD in accordance with 14 CFR 43.9(a) and 91.417(a)(2)(v). The record must be maintained as required by 14 CFR 91.417, 121.380, or 135.439.

(2) Within 30 days after the effective date of this AD, update the database for your Thales FMC2 NAVM, P/N C13084CA03, with a database that does not contain the procedures specified in section II of Thales Service Information Letter F9111–J70859DN–00, issued January 18, 2022 (Thales SIL F9111–J70859DN–00).

(3) As of the effective date of this AD, do not install a database for your Thales FMC2 NAVM, P/N C13084CA03, unless it does not include the procedures specified in section II of Thales SIL F9111–J70859DN–00.

(h) Alternative Methods of Compliance (AMOCs)

(1) The Manager, East Certification 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 certification branch, send it to the attention of the person identified in paragraph (i)(2) of this AD.

(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.

(i) Additional Information

(1) Refer to European Union Aviation Safety Agency (EASA) AD 2022–0024, dated February 4, 2022, for related information. This EASA AD may be found in the AD docket at regulations.gov under Docket No. FAA–2023–1716.

(2) For more information about this AD, contact Nicholas Rediess, Aviation Safety Engineer, FAA, 1701 Columbia Avenue, College Park, GA 30337; phone: (781) 238–7159; email: *9-AVS-AIR-BACO-COS@faa.gov*.

(j) Material Incorporated by Reference

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

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

(i) Thales Service Information Letter F9111–J70859DN–00, issued January 18, 2022.

Note 1 to paragraph (j)(2)(i): The footer on pages 2 through 32 of Thales Service Information Letter F9111–J70859DN–00, issued January 18, 2022, contains the text ''Reference: 0026–F9111–J70859DN–00.''

(ii) [Reserved]

(3) For service information identified in this AD, contact Thales AVS France SAS, 75–77 Avenue Marcel Dassault, 33700 Merignac, France; phone: +33 7 86 33 59 20; email: *continued.airworthiness@thalesgroup.com*.

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

(5) You may view this material at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, visit *www.archives.gov/federal-register/cfr/ibr-locations* or email *fr.inspection@nara.gov*.

Issued on October 25, 2023.

Ross Landes,

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

[FR Doc. 2023–24564 Filed 11–6–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2023–1780; Airspace Docket No. 23–ASO–35]

RIN 2120–AA66

Revocation of Class D and Class E Airspace; Milton, FL

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action removes Class D airspace, Class E surface airspace, and Class E airspace extending upward from 700 feet above the surface for Choctaw NOLF, Milton, FL.

DATES: Effective 0901 UTC, January 25, 2024. 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: A copy of the Notice of Proposed Rulemaking (NPRM), all comments received, this final rule, and all background material may be viewed online at *www.regulations.gov* using the FAA Docket number. Electronic retrieval help and guidelines are available on the website. It is available 24 hours a day, 365 days a year.

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

FOR FURTHER INFORMATION CONTACT:

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

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority, as it removes Class D and Class E airspace in Milton, FL. The FAA determined that this update is necessary to support operations in the area due to the closing of the air traffic control tower and cancellation of all instrument approaches.

History

The FAA published a notice of proposed rulemaking for Docket No. FAA 2023–1780 in the **Federal Register** (88 FR 60910; September 6, 2023), removing Class D airspace, Class E surface airspace, and Class E airspace extending upward from 700 feet above the surface for Choctaw NOLF, Milton, FL, as the air traffic control tower has closed, and all instrument approaches canceled. 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 D and Class E airspace designations are published in Paragraphs 5000, 6002, and 6005, respectively, of FAA Order JO 7400.11, Airspace Designations and Reporting Points, which is incorporated by reference in 14 CFR 71.1 on an annual basis. This document 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 amends 14 CFR part 71 by removing Class D airspace, Class E surface airspace, and Class E airspace extending upward from 700 feet above the surface for Choctaw NOLF, Milton, FL, due to the closing of the air traffic control tower, and cancellation of all instrument approaches. Controlled airspace is necessary for the safety and management of instrument flight rules (IFR) operations in the area.

Regulatory Notices and Analyses

The FAA has determined that this 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 minimal. Since this is a routine matter that only affects air traffic procedures and air navigation, it is certified that this rule, when

promulgated, does 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 5–6.5a. This airspace action is not expected to cause any potentially significant environmental impacts, and no extraordinary circumstances warrant the 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 part 71 continues to read as follows:

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

§ 71.1 [Amended]

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

Paragraph 5000 Class D Airspace.

* * * * *

ASO FL D Milton, FL [Removed]

* * * * *

Paragraph 6002 Class E Surface Airspace.

* * * * *

ASO FL E2 Milton, FL [Removed]

* * * * *

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

* * * * *

ASO FL E5 Choctaw Outlying Field, FL [Removed]

* * * * *

ASO FL E5 Milton, FL [Removed]

* * * * *

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

Andreese C. Davis,

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

[FR Doc. 2023–24543 Filed 11–6–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF JUSTICE

Bureau of Prisons

28 CFR Part 543

[BOP–1180–I]

RIN 1120–AB80

Federal Tort Claims Act—Technical Changes

AGENCY: Bureau of Prisons, Justice.

ACTION: Interim rule.

SUMMARY: In this document, the Bureau of Prisons (Bureau) makes minor revisions to our regulations regarding the Federal Tort Claims Act that clarify requirements for presenting claims and correct obsolete and/or incorrect references to Bureau offices.

DATES: This rule is effective November 7, 2023. Electronic comments must be submitted, and written comments must be postmarked, no later than 11:59 p.m. on January 8, 2024.

ADDRESSES: Please submit electronic comments through the *regulations.gov* website, or mail written comments to the Legislative & Correctional Issues Branch, Office of General Counsel, Bureau of Prisons, 320 First Street NW, Washington, DC 20534.

FOR FURTHER INFORMATION CONTACT: Daniel J. Crooks III, Assistant General Counsel, Federal Bureau of Prisons, at the address above or at (202) 353–4885.

SUPPLEMENTARY INFORMATION: Please note that all comments received are considered part of the public record and made available for public inspection online at *www.regulations.gov.* If you want to submit personal identifying information (such as your name, address, etc.) as part of your comment, but do not want it to be posted online, you must include the phrase ''PERSONAL IDENTIFYING INFORMATION'' in the first paragraph of your comment. You must also locate all the personal identifying information you do not want posted online in the first paragraph of your comment and identify what information you want redacted.

If you want to submit confidential business information as part of your comment but do not want it to be posted online, you must include the phrase ''CONFIDENTIAL BUSINESS INFORMATION'' in the first paragraph of your comment. You must also prominently identify confidential business information to be redacted within the comment. If a comment contains so much confidential business information that it cannot be effectively redacted, all or part of that comment may not be posted *www.regulations.gov.*

Personal identifying information identified and located as set forth above will be placed in the agency's public docket file, but not posted online. Confidential business information identified and located as set forth above will not be placed in the public docket file. If you wish to inspect the agency's public docket file in person by appointment, please see the **FOR FURTHER INFORMATION CONTACT** paragraph.

I. Discussion

In this document, the Bureau makes minor revisions to regulations in 28 CFR part 543, subpart C—Federal Tort Claims Act that clarify requirements for presenting claims and correct obsolete and/or incorrect references to Bureau offices. Each of these minor changes is discussed below.

Where to present the claim. The Bureau revises section 543.31, paragraph (c), to delete extraneous language and language indicating that if a loss or injury occurs in a training center, claimants may forward claims to the Associate General Counsel, Federal Law Enforcement Training Center. This inaccurately identifies the appropriate office designated to receive claims involving Bureau training centers. Claims are now accepted and processed at the appropriate Bureau Regional Counsel office for the region in which the training center is located.

Deletion of ''a training center.'' Also in section 543.32, Processing the claim, the Bureau deletes the phrase ''a training center'' in paragraph (b). This paragraph indicates that if a claim is submitted to the incorrect office, the claimant will be notified that the claim was transferred to the appropriate office. The appropriate office may be another BOP office or another Federal agency. It will no longer refer to a training center, however, because such claims will no longer be processed there (see discussion above on ''where to present the claim'').

Requests for additional information during investigations of claims. The Bureau deletes ''rejection or'' in the last sentence of section 543.32(c) to clarify that, after a claim has been properly

presented and an investigation initiated, if a claimant fails to provide requested information, the claim may be denied.

Specificity of office designation. In paragraph (d) of section 543.32, regarding the offices with authority to deny or propose settlement of a claim, the Bureau clarifies that the Associate General Counsel, Litigation Branch, in the Office of General Counsel will investigate and propose settlement, and that if the proposed settlement exceeds the authority granted to the Bureau of Prisons (not authority granted to the Office of General Counsel), the General Counsel will seek Department of Justice approval.

No consideration of appreciation/depreciation. Finally, the Bureau deletes paragraph (f) of section 543.32, regarding the consideration of appreciation or depreciation of lost or damaged property during settlement of a claim. The Bureau deletes this paragraph because the former Department of Justice policy that required consideration of appreciation or depreciation, Policy Statement 2110.23C (Filing And Settlement Of Claims Of Civilian Personnel For Damages To Or Loss Of Personal Property Incident To Service), was replaced with 1400.05 (Claims for Damage to, or Loss of, Personal Property), which does not allow for the use of appreciation/depreciation to determine the value of lost or damaged property. The Bureau also adjusts the designation of the paragraphs that follow to account for this deletion.

II. Regulatory Analyses

Administrative Procedure Act.

''Unless a statutory exception applies, the APA requires agencies to publish a notice of proposed rulemaking in the **Federal Register** before promulgating a rule that has legal force.'' *Little Sisters of the Poor Sts. Peter & Paul Home* v. *Pennsylvania,* 591 U.S.---, 140 S. Ct. 2367, 2384 (2020). The Administrative Procedure Act (5 U.S.C. 553(b)(3)(B)) allows exceptions to notice-and-comment rulemaking ''when the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.'' Further, sec. 553(d) provides an exception to the usual requirement of a delayed effective date when an agency finds ''good cause'' that the rule be made immediately effective.

An agency may claim notice and comment is ''unnecessary'' where the administrative rule is a routine determination, insignificant in nature and impact, and inconsequential to the industry and public. *Mack Trucks, Inc.* v. *EPA,* 682 F.3d 87, 94 (D.C. Cir. 2012); *Util. Solid Waste Activities Grp.* v. *EPA,* 236 F.3d 749, 754–55 (D.C. Cir. 2001). Unlike previous Bureau interim rules courts have addressed, this Interim Rule is by its nature non-substantive, functioning only as updated step-by-step guidance for how individuals, including current and former inmates, can present administrative tort claims. *Cf. Paulsen* v. *Daniels,* 413 F.3d 999 (9th Cir. 2005) (holding the Bureau violated the APA by issuing an interim rule that had ''the effect . . . [of] deny[ing] program eligibility to certain categories of inmates . . .).

This rulemaking is exempt from normal notice-and-comment procedures because advance notice and public comment in this instance are unnecessary. The change to this regulation is non-substantive, minor, routine, insignificant, and made only to clarify Federal Tort Claims Act processing. This rulemaking makes no change to any rights or responsibilities of the agency or any regulated entities. Instead, this rulemaking seeks to promptly clarify legal procedures primarily for the benefit of individuals, including current and former federal inmates, who present administrative tort claims against the Bureau. For the same reasons, the Bureau finds that ''good cause'' exists to make this rule effective upon publication. Nevertheless, the Bureau invites public comment on this Interim Rule.

Executive Orders 12866 and 13563. This rule does not fall within a category of actions that the Office of Management and Budget (OMB) has determined constitutes a ''significant regulatory action'' under section 3(f) of Executive Order 12866 and, accordingly, it was not reviewed by OMB. The economic impact of this proposed rule is limited to inmates in the custody of the Federal Bureau of Prisons.

Executive Order 13132. This rule will not have substantial direct effect on the States, on the relationship between the National Government and the States, or on distribution of power and responsibilities among the various levels of government. Therefore, under Executive Order 13132, the Bureau determines that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Regulatory Flexibility Act. The Director of the Bureau of Prisons, under the Regulatory Flexibility Act (5 U.S.C. 605(b)), reviewed this rule and by approving it certifies that it will not have a significant economic impact upon a substantial number of small entities for the following reasons: This rule pertains to the correctional management of offenders committed to the custody of the Attorney General or the Director of the Bureau of Prisons, and its economic impact is limited to the Bureau's appropriated funds.

Unfunded Mandates Reform Act of 1995. This rule 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.

Congressional Review Act. This rule is a not major rule as defined by the Congressional Review Act, 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.

List of Subjects in 28 CFR Part 543

Prisoners.

Colette S. Peters,

Director, Federal Bureau of Prisons.

Under rulemaking authority vested in the Attorney General in 5 U.S.C 301; 28 U.S.C. 509, 510 and delegated to the Director of the Bureau of Prisons in 28 CFR 0.96, the Bureau revises 28 CFR part 543 as follows.

PART 543—LEGAL MATTERS

■ 1. The authority citation for 28 CFR part 543 continues to read as follows:

Authority: 5 U.S.C. 301; 18 U.S.C. 3621, 3622, 3624, 4001, 4042, 4081, 4082 (Repealed in part as to offenses committed on or after November 1, 1987), 5006–5024 (Repealed October 12, 1984 as to Offenses committed after that date), 5039; 28 U.S.C. 509, 510, 1346(b), 2671–80; 28 CFR 0.95–0.99, 0.172, 14.1–11.

Subpart C—Federal Tort Claims Act

■ 2. Revise paragraph (c) of § 543.31 to read as follows:

§ 543.31 Presenting a claim.

* * * * *

(c) *Presenting a claim.* You may either mail or deliver the claim to the regional office in the region where the loss or injury occurred. If the loss or injury occurred in the Central Office, you may either mail or deliver the claim to the

Office of General Counsel, Central Office. A list of addresses for all the Bureau institutions and offices can be found at *www.bop.gov.*

■ 3. Revise paragraphs (a) through (d) and (f) of § 543.32 to read as follows:

§ 543.32 Processing the claim.

(a) *Receipt of acknowledgment letters.* If you have presented a claim signed by you or a duly authorized agent or legal representative that provides all the necessary information (such as time, date, and place where the incident occurred, and a specific sum of money you are requesting as damages), you will receive an acknowledgment letter indicating the presentment date and a claim number. If your submission is unsigned, or signed by a person without legal authority to present the claim on your behalf, or you fail to provide all necessary information, your submission will be rejected and returned to you for resubmission. The presentment date is the date your submission containing all required signatures and necessary information is first received by either the Department of Justice or an office of the Bureau of Prisons. You should refer to your claim number in all further correspondence with the agency. Additionally, you must inform the agency of any changes in your address.

(b) *Transfer of claims.* If your claim is improperly submitted to the wrong office or agency, you will be notified by the responsible office that your claim was transferred to another regional office, the Central Office, or another agency.

(c) *Investigation.* The regional office ordinarily refers the claim to the appropriate institution or office for investigation. You may also be required to provide additional information during the investigation. Your failure to respond within a reasonable time may result in the denial of the claim.

(d) *Administrative claim decisionmaker.* The Regional Counsel or his or her designee reviews the investigation and the supporting evidence and renders a decision on all claims properly presented to the regional office and within regional settlement authority. The Regional Counsel has limited settlement authority (up to an amount established by the Director of the Bureau of Prisons). After considering the merits of the claim, the Regional Counsel may deny or propose a settlement of the claim. The Associate General Counsel, Litigation Branch, will investigate and propose settlement for all claims properly presented in the Central Office in accordance with delegated settlement authority. If the proposed settlement exceeds the Bureau of Prisons' authority, the General Counsel will seek approval from the appropriate Department of Justice officers.

* * * * *

(f) *Options if claim is denied or settlement offer is unsatisfactory.* If your claim is denied or you are dissatisfied with a settlement offer, you may request in writing that the Bureau of Prisons reconsider your claim in the administrative stage. You should include additional evidence of injury or loss to support your request for reconsideration. If you are dissatisfied with the final agency action, you may file suit in an appropriate United States District Court, as no further administrative action is available.

(g) *Acceptance of settlement.* If you accept a settlement, you give up your right to bring a lawsuit against the United States or against any employee of the government whose action or lack of action gave rise to your claim.

(h) *Response timeline.* Generally, you will receive a decision regarding your claim within six months of when you properly present the claim. If you have not received a letter either proposing a settlement or denying your claim within six months after the date your claim was presented, you may assume your claim is denied. You may then proceed to file a lawsuit in the appropriate United States District Court.

* * * * *

[FR Doc. 2023–24384 Filed 11–6–23; 8:45 am]

BILLING CODE 4410–05–P

FEDERAL MEDIATION AND CONCILIATION SERVICE

29 CFR Part 1406

RIN 3076–AA26

FMCS Terms of Service

AGENCY: Federal Mediation and Conciliation Service.

ACTION: Final rule.

SUMMARY: The Federal Mediation and Conciliation Service (FMCS) is issuing this final rule for FMCS clients. This rulemaking sets forth terms for FMCS's provision of services. This rulemaking further expounds upon confidentiality rules associated with FMCS's services.

DATES: This final rule is effective December 7, 2023.

FOR FURTHER INFORMATION CONTACT: Alisa Zimmerman, Deputy General Counsel, Office of General Counsel, Federal Mediation and Conciliation Service, 250 E St SW, Washington, DC 20427; Office/Fax/Mobile 202–606–5488; *azimmerman@fmcs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

The Federal Mediation and Conciliation Service (FMCS) works to build better, more effective workplace relationships and mitigate the damage from inevitable conflict through preventive dialogue, honest communication, and responsive strategies. Through our mission, FMCS provides professional services to a wide range of Federal, state, and local government agencies to resolve disputes, design conflict management systems, build capacity for constructive conflict management, and strengthen inter-agency and public-private cooperation. In offering these services, FMCS recipients must agree to abide by the final rule to preserve the integrity of the provided services.

II. Analysis of the Regulations

Section 1406.1 General Terms of Service

Paragraphs (a) through (g) set forth general terms of service applicable to all FMCS services. More specifically:

Paragraph (a) explains that when FMCS services are chosen, recipients of the services agree to abide by the terms as well as any other terms of services provided by FMCS and will hold FMCS and any FMCS neutral harmless.

Paragraph (b) notes FMCS will determine the date, time, and manner of services in accordance with applicable statutes and regulations.

Paragraph (d) explains that any person shadowing an FMCS neutral agrees to be bound by the same confidentiality standards as the FMCS neutral, which will be honored by the parties.

Paragraph (e) notes that FMCS recognizes the importance of mediator confidentiality, and as such FMCS will not produce materials related to a mediation, with some exceptions.

Paragraph (f) states that this section does not negate or modify FMCS's Confidential Commercial Information (CCI) regulation.

Paragraph (g) discusses that FMCS will make the terms publicly available and make a copy available to all parties upon request.

Section 1406.2 Terms of Service for Mediation, Facilitation, and Other Alternative Dispute Resolution Services

Paragraphs (a) through (g) sets forth additional terms of service specific to mediation, facilitation, & other alternative dispute resolution services provided by FMCS.

Section 1406.3 Virtual Services—Additional Terms of Service

Paragraphs (a) through (c) set forth additional terms of service specific to virtual services provided by FMCS.

Section 1406.4 Grievance Mediation and Federal Sector Inter-Agency Agreement Mediation—Additional Terms of Service

Paragraphs (a) through (e) set forth additional terms of service specific to grievance mediations and Federal sector inter-agency agreement mediations provided by FMCS.

Section 1406.5 Training and Outreach

This section sets forth additional terms of service specific to training and outreach presentations provided by FMCS.

III. Matters of Regulatory Procedure

Administrative Procedure Act

Under 5 U.S.C. 553(a)(2), rules relating to agency management or personnel are exempt from the notice and comment rulemaking requirements of the Administrative Procedure Act (APA). In addition, under 5 U.S.C. 553(b)(3)(A), notice and comment rulemaking requirements do not apply to rules concerning matters of agency organization, procedure, or practice. Given that the rule concerns matters of agency management or personnel, and organization, procedure, or practice, the notice and comment requirements of the APA do not apply here. Nor is a public hearing required under 45 U.S.C. 160a. However, in issuing a final rule on this matter, FMCS, previously issued a proposed rule with a notice and comment period and received no public comments.

Executive Order 12866

This final rule is not a significant rule for purposes of Executive Order 12866 and has not been reviewed by the Office of Management and Budget.

Regulatory Flexibility Act.

FMCS has determined under the Regulatory Flexibility Act, 5 U.S.C. chapter 6, that this final rule would not have a significant economic impact on a substantial number of small entities because it would primarily affect FMCS employees.

Paperwork Reduction Act.

The Paperwork Reduction Act, 44 U.S.C. chapter 35, does not apply to this final rule because it does not contain any information collection requirements that would require the approval of the Office of Management and Budget.

Congressional Review Act

FMCS has determined that this final rule does not meet the definition of a rule, as defined by the Congressional Review Act, 5 U.S.C. chapter 8, and thus does not require review by Congress.

IV. Public Comment Period

The public comment period on the proposed rule opened on September 1, 2023, the date of its publication in the **Federal Register**, and closed on October 31, 2023. During this period, FMCS did not receive any comments on our proposed rule.

List of Subjects in 29 CFR Part 1406

Administrative practice and procedure, Labor management relations.

For the reasons discussed in the preamble, FMCS amends 29 CFR chapter XII by adding part 1406 to read as follows:

PART 1406—FMCS TERMS OF SERVICE

Sec.

1406.1 General terms of service.
1406.2 Terms of service for mediation, facilitation, and other alternative dispute resolution services.
1406.3 Virtual services—additional terms of service.
1406.4 Grievance mediation and Federal sector inter-agency agreement mediation— additional terms of service.
1406.5 Training and outreach presentations.

Authority: 29 U.S.C. 172; 29 U.S.C. 173 *et seq.;* and 5 U.S.C. 574.

§ 1406.1 General terms of service.

When Federal Mediation and Conciliation Service (FMCS) services are used, the recipients of the services have agreed to abide by FMCS's general terms of service as well as any other terms of service provided by FMCS.

(a) The recipients of a service shall hold FMCS and any FMCS neutrals harmless of any claim arising from the delivery of that FMCS service.

(b) FMCS will determine the date, time, place, and manner (virtual, in-person, or hybrid) of services provided in accordance with any applicable statutes, regulations, and agreements.

(c) FMCS may convene the parties for a threatened or actual work stoppage whenever in its judgment such dispute threatens to cause a substantial interruption of commerce.

(d) Any person shadowing an FMCS neutral agrees to be bound by the same confidentiality standards as the FMCS neutral and such confidentiality standards will be honored by the parties.

(e) FMCS recognizes the importance of mediator confidentiality to further its mission. Therefore, FMCS will not produce any materials related to a mediation other than the date, parties, location, and mediator, unless required by law. FMCS will not produce materials related to a mediation, materials exchanged in a mediation or facilitation, information related to non-plenary sessions of a facilitation, mediator or facilitator notes, and any internal communications with the mediator of facilitator, unless required by law.

(f) Nothing in this section shall be construed so as to negate or modify the FMCS's Confidential Commercial Information (CCI) regulation (29 CFR 1401.26).

(g) FMCS will make a copy of these terms available to all parties upon request.

§ 1406.2 Terms of service for mediation, facilitation, and other alternative dispute resolution services.

The following Terms of Service additionally apply when the FMCS service is a mediation, facilitation, training, and other alternative dispute resolution service.

(a) These services are voluntary processes that may be terminated at any time unless otherwise provided by statute or by agreement.

(b) The neutral has no authority to compel resolution.

(c) These services are confidential to the extent allowed by law. The obligations imposed by these terms and conditions are in addition to and do not supersede any obligations imposed by applicable state or Federal laws regarding mediation confidentiality.

(d) The parties agree that they will not record, transcribe, save, or otherwise capture any audio, video, files, documents, chat texts, or any other data that they would not have access to but for the service being provided, unless agreed to by all parties and with prior written approval of FMCS, or as otherwise required by law. They further agree to notify the neutral immediately if recordings, saves or other captures of data occur, to ensure that no further distribution or transfer occurs, and to immediately and permanently delete them.

(e) Non-parties may attend only with the agreement of the parties and the neutral unless otherwise required by law and are bound by these terms of service.

(f) If a party inadvertently gains access to any confidential discussions involving another party, the party with inadvertent access shall immediately disclose their presence and exit from the confidential discussions. Any

confidential information inadvertently disclosed may not be used by the party with inadvertent access, even within the confines of the alternative dispute resolution session.

(g) The parties agree not to subpoena or compel the neutral to testify or produce any documents provided by a party in any administrative or judicial proceeding. The neutral will not voluntarily testify or produce documents on behalf of a party in any administrative or judicial proceeding unless otherwise required by law.

§ 1406.3 Virtual services—additional terms of service.

The following Terms of Service additionally apply when the FMCS service is provided virtually.

(a) Parties may not provide meeting access information to non-parties without permission from the neutral unless the session is open to the public.

(b) The neutral and all parties must be provided notice of all attendees before or at the time of attendance unless the session is open to the public.

(c) Parties must ensure the integrity of technology used in virtual meetings. If an attendee is aware of any security breach, that attendee will inform the neutral immediately.

§ 1406.4 Grievance mediation and Federal sector inter-agency agreement mediation —additional terms of service.

The following Terms of Service additionally apply when the FMCS service is a grievance mediation or Federal sector inter-agency agreement mediation.

(a) The grievant or complainant is entitled to be present at the mediation.

(b) The parties agree not to disclose to any non-party oral or written communications made during the mediation process, including settlement terms, proposals, offers, or other statements, whether made privately to the neutral or when all parties are present.

(c) Evidence that is otherwise admissible or discoverable will not be rendered inadmissible or non-discoverable as a result of its use in the mediation proceedings.

(d) The neutral has no authority to compel agreement or other resolution of the dispute and will issue no written recommendations or conclusions. At the request of the parties, or on the initiative of the neutral, the neutral may provide an oral recommendation or opinion to resolve the dispute. In that circumstance, the parties may jointly decide to implement that recommendation or opinion but neither party is obligated to do so.

(e) (For Federal sector inter-agency agreement mediation, if applicable) Any communications between the Agency or Organizational Program/or Alternative Dispute Resolution Coordinator and the neutral(s) and/or the parties are considered dispute resolution communications with a neutral and will be kept confidential.

§ 1406.5 Training and outreach presentations.

The following Terms of Service additionally apply when the FMCS service is a training or outreach presentation.

(a) The parties agree that they will not record any FMCS training or outreach presentation (whether delivered in-person or virtually) without the knowledge and consent of the parties and prior written approval of FMCS.

(b) [Reserved]

Dated: November 1, 2023.

Alisa Zimmerman,

Deputy General Counsel.

[FR Doc. 2023–24526 Filed 11–6–23; 8:45 am]

BILLING CODE 6732–01–P

PENSION BENEFIT GUARANTY CORPORATION

29 CFR Parts 4000, 4003, 4006, 4010, 4022, 4041A, 4043, 4211, and 4262

RIN 1212–AB56

Technical Amendments: Special Financial Assistance Withdrawal Liability Condition; SECURE 2.0 Act; and Other Updates

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Final rule.

SUMMARY: The Pension Benefit Guaranty Corporation (PBGC) is making miscellaneous technical updates, clarifications, and corrections to PBGC's regulations, including to clarify a special financial assistance withdrawal liability condition and to update the reference to the dollar limit for lump-sum distributions in the closeout of sufficient multiemployer plans to reflect changes implemented under the SECURE 2.0 Act of 2022.

DATES: This rule is effective on December 7, 2023.

FOR FURTHER INFORMATION CONTACT: Hilary Duke (*duke.hilary@pbgc.gov;* 202–229–3839), Assistant General Counsel for Regulatory Affairs, or Melissa Rifkin (*rifkin.melissa@pbgc.gov;* 202–229–6563), Attorney, Regulatory Affairs Division; Office of the General Counsel, Pension Benefit Guaranty Corporation, 445 12th Street SW, Washington, DC 20024–2101. If you are deaf or hard of hearing or have a speech disability, please dial 7–1–1 to access telecommunications relay services.

SUPPLEMENTARY INFORMATION:

Executive Summary

Purpose and Authority

This final rule makes technical corrections, updates, and clarifications to several Pension Benefit Guaranty Corporation (PBGC) regulations.

PBGC's legal authority for this rulemaking comes from section 4002(b)(3) of the Employee Retirement Income Security Act of 1974 (ERISA), which authorizes PBGC to issue regulations to carry out the purposes of title IV of ERISA, and section 4262 of ERISA (Special Financial Assistance by the Corporation), which permits PBGC, in consultation with the Secretary of the Treasury, to impose reasonable conditions by regulation or other guidance on an eligible multiemployer plan that receives special financial assistance (SFA). It also comes from section 4003 of ERISA (Operation of Corporation); section 4006 of ERISA (Premium Rates); section 4010 of ERISA (Authority to Require Certain Information); section 4022 of ERISA (Single-Employer Plan Benefits Guaranteed); section 4041A of ERISA (Termination of Multiemployer Plans); section 4043 of ERISA (Reportable Events); and section 4211 of ERISA (Methods for Computing Withdrawal Liability).

Major Provisions

The major provisions of this regulatory action amend PBGC's regulations on: (1) Special Financial Assistance by PBGC (29 CFR part 4262) to clarify the calculation methodology for the condition requiring a phased recognition of SFA in a plan's determination of withdrawal liability for plans that receive SFA; and (2) Termination of Multiemployer Plans (29 CFR part 4041A) to update the reference to the dollar limit for lump-sum distributions in the closeout of sufficient multiemployer plans (reflecting updated dollar limits for pension plans under section 304 of the SECURE 2.0 Act of 2022 (SECURE 2.0)).[1] In addition, this regulatory action makes other clarifications, corrections, and updates.

[1] SECURE 2.0 Act of 2022, Division T of the Consolidated Appropriations Act, 2023, Public Law 117–328 (Dec. 29, 2022).

Background

PBGC administers two insurance programs for private-sector defined benefit pension plans under title IV of ERISA: a single-employer plan termination insurance program and a multiemployer plan insolvency insurance program. In addition, PBGC administers an SFA program for eligible financially distressed multiemployer plans. The primary amendments in this rulemaking apply to the SFA program.

This rulemaking responds to questions from stakeholders requesting clarification of the calculation methodology for the condition imposed on plans that receive SFA requiring a phased recognition of SFA in the determination of withdrawal liability. It also arises from statutory changes and from PBGC's ongoing retrospective regulatory review program to identify and correct inaccuracies, inconsistencies, and requirements made irrelevant over time.

Clarifications to SFA Program Withdrawal Liability Condition

Background

Under section 4262 of ERISA and PBGC's SFA regulation, PBGC provides SFA to certain financially troubled multiemployer plans upon application for assistance. To ensure that SFA is used to pay benefits and the expenses related to those benefit payments, section 4262(m)(1) of ERISA expressly authorizes PBGC, in consultation with the Secretary of the Treasury, to impose reasonable conditions on an eligible multiemployer plan that receives SFA relating to certain aspects of plan terms or operations. These conditions are described in § 4262.16 of PBGC's SFA regulation and include conditions that relate to withdrawal liability.[2]

On July 8, 2022, PBGC published a final rule[3] (July 2022 final rule) adding a condition requiring a phased recognition of SFA in a plan's determination of withdrawal liability. PBGC provided for a 30-day comment period solely on this condition. In response to comments received, PBGC published, on January 26, 2023, a final rule[4] (January 2023 final rule) which provided a process for a plan sponsor to request approval from PBGC for an exception from the withdrawal liability conditions in § 4262.16(g)(1) and (2) under specific circumstances.

Following publication of the January 2023 final rule, PBGC received practitioner questions at public forums related to the withdrawal liability phase-in condition and make-up payments of previously suspended benefits. To address these questions, on July 19, 2023, PBGC posted guidance on its website at *www.pbgc.gov,* in the form of questions and answers, on the withdrawal liability phase-in condition. That guidance clarifies the calculation methodology for the phased recognition of SFA assets for plans that paid make-up payments of previously suspended benefits.

Clarification of Calculation Methodology for Withdrawal Liability Phase-In Condition

The withdrawal liability condition in § 4262.16(g)(2) requires a phased recognition of SFA assets, *i.e.,* SFA and earnings thereon, for the purpose of determining the plan's unfunded vested benefits (UVBs) for calculating withdrawal liability, and provides the calculation methodology for determining the amount of SFA that is phased in for withdrawal liability purposes each year over the projected life of the SFA assets (determined as if SFA assets are exhausted before other plan assets are used to pay benefits and expenses). The applicable phase-in period runs from the first plan year in which the plan receives payment of SFA through the end of the plan year by which, according to the plan's projections, it will exhaust any SFA assets.[5]

To calculate the amount of SFA assets excluded for each plan year during the phase-in period, the plan must take the total amount of SFA paid to the plan (not including the amount paid to PBGC for repayment of traditional financial assistance) and multiply that by a fraction, the numerator of which is the number of years remaining in the phase-in period as of the date (the end of the determination year) that the UVBs are being determined, and the denominator is the total number of years in the phase-in period.[6]

Examples are included in § 4262.16(g)(2) to illustrate the calculation methodology for the phased recognition of SFA assets.

Section 4262(k) of ERISA and § 4262.15 require that benefits suspended under sections 305(e)(9) or 4245(a) of ERISA must be reinstated and make-up payments of previously suspended benefits must be paid to certain participants and beneficiaries. Plans must pay these make-up payments either as a lump sum within 3 months of the date SFA is paid, or in equal monthly installments over 5 years, starting within 3 months of the SFA payment date.

As stated in PBGC's guidance posted July 19, 2023, the phased recognition of SFA assets for purposes of calculating employer withdrawal liability was intended to approximate the pattern of how the SFA assets are likely to be spent down by a plan. Therefore, in the calculation under § 4262.16(g)(2)(ix), the amount of the SFA attributable to the make-up payments that have already been paid to participants and beneficiaries should be excluded from the ''total amount of SFA paid to the plan under § 4262.12'' before multiplication by the phase-in fraction. The result is the amount under § 4262.16(g)(2)(ix) by which the value of plan assets used to determine UVBs for the determination year is reduced under § 4262.16(g)(2)(viii). This calculation methodology applies regardless of whether the make-up payments are made in a lump sum or in equal monthly installments over 5 years, and regardless of whether such payments are made from SFA assets or non-SFA assets, or some combination thereof.

Accordingly, this final rule incorporates the guidance posted on July 19, 2023, and amends § 4262.16(g)(2)(ix) to reorganize the existing provisions as paragraph (g)(2)(ix)(A) and to add new paragraph (g)(2)(ix)(B) to clarify how plan assets expended on make-up payments of

[2] Withdrawal liability represents a withdrawing employer's proportionate share of the plan's unfunded benefit obligations and is an important source of income for the plan. To assess withdrawal liability, the plan sponsor must determine the withdrawing employer's: (1) allocable share of the plan's unfunded vested benefits (UVBs) (the value of nonforfeitable benefits that exceeds the value of plan assets) as of the end of the plan year before the employer's withdrawal, or as otherwise provided under section 4211 of ERISA, and (2) annual withdrawal liability payment and amortization period under section 4219.

[3] *See* 87 FR 40968. PBGC published the July 2022 final rule in response to comments received on an interim final rule, which was published in the **Federal Register** on July 12, 2021, at 86 FR 36598.

[4] *See* 88 FR 4900.

[5] For a plan that receives payment of SFA under the terms of the interim final rule and then files a supplemented application, the first plan year of payment is the year in which it received SFA under the terms of the interim final rule. Where a plan's first plan year of payment is not the plan year that includes the plan's SFA measurement date, the exhaustion year is deferred by the number of years the first plan year of payment is after the plan year that includes the SFA measurement date.

[6] For a plan that receives payment of SFA under the interim final rule and receives a supplemental payment, the total amount (payment under the interim final rule and supplemental payment) will be included in the phased recognition of SFA assets in determining UVBs for withdrawals occurring in plan years after the plan year the supplemental payment is received by the plan. For withdrawals that occur after the date the supplemented application is filed and before the plan year after the plan year in which the supplemental payment is made, only the payment of SFA under the interim final rule is included in the phased recognition of SFA assets.

previously suspended benefits are considered in the calculation methodology. The amendment also clarifies how the repayment of traditional financial assistance is considered in the calculation methodology. In addition, this final rule adds the example from the July 19, 2023, guidance to § 4262.16(g)(2)(xvi)(D).

PBGC also received practitioner questions asking whether the calculation of SFA excluded under § 4262.16(g)(2)(viii) could reduce the value of plan assets for determining UVBs to less than zero. In response, PBGC included in the July 19, 2023, guidance, a provision, applicable to all plans that receive SFA (regardless of whether they are required to pay make-up payments), stating that the value of the plan assets taken into account as of the end of a determination year under § 4262.16(g)(2)(viii) used for purposes of determining UVBs may not be less than zero. This clarification is added in § 4262.16(g)(2)(viii) of the SFA regulation.

Clarifications and Corrections to Multiemployer Plan Regulations

Termination of Multiemployer Plans—29 CFR part 4041A

PBGC's regulation on Termination of Multiemployer Plans (29 CFR part 4041A) contains rules for the administration of multiemployer plans that have terminated by mass withdrawal. Subpart D contains procedures for closing out a plan where a plan's assets, excluding any claim of the plan for unpaid withdrawal liability, are sufficient to satisfy all obligations for nonforfeitable benefits provided under the plan. In the case of such a plan, the plan sponsor may close out the plan by distributing plan assets in full satisfaction of all nonforfeitable benefits under the plan. Section 4041A.43 provides rules for the payment of nonforfeitable benefits to participants and beneficiaries, including for lump-sum distributions.

Section 203(e)(1) of ERISA and section 411(a)(11)(A) of the Internal Revenue Code provide a threshold (*i.e.,* maximum present value of a benefit) that a pension plan may pay in a mandatory lump-sum distribution. From 1997 through 2023, that maximum was $5,000.[7] After 2023, it will be $7,000, as changed by section 304 of SECURE 2.0.

Before the amendment provided by this final rule, § 4041A.43(b)(1) provided the dollar figure of $5,000 as the dollar threshold up to which the plan sponsor of a terminated multiemployer plan that is closing out may make as a lump-sum payment of nonforfeitable benefits. To avoid amending the regulation each time Congress changes the threshold for mandatory lump-sum distributions, the final rule amends § 4041A.43(b)(1) to refer not to a set monetary figure, but to the dollar amount specified in section 203(e)(1) of ERISA. As a result, for purposes of part 4041A, the new $7,000 maximum automatically will apply to the lump-sum payment of nonforfeitable benefits after December 31, 2023.

Allocating Unfunded Vested Benefits to Withdrawing Employers—29 CFR Part 4211

Under the Allocating Unfunded Vested Benefits to Withdrawing Employers regulation (29 CFR part 4211), PBGC is amending § 4211.31(b) by adding the words ''set forth in'' that were inadvertently omitted in a prior rule.[8] The final sentence of paragraph (b) is corrected to read, ''the statutory presumptive method set forth in subpart B of this part.''

Other Clarifications, Corrections, and Updates

Filing Rules—29 CFR Part 4000

Under PBGC's Filing, Issuance, Computation of Time, and Record Retention regulation (29 CFR part 4000), PBGC is modifying § 4000.4—Where do I file my submission? to update the reference to the telecommunications system for individuals who are deaf or hard of hearing or have a speech disability. PBGC is changing the reference from the ''Federal relay service'' to the ''7–1–1'' number, which is the system currently used by PBGC for access to telecommunications relay services.

PBGC is removing and reserving § 4000.28—What if I send a computer disk? which gives instructions for providing filings on a computer disk. Technological advancements have made this section obsolete.

Rules for Administrative Review of Agency Decisions—29 CFR Part 4003

Under PBGC's Rules for Administrative Review of Agency Decisions regulation (29 CFR part 4003), PBGC is changing § 4003.35—Decision on request for reconsideration, by removing the word ''final'' from the phrase ''final decision'' in paragraph (a). In a prior rule,[9] the word ''final'' was removed from other usages of the phrase ''final decision'' in § 4003.35. In addition, PBGC is changing the wording ''request for reconsideration'' to ''a request for reconsideration'' in paragraph (a)(1) to be consistent with the wording in paragraph (a)(2).

Premium Rates—29 CFR Part 4006

PBGC is modifying the Premium Rates regulation (29 CFR part 4006) in § 4006.3—Premium rate, and § 4006.5—Exemptions and special rules. Section 4006.3(a) contains references to sections 4006(a)(3)(F) and 4006(a)(3)(H) of ERISA. Both statutory provisions affected the calculation of flat rate premiums and sunset in 2013.[10] As these provisions are no longer relevant for calculating premiums, PBGC is removing them from the premium rates regulation.

Also, PBGC is correcting a citation in § 4006.5(b), which covers the variable-rate premium cap. This paragraph references section ''4006(a)(3)(H) of ERISA,'' which was added to § 4006.5(b) in 2008 to reference the small employer cap. [11] Section 4006(a)(3)(H) was renumbered as 4006(a)(3)(I) in 2013.[12] PBGC is changing this citation in § 4006.5(b) to ''section 4006(a)(3)(I) of ERISA for certain small employers.''

Annual Financial and Actuarial Information Reporting—29 CFR Part 4010 and Reportable Events—29 CFR Part 4043

Under PBGC's regulation on Annual Financial and Actuarial Information Reporting (29 CFR part 4010, ''4010 regulation''), PBGC is correcting a reference in § 4010.10(b). The reference to ''§ 4010.8(b)(1)'' is changed to ''§ 4010.8(b)(2)(i)'' to account for a prior reorganization of § 4010.8.[13]

PBGC is modifying § 4010.13 under PBGC's 4010 regulation and § 4043.8 under PBGC's Reportable Events and Certain Other Notification Requirements regulation (29 CFR part 4043) to replace references to ''§ 4901.21(a)(3)'' with references to ''§ 4901.21(a).'' These corrections are to account for changes in a prior reorganization of § 4901.21, under PBGC's regulation on Disclosure and Public Inspection of Pension

[7] The Taxpayer Relief Act of 1997, Public Law 105–34 (Aug. 5, 1997), increased the maximum from $3,500 to $5,000 effective for plan years beginning after August 5, 1997.

[8] *See* 86 FR 1256.

[9] *See* 85 FR 10279.

[10] Section 4006(a)(3)(F) of ERISA reads, ''For each plan year beginning in a calendar year after 2006 and before 2013. . .'' and section 4006(a)(3)(H) of ERISA refers to 4006(a)(3)(A)(iv), which says, ''in the case of a multiemployer plan, for plan years beginning after December 31, 2005, and before January 1, 2013.''

[11] *See* 73 FR 15065.

[12] *See* section 703 of the Bipartisan Budget Act of 2013, Public Law 113–67 (Dec. 26, 2013).

[13] *See* 81 FR 15432.

Benefit Guaranty Corporation Records (29 CFR part 4901).[14]

Benefits Payable in Terminated Single-Employer Plans—29 CFR Part 4022

Under the Benefits Payable in Terminated Single-Employer Plans regulation (29 CFR part 4022), for consistency, PBGC is amending the heading for § 4022.7 by changing the words ''single installment'' to ''lump sum.'' In a prior rule,[15] other usages of ''single installment'' were changed to ''lump sum'' throughout § 4022.7.

Compliance With Rulemaking Guidelines

Executive Orders 12866 and 13563

The Office of Management and Budget (OMB) has determined that this rule is not a ''significant regulatory action'' under Executive Order 12866. Accordingly, OMB has not reviewed the final rule under Executive Order 12866.

Executive Order 12866 directs 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).

Although this is not a significant regulatory action under Executive Order 12866, PBGC has examined the economic and policy implications of this final rule and has concluded that there will be no significant economic impact as a result of these amendments to PBGC's regulations. The regulatory amendments concerning SFA primarily codify clarifications already issued by PBGC in sub-regulatory guidance. Making these clarifications more transparent will decrease uncertainty among plan sponsors in applying the withdrawal liability phase-in condition. Without the clarifications, some plan sponsors may not accurately account for make-up payments or repaid traditional financial assistance when calculating the amount of SFA excluded from plan assets for purposes of the condition in the determination of withdrawal liability. The amendments concerning lump-sum distributions reflecting SECURE 2.0 changes, and the miscellaneous amendments, conform PBGC's existing regulations to statutory changes or prior regulatory changes or update and clarify outdated regulatory provisions. These amendments are cost neutral in their impact.

Section 6 of Executive Order 13563 requires agencies to rethink existing regulations by periodically reviewing their regulatory program for rules that ''may be outmoded, ineffective, insufficient, or excessively burdensome.'' These rules should be modified, streamlined, expanded, or repealed as appropriate. PBGC has identified the amendments in this final rule as consistent with the principles for review under Executive Order 13563. PBGC believes codifying its previously issued guidance provides further clarity to the public, and believes that the other amendments will improve and clarify its existing regulations.

Administrative Procedure Act

The Administrative Procedure Act provides at 5 U.S.C. 553(b) that notice and comment requirements do not apply when an agency, for good cause, finds that they are impracticable, unnecessary, or contrary to the public interest.

With respect to the clarifications to the SFA withdrawal liability condition in § 4262.16(g)(2), as described in PBGC's July 2022 final rule, Congress expressed a clear urgency for PBGC to implement an SFA program to get appropriate assistance to eligible plans as quickly as possible. Congress authorized PBGC to prioritize the filing of applications for eligible plans with the greatest need, during the first 2 years after March 11, 2021, and PBGC provided for such a process. Plans that suspended benefits under section 4245(a) of ERISA have been eligible to apply for SFA since July 12, 2021, and plans that suspended benefits under section 305(e)(9) have been eligible to apply since December 27, 2021. In 2022, plans began to receive payment of SFA and pay required make-up payments. This final rule provides clarifications needed by plan sponsors that pay make-up payments that will enable them to accurately calculate the amount of SFA excluded from plan assets for purposes of the withdrawal liability phase-in condition. Recognizing the importance of announcing these clarifications promptly, the changes to §§ 4262.16(g)(2)(viii), (ix), and (xvi)(D) were stated in sub-regulatory guidance. In addition, the amendment provides clarification for plans that repaid traditional financial assistance to PBGC. Thus, the amendments have the effect of increasing clarity of the calculation methodology for plan sponsors and employers.

With respect to the amendment to § 4041A.43(b)(1) in PBGC's Termination of Multiemployer Plans regulation, the change conforms the regulation to the SECURE 2.0 change to enable certain plans to make lump-sum distributions up to the permissible threshold amount of $7,000 beginning January 1, 2024 (from $5,000). PBGC is authorized under section 4041A(f)(1) of ERISA to permit the payment in a lump sum of benefits that exceed $1,750. In order to approve these higher distributions, PBGC must find that they are not adverse to the interests of the plan's participants and beneficiaries generally and do not unreasonably increase PBGC's risk of loss with respect to the plan. When a plan is being closed out under subpart D of part 4041A, a higher distribution threshold would not be adverse to the interests of the plan's participants and beneficiaries, since their nonforfeitable benefits must be fully satisfied as part of the closeout. This fact also ensures that the higher threshold will not unreasonably increase PBGC's risk of loss with respect to the plan. In addition, because the SECURE 2.0 change applies to distributions after December 31, 2023, conforming the regulation without delay will simplify plan administration and be in the best interests of participants and beneficiaries who may request lump-sum distributions. The other amendments in this final rule are minor technical amendments to update and correct PBGC's regulations; notice and comment are unnecessary because the amendments effect no substantive changes to any regulation.

Accordingly, PBGC has determined that the amendments in this final rule fall under the ''good cause'' exemption of the Administrative Procedure Act at 5 U.S.C. 553(b)(3)(B) and that the public interest is best served by issuing this final rule expeditiously, without further opportunity for notice and comment.

Regulatory Flexibility Act

Because PBGC is not publishing a general notice of proposed rulemaking under 5 U.S.C. 553(b), the regulatory flexibility analysis requirements of the Regulatory Flexibility Act do not apply. See 5 U.S.C. 601(2).

List of Subjects

29 CFR Part 4000

Administrative practice and procedure, Employee benefit plans, Pension insurance, Pensions, Reporting and recordkeeping requirements.

29 CFR Part 4003

Administrative practice and procedure, Organization and functions (Government agencies), Pension insurance.

29 CFR Part 4006

Employee benefit plans, Pension insurance.

[14] *See* 87 FR 43991.

[15] *See* 88 FR 44045.

29 CFR Part 4010

Employee benefit plans, Penalties, Pension insurance, Pensions, Reporting and recordkeeping requirements.

29 CFR Part 4022

Employee benefit plans, Pension insurance, Pensions, Reporting and recordkeeping requirements.

29 CFR Part 4041A

Employee benefit plans, Pension insurance, Reporting and recordkeeping requirements.

29 CFR Part 4043

Employee benefit plans, Pension insurance, Reporting and recordkeeping requirements.

29 CFR Part 4211

Employee benefit plans, Pension insurance, Pensions, Reporting and recordkeeping requirements.

29 CFR Part 4262

Employee benefit plans, Pension insurance, Pensions, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, PBGC is amending 29 CFR parts 4000, 4003, 4006, 4010, 4022, 4041A, 4043, 4211, and 4262 as follows.

PART 4000—FILING, ISSUANCE, COMPUTATION OF TIME, AND RECORD RETENTION

■ 1. The authority citation for part 4000 continues to read as follows:

Authority: 29 U.S.C. 1083(k), 1302(b)(3).

§ 4000.4 [Amended]

■ 2. Amend § 4000.4 by removing the words ''TTY/TDD users may call the Federal relay service toll-free at 1–800–877–8339 and ask to be connected to the appropriate number'' and adding in their place the words ''If you are deaf or hard of hearing or have a speech disability, please dial 7–1–1 to access telecommunications relay services''.

§ 4000.28 [Removed and Reserved]

■ 3. Remove and reserve § 4000.28.

PART 4003—RULES FOR ADMINISTRATIVE REVIEW OF AGENCY DECISIONS

■ 4. The authority citation for part 4003 continues to read as follows:

Authority: 29 U.S.C. 1302(b)(3).

§ 4003.35 [Amended]

■ 5. Amend § 4003.35 in paragraph (a) introductory text by removing the word ''final'' and in paragraph (a)(1) by removing the words ''decision on request'' and adding in their place the words ''decision on a request''.

PART 4006—PREMIUM RATES

■ 6. The authority citation for part 4006 continues to read as follows:

Authority: 29 U.S.C. 1302(b)(3), 1306, 1307.

§ 4006.3 [Amended]

■ 7. Amend § 4006.3 by:

■ a. Removing the phrase ''ERISA section 4006(a)(3)(A), (F), and (G)'' and adding in its place the phrase ''section 4006(a)(3)(A) and (G) of ERISA'' in paragraph (a)(1).

■ b. Removing the phrase ''ERISA section 4006(a)(3)(A), (H), and (J)'' and adding in its place the phrase ''section 4006(a)(3)(A) and (J) of ERISA'' in paragraph (a)(2).

§ 4006.5 [Amended]

■ 8. Amend § 4006.5 in paragraph (b) by removing the phrase ''ERISA section 4006(a)(3)(H)'' and adding in its place the phrase ''section 4006(a)(3)(I) of ERISA for certain small employers''.

PART 4010—ANNUAL FINANCIAL AND ACTUARIAL INFORMATION REPORTING

■ 9. The authority citation for part 4010 continues to read as follows:

Authority: 29 U.S.C. 1302(b)(3), 1310.

§ 4010.10 [Amended]

■ 10. Amend § 4010.10 in paragraph (b) by removing ''§ 4010.8(b)(1)'' and adding in its place ''§ 4010.8(b)(2)(i)''.

§ 4010.13 [Amended]

■ 11. Amend § 4010.13 by removing the phrase ''§ 4901.21(a)(3)'' and adding in its place the phrase ''§ 4901.21(a)''.

PART 4022—BENEFITS PAYABLE IN TERMINATED SINGLE-EMPLOYER PLANS

■ 12. The authority citation for part 4022 continues to read as follows:

Authority: 29 U.S.C. 1302, 1322, 1322b, 1341(c)(3)(D), and 1344.

■ 13. Revise the section heading for § 4022.7 to read as follows:

§ 4022.7 Benefits payable in a lump sum.

* * * * *

PART 4041A—TERMINATION OF MULTIEMPLOYER PLANS

■ 14. The authority citation for part 4041A continues to read as follows:

Authority: 29 U.S.C. 1302(b)(3), 1341a, 1431, 1441.

§ 4041A.43 [Amended]

■ 15. Amend § 4041A.43 in paragraph (b)(1) by removing ''$5,000'' and adding in its place the words ''the dollar amount specified in section 203(e)(1) of ERISA''.

PART 4043—REPORTABLE EVENTS AND CERTAIN OTHER NOTIFICATION REQUIREMENTS

■ 16. The authority citation for part 4043 continues to read as follows:

Authority: 29 U.S.C. 1083(k), 1302(b)(3), 1343.

§ 4043.8 [Amended]

■ 17. Amend § 4043.8 by removing ''§ 4901.21(a)(3)'' and adding in its place ''§ 4901.21(a)''.

PART 4211—ALLOCATING UNFUNDED VESTED BENEFITS TO WITHDRAWING EMPLOYERS

■ 18. The authority citation for part 4211 continues to read as follows:

Authority: 29 U.S.C. 1302(b)(3); 1391(c)(1), (c)(2)(D), (c)(5)(A), (c)(5)(B), (c)(5)(D), and (f).

§ 4211.31 [Amended]

■ 19. Amend § 4211.31 in paragraph (b) by removing the words ''subpart B of this part'' and adding in its place the words ''set forth in subpart B of this part''.

PART 4262—SPECIAL FINANCIAL ASSISTANCE BY PBGC

■ 20. The authority citation for part 4262 continues to read as follows:

Authority: 29 U.S.C. 1302(b)(3), 1432.

§ 4262.16 [Amended]

■ 21. Amend § 4262.16 by revising paragraphs (g)(2)(viii) and (ix) and adding paragraph (g)(2)(xvi)(D) to read as follows:

§ 4262.16 Conditions for special financial assistance.

* * * * *

(g) * * *

(2) * * *

(viii) *SFA assets excluded.* The value of the plan assets taken into account as of the end of each determination year is the value of the assets that would otherwise be taken into account in the absence of this provision reduced by the amount described in paragraph (g)(2)(ix) of this section. The value of plan assets determined under this paragraph (g)(2)(viii) may not be less than zero.

(ix) *Calculation of SFA assets excluded*—(A) *In general.* Except for plans required to pay make-up

payments described in § 4262.15(b), the amount described in this paragraph (g)(2)(ix)(A) is, as of the end of the determination year—

(*1*) The total amount of special financial assistance paid to the plan under § 4262.12 (as determined under § 4262.12(a) or (b), or under § 4262.12(b) and (c) for plans paid under a supplemented application, as applicable), minus the amount paid to PBGC under § 4262.12(e), as of the end of the determination year;

(*2*) Multiplied by a fraction, the numerator of which is the number of years determined under paragraph (g)(2)(x) of this section as of the end of the determination year and the denominator of which is the number of years determined under paragraph (g)(2)(xi) of this section as of the end of the determination year.

(B) *Plans required to pay make-up payments.* For plans required to pay make-up payments described in § 4262.15(b), the amount described in this paragraph (g)(2)(ix)(B) is, as of the end of the determination year—

(*1*) The total amount of special financial assistance paid to the plan under § 4262.12 (as determined under § 4262.12(a) or (b), or under § 4262.12(b) and (c) for plans paid under a supplemented application, as applicable), minus the amount paid to PBGC under § 4262.12(e), and minus the amount of make-up payments paid by the plan to participants and beneficiaries under § 4262.15(b) whether the payments are made from SFA assets or non-SFA assets, as of the end of the determination year;

(*2*) Multiplied by a fraction, the numerator of which is the number of years determined under paragraph (g)(2)(x) of this section as of the end of the determination year and the denominator of which is the number of years determined under paragraph (g)(2)(xi) of this section as of the end of the determination year.

* * * * *

(xvi) * * *

(D) *Example 4.* In plan year 2022, Plan D received an SFA payment amount of $50,000,000 (not including the amount paid to PBGC for repayment of traditional financial assistance) and a supplemented SFA payment amount of $30,000,000. A total of $20,000,000 in lump-sum make-up payments were paid by Plan D in plan year 2022. An employer withdraws in 2023. At the end of the determination year (2022), the amount of SFA required to be excluded from assets equals $60,000,000 ($50,000,000 + $30,000,000—$20,000,000). If, instead, the make-up payments were paid by Plan D in plan year 2023, the amount of SFA required to be excluded from assets at the end of the determination year (2022) would equal $80,000,000. Under this scenario, Plan D's unfunded vested benefit liability would be the same at the end of the determination year because the additional $20,000,000 of SFA required to be excluded from assets offsets the $20,000,000 in SFA that the plan still holds for make-up payments but has not yet distributed as of the end of the determination year. Similarly, if the employer withdraws in 2024, the make-up payments were paid in 2023, and the phase-in fraction was 9/10th for 2023, the amount of SFA excluded from the assets at the end of the determination year (2023) would be $54,000,000 (9/10th × $60,000,000), where the $60,000,000 is calculated as the total $80,000,000 in SFA paid to the plan minus the $20,000,000 in make-up payments that were disbursed prior to the end of the determination year.

Issued in Washington, DC.

Gordon Hartogensis,

Director, Pension Benefit Guaranty Corporation.

[FR Doc. 2023–24268 Filed 11–6–23; 8:45 am]

BILLING CODE 7709–02–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

31 CFR Part 587

Publication of Russian Harmful Foreign Activities Sanctions Regulations Web General License 73

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Publication of a Web General License.

SUMMARY: The Department of the Treasury's Office of Foreign Assets Control (OFAC) is publishing one general license (GL) issued pursuant to the Russian Harmful Foreign Activities Sanctions Regulations: GL 73, which was previously made available on OFAC's website.

DATES: GL 73 was issued on October 12, 2023. See **SUPPLEMENTARY INFORMATION** for additional relevant dates.

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

SUPPLEMENTARY INFORMATION:

Electronic Availability

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

Background

On October 12, 2023, OFAC issued GL 73 to authorize certain transactions otherwise prohibited by the Russian Harmful Foreign Activities Sanctions Regulations, 31 CFR part 587. GL 73 was made available on OFAC's website (*https://ofac.treasury.gov*) when it was issued. The text of this GL is provided below.

OFFICE OF FOREIGN ASSETS CONTROL

Russian Harmful Foreign Activities Sanctions Regulations

31 CFR Part 587

GENERAL LICENSE NO. 73

Authorizing Limited Safety and Environmental Transactions Involving Certain Persons or Vessels

(a) Except as provided in paragraph (c) of this general license, all transactions prohibited by Executive Order (E.O.) 14024 that are ordinarily incident and necessary to one of the following activities involving the blocked persons or vessels described in paragraph (b) are authorized through 12:01 a.m. eastern standard time, January 8, 2024, provided that any payment to a blocked person must be made into a blocked account in accordance with the Russian Harmful Foreign Activities Sanctions Regulations (RuHSR):

(1) The safe docking and anchoring of any of the blocked vessels listed in paragraph (b) of this general license (''blocked vessels'') in port;

(2) The preservation of the health or safety of the crew of any of the blocked vessels; or

(3) Emergency repairs of any of the blocked vessels or environmental mitigation or protection activities relating to any of the blocked vessels.

(b) The authorization in paragraph (a) of this general license applies to the following blocked persons and vessels listed on the Office of Foreign Assets Control's Specially Designated Nationals and Blocked Persons List and any entity in which any of the following persons own, directly or indirectly, individually or in the aggregate, a 50 percent or greater interest:

(1) Ice Pearl Navigation Corp (registered owner of YASA GOLDEN BOSPHORUS, IMO 9334038); or

(2) Lumber Marine SA (registered owner of SCF PRIMORYE, IMO 9421960).

(c) This general license does not authorize:

(1) The entry into any new commercial contracts involving the property or interests in property of any blocked persons, including the blocked entities and vessels described in paragraph (b) of this general license, except as authorized by paragraph (a);

(2) The offloading of any cargo onboard any of the blocked vessels, including the offloading of crude oil or petroleum products of Russian Federation origin, except for the offloading of cargo that is ordinarily incident and necessary to address vessel emergencies authorized pursuant to paragraph (a) of this general license;

(3) Any transactions related to the sale of crude oil or petroleum products of Russian Federation origin;

(4) Any transactions prohibited by Directive 2 under E.O. 14024, *Prohibitions Related to Correspondent or Payable-Through Accounts and Processing of Transactions Involving Certain Foreign Financial Institutions;*

(5) Any transactions prohibited by Directive 4 under E.O. 14024, *Prohibitions Related to Transactions Involving the Central Bank of the Russian Federation, the National Wealth Fund of the Russian Federation, and the Ministry of Finance of the Russian Federation;* or

(6) Any transactions otherwise prohibited by the RuHSR, including transactions involving the property or interests in property of any person blocked pursuant to the RuHSR, other than transactions involving the blocked persons or vessels in paragraph (b) of this general license, unless separately authorized.

Bradley T. Smith,

Director, Office of Foreign Assets Control.

Dated: October 12, 2023.

Bradley T. Smith,

Director, Office of Foreign Assets Control.

[FR Doc. 2023–23918 Filed 11–6–23; 8:45 am]

BILLING CODE 4810–AL–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2022–0222]

RIN 1625–AA09

Drawbridge Operation Regulation; Okeechobee Waterway, Stuart, FL

AGENCY: Coast Guard, Department of Homeland Security (DHS).

ACTION: Notification of temporary deviation from regulations; reopening of comment period.

SUMMARY: The Coast Guard is reopening the comment period to solicit additional comments concerning its notice of temporary deviation to the regulation governing the Florida East Coast (FEC) Railroad Bridge, across the Okeechobee Waterway (OWW), mile 7.41, at Stuart, FL. The expected increase in railway service was delayed and did not commence until late September 2023. Due to this delay, it was determined that we did not afford the public adequate opportunity to provide comments. We are reopening the comment period to allow the public more time to comment. The comment period is now open until November 30, 2023.

DATES: The comment period for the temporary deviation published August 11, 2023 (88 FR 54487) is reopened. Comments and relate material must reach the Coast Guard on or before November 30, 2023.

ADDRESSES: You may submit comments identified by docket number USCG–2022–0222 using Federal Decision Making Portal at *https://www.regulations.gov.*

See the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section below for instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: If you have questions on this temporary deviation, call, or email Ms. Jennifer Zercher, Bridge Management Specialist, Seventh Coast Guard District; telephone 305–415–6740, email *Jennifer.N.Zercher@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
DHS Department of Homeland Security
FR Federal Register
OMB Office of Management and Budget
NPRM Notice of Proposed Rulemaking (Advance, Supplemental)
§ Section
U.S.C. United States Code
FEC Florida East Coast
FL Florida

II. Background and Purpose

On June 23, 2023, we published a temporary deviation entitled, ''Drawbridge Operation Regulation; Okeechobee Waterway, Stuart, FL'' in the **Federal Register** (88 FR 37470). The original comment period closed on August 4, 2023. Based on the comments received and other concerns that were voiced by the public, we rescinded that test deviation, and published a new one.

On August 11, 2023, we published second a temporary deviation entitled, ''Drawbridge Operation Regulation; Okeechobee Waterway, Stuart, FL'' in the **Federal Register** (88 FR 54487). The second comment period closed on October 15, 2023. The temporary deviations are testing a more predictable operating schedule for the FEC Railroad Bridge and contains useful background and analysis related to the temporary deviation. The public is encouraged to review the temporary deviation.

We originally set a 60-day comment period for the temporary deviation and determined reopening the comment period until the end of the temporary deviation is necessary due to the delay in the start of additional railway service. Additional railway service was delayed and did not commence until late September 2023. We feel the start of additional railway service so close to the end of the comment period did not afford the public adequate opportunity to provide comments.

This notice to reopen the comment period ensures notice and opportunity to comment on the operation of the drawbridge before determining whether a permanent change to the schedule is needed.

The comment period is now open through November 30, 2023. Any comments received in the period between when the initial comment period closed on October 15, 2023 and the reopening of the comment period on November 7, 2023 will also be considered.

This notice is issued under authority of 33 U.S.C. 1223 and 5 U.S.C. 552.

III. Public Participation and Request for Comments

We view public participation as essential to determining the needs of the public and will consider all comments and material received during the comment period. Your comment can help shape the outcome of future actions. If you submit a comment, please include the docket number for this test deviation, indicate the specific

section of this document to which each comment applies, and provide a reason for each suggestion or recommendation.

Submitting comments. We encourage you to submit comments through the Federal Decision Making Portal at *https://www.regulations.gov.* To do so, go to *https://www.regulations.gov,* type USCG- 2022–0222 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 *https://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 test deviation as being available in the docket, find the docket as described in the previous paragraph, and then select ''Supporting & Related Material'' in the Document Type column. Public comments will also be placed in our online docket and can be viewed by following instructions on the *https://www.regulations.gov* Frequently Asked Questions web page. Also, if you go to the online docket and sign up for email alerts, you will be notified when comments, future actions or updates are posted to the docket.

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

Personal information. We accept anonymous comments. Comments we post to *https://www.regulations.gov* will include any personal information you have provided. For more about privacy and submissions in response to this document, see DHS's eRulemaking System of Records notice (85 FR 14226, March 11, 2020).

Dated: October 30, 2023.

Douglas M. Schofield,

Rear Admiral, U.S. Coast Guard, Commander, Coast Guard Seventh District.

[FR Doc. 2023–24528 Filed 11–6–23; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2023–0862]

RIN 1625–AA00

Safety Zone; Atlantic Ocean, Virginia Beach, Virginia

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone for navigable waters within a 550-yard radius of the M/V *HOS MYSTIQUE* and accompanying machinery while the vessel is conducting a subsea survey for potential unexploded ordinance (pUXO) in the Atlantic Ocean within three nautical miles of the shores of the State Military Reservation, Virginia Beach. The safety zone is needed to protect personnel, vessels, and the marine environment from potential hazards created by the subsea survey operations. Entry of vessels or persons into this zone is prohibited unless specifically authorized by the Captain of the Port, Sector Virgina or designated representative.

DATES: This rule is effective without actual notice from November 7, 2023 through December 31, 2023. For the purposes of enforcement, actual notice will be used from November 1, 2023, until November 7, 2023.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *https://www.regulations.gov,* type USCG–2023–0862 in the search box and click ''Search.'' Next, in the Document Type column, select ''Supporting & Related Material.''

FOR FURTHER INFORMATION CONTACT: If you have questions about this rule, call or email LCDR Ashley Holm, Chief Waterways Management Division U.S. Coast Guard; 757–617–7986, *Ashley.E.Holm@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
DHS Department of Homeland Security
FR Federal Register
pUXO Potential Unexploded Ordinance
ROV Remotely Operated Vehicle
§ Section
TFR Temporary Final Rule
U.S.C. United States Code

II. Background Information and Regulatory History

The Coast Guard is issuing this temporary rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) because Coast Guard Sector Virginia was notified on October 25, 2023 that the M/V *HOS MYSTIQUE* will conduct survey operations using an ROV to identify pUXOs beginning November 1, 2023 and a safety zone is necessary to protect the public from the safety hazards associated with any disturbances of pUXOs, as well as, the obstruction to navigation during the use of a tethered ROV. It is impracticable to publish an NPRM because we must establish this safety zone by November 1, 2023, to protect the public.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Delaying the effective date of this rule would be impracticable because immediate action is needed to respond to the potential safety hazards associated with the survey operations utilizing ROVs in shallow water to identify pUXO.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 46 U.S.C. 70034. The Captain of the Port Sector Virginia (COTP) has determined that potential hazards associated with the survey operations starting November 1, 2023, and continuing until late December, will be a safety concern for any persons or property within a 550-yard radius of the survey vessel. This rule is needed to protect personnel, vessels, and the marine environment in the navigable waters within the safety zone from potential hazards that arise from disturbing pUXOs and the use of tethered ROVs to identify them.

IV. Discussion of the Rule

This rule establishes a safety zone on November 1, 2023, through December 31, 2023. The safety zone encompasses all waters inside a radius of 550 yards from the actual position of the M/V *HOS MYSTIQUE.* During survey operations, a

tethered ROV will be used and contained within the safety zone. Two Rigid Hull Inflatable Boats (RHIBs) will operate as safety vessels during operations, one to the north and one to the south of each target while the ROV is deployed. The duration of the zone is intended to protect personnel, vessels, and the marine environment in these navigable waters during survey operations. No vessel or person will be permitted to enter the safety zone without obtaining permission from the COTP or designated representative.

V. Regulatory Analyses

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

A. Regulatory Planning and Review

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

This regulatory action determination is based on the size, location, duration, and operations requirements of the survey requiring the safety zone. Vessel traffic will be able to safely transit around this safety zone during the survey. The date range for this survey was selected to minimize vessel traffic impacts. Moreover, the Coast Guard would issue a Broadcast Notice to Mariners via VHF–FM marine channel 16 about the zone, and the rule would allow vessels to seek permission to enter the zone while survey operations are not actively conducting operations with the potential for hazards.

B. Impact on Small Entities

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

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

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

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

C. Collection of Information

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

D. Federalism and Indian Tribal Governments

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

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

E. Unfunded Mandates Reform Act

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

F. Environment

We have analyzed this rule under Department of Homeland Security Directive 023–01, Rev. 1, associated implementing instructions, and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves a safety zone that prohibits entry within 550 yards of the M/V M/V HOS MYSTIQUE only during the active survey operations which will take place in November and December of 2023. It is categorically excluded from further review under paragraph L60(a) of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 1. A Record of Environmental Consideration supporting this determination is available in the docket. For instructions on locating the docket, see the **ADDRESSES** section of this preamble.

G. Protest Activities

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

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping, Security measures, and 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.T05–0862 to read as follows:

§ 165.T05–0862 Safety Zone; Atlantic Ocean, Virginia Beach, VA.

(a) *Location.* The following area is a safety zone: All waters of the Atlantic Ocean, from surface to bottom, described by a radius of 550 yards from the actual position of the M/V HOS MYSTIQUE while survey operations are being conducted.

(b) *Definitions.* As used in this section, *designated representative* means a Coast Guard coxswain, petty officer, or other officer operating a Coast Guard vessel and a Federal, State, and local officer designated by or assisting the Captain of the Port Sector Virginia (COTP) in the enforcement of the safety zones. The term also includes the M/V HOS MYSTIQUE for the sole purpose of designating and establishing safe transit corridors, to permit passage into or through these safety zones, or to notify vessels and individuals that they have entered a safety zone and are required to depart immediately.

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

(2) To seek permission to enter, vessels should contact the M/V HOS MYSTIQUE by VHF–FM Channel 16. Those in the safety zone must comply with all directions given to them by the COTP or the COTP's designated representative.

(d) *Enforcement period.* This zone will be in effect and enforced during such times as are announced via Broadcast Notice to Mariners between November 1, 2023, through December 31, 2023.

Dated: November 1, 2023.

J.A. Stockwell,

Captain, U.S. Coast Guard, Captain of the Port Sector Virginia.

[FR Doc. 2023–24555 Filed 11–6–23; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2023–0795]

RIN 1625–AA00

Safety Zone; Potomac River, Between Charles County, MD and King George

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone for certain waters of the Potomac River. This action is necessary to provide for the safety of life on these navigable waters at the old Governor Harry W. Nice/Senator Thomas ''Mac'' Middleton Memorial (US–301) Bridge, during demolition operations from November 8, 2023 through January 30, 2024. This regulation prohibits persons and vessels from being in the safety zone unless authorized by the Captain of the Port, Sector Maryland-National Capital Region or a designated representative.

DATES: This rule is effective from November 8, 2023, through January 30, 2024.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *https://www.regulations.gov,* type USCG–2023–0795 in the search box and click ''Search.'' Next, in the Document Type column, select ''Supporting & Related Material.''

FOR FURTHER INFORMATION CONTACT: If you have questions about this rule, call or email LCDR Kate Newkirk, Sector Maryland-NCR, Waterways Management Division, U.S. Coast Guard: telephone 410–576–2519, email *MDNCRWaterways@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

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

II. Background Information and Regulatory History

Skanska-Corman-McLean, Joint Venture notified the Coast Guard that it will be conducting demolition of the old Governor Harry W. Nice/Senator Thomas ''Mac'' Middleton Memorial (US–301) Bridge, which will occur from 12:01 a.m. on November 8, 2023, to 11:59 p.m. on January 30, 2024. The bridge is located on the Potomac River, at mile 43.3, between Charles County, MD and King George County, VA. The segment of the old bridge over waters that include the bridge piers sections between Piers 14 and the east riverbank of the Potomac River requires the use of explosives, and debris removal and hydrographic surveying equipment. Marine equipment, including barges, positioned in the Potomac River will be used to support the bridge demolition and debris removal operation. This operation also requires the use of a temporary commercial mooring buoy in the Potomac River south of the old bridge where the explosives barge will be kept. Hazards from the demolition and debris removal work include accidental discharge of explosives, dangerous projectiles, hanging ropes or cables, and falling objects or debris. In response, on October 12, 2023, the Coast Guard published a notice of proposed rulemaking (NPRM) titled Safety Zone; Potomac River, Between Charles County, MD and King George County, VA (USCG–2023–0795). During the comment period that ended October 27, 2023, we received no comments.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Delaying the effective date of this rule would be impracticable because immediate action is needed to respond to the potential safety hazards associated with demolition of the old Governor Harry W. Nice/Senator Thomas ''Mac'' Middleton Memorial (US–301) Bridge.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 46 U.S.C. 70034. The Captain of the Port Sector Maryland-National Capital Region (COTP) has determined that potential hazards associated with the demolition and removal of the old Governor Harry W. Nice/Senator Thomas ''Mac'' Middleton Memorial (US–301) Bridge would be a safety concern for anyone within or near project area.

IV. Discussion of Comments, Changes, and the Rule

As noted above, we received no comments on our NPRM published October 12, 2023. There are no changes in the regulatory text of this rule from the proposed rule in the NPRM.

This rule establishes a safety zone from 12:01 a.m. on November 8, 2023, to 11:59 p.m. on January 30, 2024. The safety zone would cover the following areas:

Area 1. All navigable waters of the Potomac River, encompassed by a line connecting the following points beginning at 38°21′49.10″ N, 076°59′32.46″ W, thence south to 38°21′40.04″ N, 076°59′30.62″ W, thence east to 38°21′43.52″ N, 076°59′15.22″ W, thence south along the shoreline to 38°21′52.49″ N, 076°58′59.70″ W, and west back to the beginning point, located between Charles County, MD and King George County, VA.

Area 2. All navigable waters of the Potomac River, within 1,500 feet of the explosives barge located in approximate position 38°21′21.47″ N, 076°59′45.40″ W.

The duration of the zone is intended to ensure the safety of vessels and these navigable waters before, during, and after the scheduled demolition and debris removal. Except for marine equipment and vessels operated by Skanska-Corman-McLean, Joint Venture, or its subcontractors, no vessel or person would be permitted to enter the safety zone without obtaining permission from the COTP or a designated representative. The term designated representative also includes an employee or contractor of Skanska-Corman-McLean, Joint Venture for the sole purposes of designating and establishing safe transit corridors, to permit passage into or through the safety zone, or to notify vessels and individuals that they have entered the safety zone and are required to leave.

The COTP will notify the public that the safety zone will be enforced by all appropriate means to the affected segments of the public, as practicable, in accordance with 33 CFR 165.7(a). Such means of notification will also include, but are not limited to, Broadcast Notice to Mariners. Vessels or persons violating this rule are subject to the penalties set forth in 46 U.S.C. 70036 and 46 U.S.C. 70052 . The regulatory text we are proposing appears at the end of this document.

V. Regulatory Analyses

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

A. Regulatory Planning and Review

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

This regulatory action determination is based on the size, location, duration and time of year of the regulated area. The temporary safety zone comprises two separate geographic areas which total a maximum of approximately 900 yards in width and 350 yards in length. This safety zone would impact a small, designated area of the Potomac River for a maximum 84 total days, but we anticipate that there would be no vessels that are unable to conduct business because of the safety zone. Excursion vessels and commercial fishing vessels are not impacted by this rulemaking. Excursion vessels do not operate in this area, and commercial fishing vessels are not impacted because of their draft. Some towing vessels may be impacted, but bridge project personnel have been conducting outreach throughout the project to coordinate with those vessels. This safety zone would be established outside the normal recreational boating season for this area, which occurs during the summer. Moreover, the Coast Guard would issue Local Notices to Mariners and a Broadcast Notice to Mariners via VHF–FM marine channel 16 about the zone on days it is being enforced.

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 received no comments from the Small Business Administration on this rulemaking. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

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

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

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

C. Collection of Information

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

D. Federalism and Indian Tribal Governments

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

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

E. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or Tribal government, in the

aggregate, or by the private sector of $100,000,000 (adjusted for inflation) or more in any one year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

F. Environment

We have analyzed this rule under Department of Homeland Security Directive 023–01, Rev. 1, associated implementing instructions, and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves a safety zone lasting 84 total days that would prohibit entry within a portion of the Potomac River. It is categorically excluded from further review under paragraph L60(a) of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 1. A Record of Environmental Consideration supporting this determination is available in the docket. For instructions on locating the docket, see the **ADDRESSES** section of this preamble.

G. Protest Activities

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

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

Authority: 46 U.S.C. 70034, 70051; 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.T05–0145 to read as follows:

§ 165.T05–0145 Safety Zone; Potomac River, Between Charles County, MD and King George County, VA.

(a) *Location.* The following areas are a safety zone: These coordinates are based on datum NAD 83.

(1) *Area 1.* All navigable waters of the Potomac River, encompassed by a line connecting the following points beginning at 38°21′49.10″ N, 076°59′32.46″ W, thence south to 38°21′40.04″ N, 076°59′30.62″ W, thence east to 38°21′43.52″ N, 076°59′15.22″ W, thence south along the shoreline to 38°21′52.49″ N, 076°58′59.70″ W, and west back to the beginning point, located between Charles County, MD and King George County, VA.

(2) *Area 2.* All navigable waters of the Potomac River within 1,500 feet of the explosives barge located in approximate position 38°21′21.47″ N, 076°59′45.40″ W.

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

Captain of the Port (COTP) means the Commander, U.S. Coast Guard Sector Maryland-National Capital Region.

Designated representative means any Coast Guard commissioned, warrant, or petty officer, including a Coast Guard coxswain, petty officer, or other officer operating a Coast Guard vessel and a Federal, State, and local officer designated by or assisting the Captain of the Port Maryland-National Capital Region (COTP) in the enforcement of the safety zone. The term also includes an employee or contractor of Skanska-Corman-McLean, Joint Venture for the sole purposes of designating and establishing safe transit corridors, to permit passage into or through the safety zone, or to notify vessels and individuals that they have entered the safety zone and are required to leave.

Marine equipment means any vessel, barge or other equipment operated by Skanska-Corman-McLean, Joint Venture, or its subcontractors.

(c) *Regulations.* (1) Under the general safety zone regulations in subpart C of this part, except for marine equipment, you may not enter the safety zone described in paragraph (a) of this section unless authorized by the COTP, Skanska-Corman-McLean, Joint Venture, or the COTP's designated representative. If a vessel or person is notified by the COTP, Skanska-Corman-McLean, Joint Venture, or the COTP's designated representative that they have entered the safety zone without permission, they are required to immediately leave in a safe manner following the directions given.

(2) Mariners wishing to transit any of these safety zone areas must first contact the Skanska-Corman-McLean, Joint Venture designated representative, the on-site project manager by telephone number 785–953–1465 or on Marine Band Radio VHF–FM channels 13 and 16 from the pusher tug Miss Stacy to request permission. If permission is granted, mariners must proceed at their own risk and strictly observe any and all instructions provided by the COTP, Skanska-Corman-McLean, Joint Venture, or designated representative to the mariner regarding the conditions of entry to and exit from any area of the safety zone. The COTP or the COTP's representative can be contacted by telephone number 410–576–2693 or on Marine Band Radio VHF–FM channel 16 (156.8 MHz).

(3) The Coast Guard will publish a notice in the Fifth Coast Guard District Local Notice to Mariners and issue marine information broadcasts on VHF–FM marine band radio announcing specific enforcement dates and times.

(d) *Enforcement officials.* The U.S. Coast Guard may be assisted in the patrol and enforcement of the safety zone by Federal, State, and local agencies.

(e) *Enforcement period.* This section will be in effect, and subject to enforcement, from 12:01 a.m. on November 8, 2023, to 11:59 p.m. on January 30, 2023.

Dated: November 1, 2023.

David E. O'Connell,

Captain, U.S. Coast Guard, Captain of the Port Maryland-National Capital Region.

[FR Doc. 2023–24561 Filed 11–6–23; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF AGRICULTURE

Forest Service

36 CFR Part 261

RIN 0596–AD52

Prohibitions in Region 8, Southern Region

AGENCY: Forest Service, USDA.

ACTION: Final rule.

SUMMARY: The Chattooga Wild and Scenic River is located in the Nantahala National Forest in North Carolina, the Sumter National Forest in South Carolina, and the Chattahoochee National Forest in Georgia. Forest Service regulations generally prohibit floating activities on the Chattooga Wild and Scenic River unless authorized by a permit. On January 31, 2012, the U.S. Department of Agriculture (USDA), Forest Service issued decisions to change some of the locations where, and

conditions under which, boating would be allowed. The 2012 decision included segments of the Chattooga Wild and Scenic River in North Carolina, which was not included in the original rule. Consequently, the Forest Service is amending the regulations to reflect the new management direction more accurately for the Chattooga Wild and Scenic River.

DATES: This rule is effective December 7, 2023.

ADDRESSES: The rulemaking record for this final rule contains all the documents pertinent to this rulemaking. These documents are available for inspection and copying at the office of the Director, Wilderness and Wild and Scenic Rivers, USDA, Forest Service, 4th Floor Central, Sidney R. Yates Federal Building, 1400 Independence Avenue SW, Washington, DC, from 8:30 a.m. to 4 p.m., Monday through Friday, except holidays. Those wishing to inspect or copy these documents are encouraged to call Stephen Chesterton, Wild and Scenic Rivers Program Manager at 202–205–1398 beforehand to facilitate access to the building.

FOR FURTHER INFORMATION CONTACT: John Campbell, Regional Wilderness and Wild & Scenic River Program Manager, Southern Region, 404–805–8110. Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800–877–8339 between 8 a.m. and 8 p.m., Eastern Standard Time, Monday through Friday.

SUPPLEMENTARY INFORMATION:

Background and Purpose for the Amendment

In 1974, Congress designated the 57-mile Chattooga River (and its 15,432-acre corridor) as a component of the National Wild and Scenic River System. The uppermost portion of the Chattooga Wild and Scenic River is located in the Nantahala National Forest (NF) in North Carolina. The river then flows in a southerly, south-westerly direction to form the boundary between Georgia and South Carolina, and also the boundary between the Chattahoochee NF (in Georgia) and the Sumter NF (in South Carolina).

In the initial 1976 river management plan for the Chattooga River, the U.S. Forest Service used zoning to manage the upper and lower segments of the river for different recreational opportunities. As part of the initial zoning effort, management direction prohibited floating on the upper segment above GA/SC Highway 28 (which includes a section of the river in the Sumter NF in South Carolina, a section of the river in the Chattahoochee NF in Georgia, and all of the sections of the river in the Nantahala NF in North Carolina).

Under the authority of 36 CFR 261.70(a)(7), these prohibitions were codified at 36 CFR 261.77 (**Federal Register**, 43 FR 3706, January 27, 1978). In general terms, 36 CFR 261.77 prohibits floating activities on the Chattooga Wild and Scenic River unless authorized by a permit. Consistent with the river management plan that is incorporated into the forest plans, the original terms and conditions of the permits issued pursuant to 36 CFR 261.77 allowed floating on the Chattooga Wild and Scenic River but only on that portion of the river located downstream of GA/SC Highway 28. Therefore, due to the combination of 36 CFR 261.77 and the terms of the self-registration permit issued pursuant to that regulation, floating was only allowed on that section of the river downstream of GA/SC Highway 28 and prohibited upstream from that location. However, in 2012 that management direction changed, allowing for an increase in boating opportunities upstream of GA/SC Highway 28. To be consistent with this new management direction, this final rule amends 36 CFR 261.77.

On January 31, 2012, the Chattahoochee-Oconee, Nantahala and Sumter National Forests issued Decision Notices that amended their forest plans to incorporate new management direction for the Chattooga Wild and Scenic River. These changes were based upon an Environmental Assessment titled ''Managing Recreation Uses in the Upper Segment of the Chattooga Wild and Scenic River Corridor.'' Generally, these new decisions allow floating along certain segments of the Chattooga Wild and Scenic River above GA/SC Highway 28, contingent upon certain restrictions.

In the previous regulations at 36 CFR 261.77, the sections of the river that lie within the Nantahala NF in North Carolina were not addressed. This area instead has been regulated by Forest Supervisor's closure order pursuant to subpart B of 36 CFR part 261. To be consistent with the new management direction, this final rule amends 36 CFR 261.77 to include those sections of the river that lie within the Nantahala NF.

The original regulations at 36 CFR 261.77(d) and (e) also only addressed the portion of the river within the boundaries of the Chattahoochee National Forest. This final rule changes this to be applicable to ''any portion or segment of the Chattooga River within National Forest System land.'' Through the public comment period, it was pointed out the original regulation made a distinction between States because the 1971 Wild and Scenic River Report for the Chattooga River identified that the State of South Carolina has title to the riverbed and water from the mean high-water mark to the middle of the river. However, it has been firmly established in law and by the courts that the Secretary of Agriculture has the authority to regulate the public use of waters within the boundaries of a Wild and Scenic River.

Another change in the proposed rule involved an effort to use more accurate and consistent terminology by replacing the term ''special use permit'' with ''special use authorization.'' This however, created a certain amount of confusion with the public. In an effort to reduce the uncertainty as to how to interpret the use of the term ''special use authorization,'' this final rule maintains the original term of ''special use permit'' and clarifies that the other type of permit authorizing use is a ''self-registration floating permit.''

Lastly, to better serve the public, this final rule amends 36 CFR 261.77 by eliminating references to specific locations where self-registration permits are made available to the public. Instead, the Forest Service will use other means to inform the public of the variety of places where it can go to obtain permits to float the Chattooga Wild and Scenic River.

Public Comments on the Proposed Rule and Responses

Overview

On January 19, 2016, the Forest Service published a proposed rule in the **Federal Register** (Vol. 81, No. 11, pages 2788–2791) seeking public comment in amending regulations at 36 CFR 261.77 related to prohibitions in Region 8, Southern Region. The proposed rule was posted electronically on the **Federal Register** website at *https://www.federalregister.gov* and on the local agency's website at *https://www.fs.usda.gov/scnfs.* The proposed rule would prohibit floating activities on the Chattooga Wild and Scenic River (WSR) unless authorized by permit.

During the 60-day comment period, which ended on March 21, 2016, the Forest Service received 13 letters or electronic messages in response to the proposed rule, resulting in a total of 594 comments. Of the 13 letter/email responses, 9 came from individuals, 1 from a State Government agency, 1 from an environmental organization, 1 from a whitewater organization, and 1 from a homeowners association. Copies of the letters/emails received can be seen on

the website for the Francis Marion and Sumter National Forests website at *https://www.fs.usda.gov/scnfs.* A complete report of all the comments received and their responses are available by contacting the Forest Service (see **ADDRESSES** and **FOR FURTHER INFORMATION CONTACT**).

General Comments

Comment. Some of the comments from respondents focused on whether the Forest Service should allow boating in the upper segment of the Chattooga Wild and Scenic River (Chattooga WSR). Some respondents stated that they are against boating under any circumstances in the Chattooga WSR, specifically in the Grimshawes area to Bull Pen Bridge.

Response. Forest Plan Amendments signed in 2012 for the Nantahala, Chattahoochee-Oconee and Sumter National Forests permit boating under certain conditions in the upper segment of the Chattooga WSR from the confluence of Green Creek and the Chattooga WSR in North Carolina to a spot where boaters are required to take their boats out of the water near the confluence of Lick Log Creek and the Chattooga WSR in South Carolina. Boating is permitted from December 1st to April 30th during daylight hours (starting 30 minutes before sunrise and 30 minutes after sunset) when flows are 350 cubic feet per second or greater at the USGS water gage at Burrells Ford. The final rule is consistent with this management direction.

Comment. One respondent was concerned with safety and the remote access for search and rescue teams to do their jobs.

Response. The Forest Service analyzed this concern in the 2012 environmental assessment, ''Managing Recreation Uses in the Upper Segment of the Chattooga Wild and Scenic River Corridor'' (2012 EA) associated with the Forest Plan Amendments for the Nantahala, Chattahoochee-Oconee and Sumter National Forests. The 2012 EA disclosed, based on likely use levels and information from other rivers of similar difficulty, accidents, injuries, and fatalities would likely be low and few would require search and rescue responses.

Comment. Some respondents requested that a new section be added to the final rule that references the 2012 EA and Decision Notices to ensure that there is no change to restrictions and to the scope of the decisions with the issuance of the final rule.

Response. Additional rule language is not needed. The final rule is consistent with the Forest Plan Amendments signed in 2012 for the Nantahala, Chattahoochee-Oconee and Sumter National Forests. The purpose of this regulation is not to specify the terms of any permit but rather to establish the framework that boating on the Chattooga River is prohibited except where authorized under permit. It is then up to site-specific decisions, which will be made following the National Environmental Policy Act (NEPA) procedures and involving the public, to determine the actual terms of any permit that allows boating. The Regulatory Certifications, Environmental Impact section, clearly provides reference to the 2012 EA and the signed Decisions Notices that incorporate plan amendments. The forest plan amendments provide sufficient management direction for the three national forests.

Comment. One respondent supported boating in the upper Chattooga without a permit.

Response. Forest Plan Amendments signed in 2012 for the Nantahala, Chattahoochee-Oconee and Sumter National Forests require individual boaters to fill out a self-registration floating permit.

Comment. Some respondents stated that the proposed rule revisions are inconsistent with the 2012 EA and Decision Notices and would invalidate court rulings that upheld Forest Service management of the Chattooga WSR. Further, the respondents contend that the proposed rule circumvents the agency decision-making process and judicial oversight under the Administrative Procedures Act (APA).

Response. The final rule is consistent with the 2012 EA and Decision Notices and amendments to the Nantahala, Chattahoochee-Oconee and Sumter National Forests. The Forest Service has received favorable court rulings in the following court cases relative to the 2012 EA: Civil Action No.: 8:09–2665–MGL, Amended Order and Opinion; 7/30/2013 US Court of Appeals for the Fourth Circuit, No. 13–1960, 11/05/2014; and Civil Action No.: 8:12–CV–3455–BHH, Opinion and Order. The US District Court, District of South Carolina, Greenville Division found ''. . . that the Forest Service's 2012 Plan for Management of the Chattooga WSR complies with the federal law analyzed . . .''. In 2016 the Nantahala, Chattahoochee-Oconee and Sumter National Forests signed site-specific decisions for specific boater put-in and take-out locations on the Chattooga WSR. This is consistent with the forest plan amendments signed in 2012. Some of these access sites were constructed in 2016. In addition, biophysical monitoring relative to recreation impacts has been completed and specific monitoring as specified in the 2012 plan amendments began in 2015. There has been and continues to be considerable public interest in Forest Service management activities on the Chattooga WSR. The Forest Service is required to comply with NEPA, the APA and other Federal laws during revisions or amendments to land management plans and during planning of site-specific projects.

Comment. Some respondents believe that the Forest Service should have considered all the actions and decisions as connected actions that should have been considered in a single review process.

Response. All management actions and decisions have been informed by the Environmental Assessment (EA), ''Managing Recreation Uses in the Upper Segment of the Chattooga Wild and Scenic River Corridor.'' The Regulatory Certifications, Environmental Impact section, in the final rule clearly provides reference to the 2012 EA and Decisions Notices that incorporate plan amendments into the Nantahala, Chattahoochee-Oconee and Sumter forest plans. The final rule is consistent with current management on the three national forests.

Comment. Some respondents contend that the proposed rule changes would allow floating through private property unless explicitly restricted; and that the proposed rule asserts the 2012 Decisions allow floating unless explicitly restricted.

Response. The final rule prohibits boating on the Chattooga WSR on National Forest System land abutting the river unless authorized by permit. All trails and access points to the Chattooga WSR are located on the Nantahala, Chattahoochee-Oconee and Sumter National Forests. All permitted boating activity occurs down-river from private land. Floating activities authorized by permit will take place entirely through National Forest System land abutting the Chattooga River. Existing trailhead locations enable recreationist to get to the Chattooga WSR using Forest Service trails and access points. Any changes to the existing terms of the permit would need to be approved through a separate NEPA analysis that would involve the public.

Comment. The proposed rule contradicts the Courts understanding of the 2012 Plan by allowing floating use of the Chattooga River unless explicitly restricted.

Response. The final rule is intended to update prohibitions in Region 8, Southern Region, to now be consistent with the Decision Notices (one for each

National Forest) signed on January 31, 2012, which were based upon an Environmental Assessment (EA) titled ''Managing Recreation uses in the Upper Segment of the Chattooga Wild and Scenic River Corridor.'' The final rule prohibits boating on the Chattooga WSR on National Forest System land abutting the river unless authorized by permit. The final rule does not ''allow floating use of the Chattooga River unless explicitly restricted'' as the commenter alleges—rather it says the opposite. The final rule establishes that boating on the Chattooga River is prohibited unless explicitly allowed under the terms of a permit.

Comment. The proposed CFR revision expands Forest Service discretion to issue special use authorizations without limitations.

Response. The self-registration floating permit for private boating has been in use for many decades on the lower segment of the Chattooga WSR. An amended version of this permit that includes the conditions for boating in the upper segment (above GA/SC Highway 28) has been in use since 2012.

Based on public comments received during the comment period on the proposed rule, the final rule will replace the word ''permit'' with the term ''self-registration floating permit'' when referring to private boaters wishing to boat on the Chattooga River. The conditions for boating are listed on the back of the self-registration floating permit and are consistent with forest plan direction for the Nantahala, Chattahoochee-Oconee and Sumter National Forests.

While the proposed rule included the term ''special use authorization,'' which from 36 CFR 251.50, is the more appropriate term to use, the term ''special use authorization'' is also a broader term that includes other types of ''authorizations.'' This has led to some confusion and consequently, the final rule will replace the term ''special use authorization'' with the original term ''special use permit'' when referring to commercial boating that is authorized on the lower segment of the Chattooga WSR. Commercial boating on the upper segment of the Chattooga WSR (above GA/SC Highway 28) is currently prohibited under the terms of the previous decisions. Any changes to the terms of these permits can only be made following the NEPA procedures and involving the public.

Comment. Some respondents stated that the proposed rule is inconsistent with the 2012 Decision Notices and the existing 36 CFR 261.77 language by specifying that the prohibitions are applicable to ''National Forest System land'' instead of ''any area of the . . . National Forest abutting the Chattooga River''.

Response. The term ''National Forest'' can be interpreted to include private lands within a proclaimed National Forest. However, the intent of this rule is not to regulate activities on privately-owned lands. Therefore, it was determined that the applicable term to use in these regulations is ''National Forest System land''.

Comment. Some respondents contend that the original CFR (261.77(d)) included a copy of a Chattooga-specific floater permit that listed the conditions of the permit. The proposed rule revision provides no permit conditions whatsoever. This leaves the proposed rule ''undefined'' and ''limitless.'' Without listing the conditions of the floater permit, it is impossible to know if the CFR revisions are consistent with the 2012 Decisions and forest plan amendments.

Response. The Forest Service intends to issue a revised self-registration floating permit that is consistent with current management of the river as stated in the 2012 Decisions and plan amendments for the Nantahala, Chattahoochee-Oconee, and Sumter National Forests. The permit will list the conditions for private boating on the upper segment of the Chattooga River WSR on the back of the self-registration floating permit. The purpose of this regulation is not to specify the terms of any permit but rather to establish the framework that boating on the Chattooga River is prohibited except where authorized under permit. It is then up to site-specific decisions, which will be made following the NEPA procedures and involving the public, to determine the actual terms of any permit that allows boating.

Comment. Some respondents maintain that the locations for obtaining a permit should be listed like they were in the original CFR (261.77(d)) as they have served a purpose of providing egress points to discrete locations on the River. The rule should include the new locations of where boaters can obtain a permit as this would direct boaters to the approved locations to initiate their trip.

Response. The Department expanded the number of kiosk locations for obtaining information and self-registration floating permits after the 2012 Decisions were signed. The new kiosk locations are adjacent to trailheads close to the locations where boating is permitted for public convenience. It is not necessary to define those in the final rule and information on where and how to get permits along with boating requirements can be shared in a number of venues (Forest Service websites for example).

Comment. The text of the proposed rule does not explicitly detail any of the twelve boating restrictions enumerated in the 2012 Decision Notices.

Response. The final rule only addresses floating prohibitions on the Chattooga WSR. The self-registration floating permit lists the conditions for boating which are consistent with the 2012 Decision Notices and forest plan amendments for the Nantahala, Chattahoochee-Oconee, and Sumter National Forests. This allows flexibility in future management as forest plans are revised or amended and new site-specific decisions are made following NEPA procedures. The purpose of this regulation is not to specify the terms of any permit but rather to establish the framework that boating on the Chattooga River is prohibited except where authorized under permit. It is then up to site-specific decisions, which will be made following the NEPA procedures and involving the public, to determine the actual terms of any permit that allows boating.

Comment. One respondent asked that the final rule clarify that closure orders may still be used to restrict or even prohibit boating to prevent degradation of the Chattooga's Outstandingly Remarkable Values (ORVs).

Response. The final rule does not limit Forest Service authority to issue closure orders as needed.

Comment. One respondent contends that by not stipulating where permits may be obtained, that eventually permit kiosks will be removed entirely. Without permit boxes being present at trailheads, an impression will invariably develop that no permits are required.

Response. The wording in the final rule is clear, that boating on the Chattooga WSR is prohibited without a permit and the permit specifies the conditions for floating the river. Self-registration stations are not being eliminated but have increased with stations being located at key trailheads that provide access to the upper segment of the River where boating takes place. The Forest Service has maintained self-registration stations on the lower segment of the Chattooga WSR since designation and has even added three additional stations on the lower segment over the years. Along with the permit itself, the self-registration stations provide information on rules and regulations.

Comments on Regulatory Certifications in the Proposed Rule

Environmental Impact

Comment. One respondent contends that the proposed rule can only be applied to that portion of the Chattooga WSR within the geographic scope of the Environmental Assessment (EA), ''Managing Recreation Uses in the Upper Segment of the Chattooga Wild and Scenic River Corridor'' to which it tiers.

Response. The 1976 and 1985 forest management plans prohibited boating above GA/SC Highway 28. The 2012 forest plan amendments for the Nantahala, Chattahoochee-Oconee, and Sumter National Forests permitted boating under certain conditions on National Forest System land abutting the Chattooga River. These amendments did not change the status quo on any prohibition that already exists on National Forest System land above the confluence of the Chattooga River and Green Creek all the way to the upper limit of the Chattooga WSR Corridor. The 2012 Decisions simply made conditional exceptions to the long-standing prohibition on floating above GA/SC Highway 28 on National Forest System land abutting the Chattooga WSR. This was reiterated in the July 30, 2013, Amended Order and Opinion from Judge Mary G. Lewis in Civil Action No.: 8:09_2665–MGL, page 4.

No Takings Implications

Comment. Some respondents maintain that a taking analysis was not completed for the proposed rule as required by Executive Order 12630. In addition, the respondents want language added to the final rule that floating is prohibited above the confluence of Green Creek, a section of the River that contains private property.

Response. The final rule does not pose a risk of taking private property. The potential impacts to private lands were evaluated in the Environmental Assessment (EA), ''Managing Recreation Uses in the Upper Segment of the Chattooga Wild and Scenic River Corridor.'' The portions of the River that are permitted for boating are located on National Forest System land and do not include private property or public use of private land. Any changes to what might be allowed under permit can only be made following the NEPA procedures and involving the public.

Federalism and Consultation and Coordination With Indian Tribal Governments

Comment. Some respondents stated that some segments of the Chattooga River are owned by the State and are therefore beyond the scope of Forest Service statutory authority.

Response. The final rule recognizes that the Secretary of Agriculture has the authority to regulate the public use of waters within the boundaries of a Wild and Scenic River. (See 16 U.S.C. 551, 36 CFR 261.1(a)(4), 36 CFR 261.58(z), and Forest Service Manual 2354.01.) The Forest Service's authority to manage recreational uses, including the regulation of floating, in the Chattooga Wild and Scenic River corridor was also challenged in *American Whitewater, et al.* v. *Tidwell, et al.* The U.S. District Court for the District of South Carolina upheld the decision of the Forest Service. The decision of the court was subsequently affirmed by the 4th Circuit Court of Appeals.

Regulatory Certifications for the Final Rule

Environmental Impact

The final rule amends an existing regulation to make it consistent with a USDA, Forest Service decision on the management of the Chattooga Wild and Scenic River, which lies within the Chattahoochee, Nantahala and Sumter National Forests. The Decision Notices (one for each National Forest) were signed on January 31, 2012, which were based upon an Environmental Assessment (EA) titled ''Managing Recreation Uses in the Upper Segment of the Chattooga Wild and Scenic River Corridor.'' The social and environmental effects of this decision are documented in this EA. The final rule amendment is to update the Forest Service regulations to be consistent with this new management decision.

Regulatory Impact

This final rule has been reviewed under USDA procedures and Executive Order 12866 on regulatory planning and review. It has been determined that this is not a significant rule. This rule will not have an annual effect of $100 million or more on the economy, nor will it adversely affect productivity, competition, jobs, the environment, public health and safety, or State or local governments. This rule will not interfere with an action taken or planned by another agency, nor will it raise new legal or policy issues. Finally, this rule will not alter the budgetary impact of entitlement, grant, user fee, or loan programs or the rights and obligations of beneficiaries of such programs. Accordingly, this rule is not subject to Office of Management and Budget (OMB) review under Executive Order 12866.

Regulatory Flexibility Act

This final rule has been considered in light of the Regulatory Flexibility Act (5 U.S.C. 602 *et seq.*). The rule makes minor, technical changes to the Forest Service's regulations. This rule will not have a significant economic impact on a substantial number of small entities as defined by the act because the rule will not impose recordkeeping requirements on them; it will not affect their competitive position in relation to large entities; and it will not affect their cash flow, liquidity, or ability to remain in the market.

No Takings Implications

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 12630. It has been determined that the rule will not pose the risk of a taking of private property.

Civil Justice Reform

This final rule has been reviewed under Executive Order 12988 on civil justice reform. After adoption of this rule, (1) all State and local laws and regulations that conflict with this rule or that impede its full implementation will be preempted; (2) no retroactive effect will be given to this rule; and (3) it will not require administrative proceedings before parties may file suit in court challenging its provisions.

Federalism and Consultation and Coordination With Indian Tribal Governments

The Department has considered this final rule under the requirements of Executive Order 13132 on federalism, and has determined that the rule conforms with the federalism principles set out in this Executive order; will not impose any compliance costs on the States; and will not have substantial direct effects on the States, the relationship between the Federal Government and the States, or the distribution of power and responsibilities among the various levels of government. Therefore, the Department has determined that no further assessment of federalism implications is necessary.

Moreover, this final rule does not have Tribal implications as defined by Executive Order 13175, Consultation and Coordination with Indian Tribal Governments. The Department recognized that one or more Indian Tribes may have direct interest in the management of Chattooga Wild & Scenic River. These Indian Tribes were consulted during the public comment period and no concerns with the proposed rule were expressed.

Energy Effects

This final rule has been reviewed under Executive Order 13211 of May 18, 2001, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. It has been determined that this rule does not constitute a significant energy action as defined in the Executive order.

Unfunded Mandates

Pursuant to Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538), which the President signed into law on March 22, 1995, the Department has assessed the effects of this final rule on State, local, and Tribal Governments and the private sector. This rule will not compel the expenditure of $100 million or more by any State, local, or Tribal Government or anyone in the private sector. Therefore, a statement under section 202 of the act is not required.

Controlling Paperwork Burdens on the Public

This final rule does not contain any recordkeeping or reporting requirements or other information collection requirements as defined in 5 CFR part 1320 that are not already required by law or not already approved for use. Accordingly, the review provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) and its implementing regulations at 5 CFR part 1320 do not apply.

List of Subjects in 36 CFR Part 261

Law enforcement, National forests, Prohibitions.

Therefore, for the reasons set out in the preamble, part 261 of title 36 of the Code of Federal Regulations is amended as follows:

PART 261–PROHIBITIONS

■ 1. The authority citation for part 261 continues to read as follows:

Authority: 7 U.S.C. 1011(f); 16 U.S.C. 460l–6d, 472, 551, 620(f), 1133(c)–(d)(1), 1246(i).

Subpart C–Prohibitions in Regions

■ 2. Revise § 261.77 to read as follows:

§ 261.77 Prohibitions in Region 8, Southern Region.

(a) Using or occupying any area of National Forest System land abutting the Chattooga River for the purpose of entering or going upon the River in, on, or upon any floatable object or craft of every kind or description, unless authorized through a self-registration floating permit or through a special use permit. (The Chattooga River is located in the Nantahala National Forest in North Carolina, the Sumter National Forest in South Carolina, and the Chattahoochee National Forest in Georgia.)

(b) Using or occupying within the scope of any commercial operation or business any area of National Forest System land abutting the Chattooga River for the purpose of entering or going upon the River in, on, or upon any floatable object or craft of every kind or description, unless authorized under a special use permit.

(c) Violating or failing to comply with any of the terms or conditions of any self-registration floating permit or special use permit authorizing the occupancy and use specified in paragraph (a) or (b) of this section is prohibited.

(d) Entering, going, riding, or floating upon any portion or segment of the Chattooga River within National Forest System land in, on, or upon any floatable object or craft of every kind or description, unless authorized through a self-registration floating permit or through a special use permit.

(e) Entering, going, riding, or floating within the scope of any commercial operation or business upon any portion or segment of the Chattooga River within National Forest System land in, on, or upon any floatable object or craft of every kind or description, unless authorized under a special use permit.

(f) Violating or failing to comply with any of the terms or conditions of any self-registration floating permit or special use permit authorizing the occupancy and use specified in paragraph (d) or (e) of this section is prohibited.

Andrea Delgado Fink,

Chief of Staff, Natural Resources and Environment.

[FR Doc. 2023–24569 Filed 11–6–23; 8:45 am]

BILLING CODE 3411–15–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R08–OAR–2023–0272; FRL–11237–02–R8]

Air Plan Approval and Disapproval; Colorado; Serious Attainment Plan Elements and Related Revisions for the 2008 8-Hour Ozone Standard for the Denver Metro/North Front Range Nonattainment Area

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving portions and disapproving portions of a state implementation plan (SIP) revision submitted by the State of Colorado to meet Clean Air Act (CAA) requirements for the 2008 8-hour ozone national ambient air quality standards (NAAQS) in the Denver Metro/North Front Range nonattainment area (DMNFR Area). Specifically, the EPA is approving the submitted enhanced monitoring SIP element as meeting applicable Serious area requirements for the 2008 8-hour ozone NAAQS, and is disapproving the contingency measure element of the SIP submittal. The EPA is taking this action pursuant to the CAA.

DATES: This rule is effective December 7, 2023.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–R08–OAR–2023–0272. All documents in the dockets are listed on the *https://www.regulations.gov* website. Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available through *https://www.regulations.gov,* or please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section for additional availability information.

FOR FURTHER INFORMATION CONTACT: Abby Fulton, Air and Radiation Division, EPA, Region 8, Mailcode 8ARD–IO, 1595 Wynkoop Street, Denver, Colorado, 80202–1129, telephone number: (303) 312–6563, email address: *fulton.abby@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document, ''we,'' ''us,'' and ''our'' means the EPA.

I. Background

The background and rationale for this action are discussed in detail in our August 14, 2023 proposed rule and our Response to Comments document for this action.[1] In the proposed rule, we proposed to approve the enhanced monitoring element and to disapprove the contingency measures element of the March 22, 2021 8-hour ozone attainment plan SIP submission from the State of Colorado for the DMNFR

[1] Proposed rule, Air Plan Approval and Disapproval; Colorado; Serious Attainment Plan Elements and Related Revisions for the 2008 8-Hour Ozone Standard for the Denver Metro/North Front Range Nonattainment Area, 88 FR 54975; the response to comments document is in the docket.

Area. Additionally, we proposed to disapprove certain provisions submitted by the State to meet reasonably available control technology (RACT) requirements in SIP submissions from March 22, 2021 and May 20, 2022. Specifically, we proposed disapproval of the categorical RACT rules for refinery fueled process heaters as well as landfill or biogas fired reciprocating internal combustion engines and the State's RACT determination for the Golden Aluminum facility. This action does not take final action on the RACT portion of the proposal. EPA will take final action on the RACT portion of the August 14, 2023 proposal via a separate action.

II. Comments

We received comments on the August 14, 2023 proposal from several commenters: the Center for Biological Diversity, the Air Pollution Control Division of the Colorado Department of Public Health and Environment, William Weese Pepple & Ferguson on behalf of Suncor Energy Inc., and one citizen. All comments received are in the docket for this action. The comments included views concerning the timing, process, and approach for EPA to act on Colorado's SIP submittals; supportive and adverse comments related to our proposed action on the contingency measures element; and adverse comments related to our proposed action on certain RACT elements. A summary of the comments that are relevant to this final action and the EPA's responses are provided in the Response to Comments document, which is in the docket for this action. Comments related to RACT will be addressed in a separate action.

III. Final Action

The EPA is approving the enhanced monitoring portion of Colorado's ozone attainment plan submitted on March 22, 2021 because we find that it satisfies the requirements under CAA section 182(c)(1) for the DMNFR Area with respect to the 2008 ozone NAAQS. We are disapproving the contingency measures portion of Colorado's ozone attainment plan submitted on March 22, 2021 because we find that it does not satisfy the requirements under CAA sections 172(c)(9) or 182(c)(9) for the DMNFR Area with respect to the 2008 ozone NAAQS. We will be finalizing action on the RACT requirements in SIP submissions from March 22, 2021 and May 20, 2022 in a separate action. EPA has previously acted on all other parts of these submittals.[2]

Section 110(c)(1) of the CAA requires the Administrator to promulgate a Federal implementation plan (FIP) at any time within two years after the Administrator finds that a state has failed to make a required SIP submission, finds a SIP submission to be incomplete, or disapproves a SIP submission, unless the state corrects the deficiency, and the Administrator approves the SIP revision, before the Administrator promulgates a FIP. Therefore, EPA will be obligated under CAA section 110(c)(1) to promulgate a FIP within two years after the effective date of this disapproval, unless the state submits, and the EPA approves, SIP revisions to correct the identified deficiencies before EPA promulgates the FIP.

In addition, this final disapproval will trigger mandatory sanctions in accordance with the timelines and provisions of CAA section 179 and 40 CFR 52.31 unless the state submits, and EPA approves, SIP revisions that correct the identified deficiencies within 18 months of the effective date of the final disapproval action.

IV. Environmental Justice Considerations

The EPA reviewed demographic data, which provides an assessment of individual demographic groups of populations living within the DMNFR Area. The EPA then compared the data to the national averages for each of the demographic groups. The results of this analysis are being provided for informational and transparency purposes. The results of the demographic analysis indicate that for populations within the DMNFR Area, there are census block groups with the percent of people of color (persons who reported their race as a category other than White alone and/or Hispanic or Latino) is greater than the national average (39%) and above the 80th percentile.[3] There are also census block groups within the DMNFR Area that are below the national average (33%) poverty level and above the 80th percentile.[4]

This final SIP action identifies deficiencies in the contingency measure element of the March 22, 2021 SIP submittal for the DMNFR Area under the 2008 8-hour ozone NAAQS. The EPA's disapproval of these contingency measures, if finalized, would require that Colorado submit plans for the DMNFR Area containing contingency measures consistent with the requirements of the CAA as explained in *Sierra Club* v. *EPA,* 985 F.3d 1055 (D.C. Cir. 2021). Such measures would help to improve air quality in the entire affected nonattainment area through ongoing reductions of ozone precursor emissions should the measures be triggered.

The CAA requires this action, and the EPA recognizes the adverse impacts of ozone. Information on ozone and its relationship to negative health impacts can be found in the National Ambient Air Quality Standards for Ozone.[5] We expect that this action and resulting emission reductions will generally be neutral or contribute to reduced environmental and health impacts on all populations in the DMNFR Area, including people of color and low income populations. At a minimum, this action would not worsen any existing air quality and is expected to ensure the area is meeting requirements to attain and/or maintain air quality standards. Further, there is no information in the record indicating that this action is expected to have disproportionately high or adverse human health or environmental effects on a particular group of people.

V. Statutory and Executive Order Reviews

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

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);

[2] Final rule, Air Plan Approval, Conditional Approval, Limited Approval and Limited Disapproval; Colorado; Serious Attainment Plan Elements and Related Revisions for the 2008 8-Hour Ozone Standard for the Denver Metro/North Front Range Nonattainment Area, 88 FR 29827 (May 9, 2023).

[3] See ''EJSCREEN Maps'' pdf, available within the docket.

[4] *Id.*

[5] Final rule, 73 FR 16436 (March 12, 2008).

• Does not contain any unfunded mandate or significantly or uniquely affect small governments, described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);

• Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);

• Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);

• Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);

• Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and

In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

Executive Order 12898 (Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations, 59 FR 7629, Feb. 16, 1994) directs Federal agencies to identify and address ''disproportionately high and adverse human health or environmental effects'' of their actions on minority populations and low-income populations to the greatest extent practicable and permitted by law. EPA defines environmental justice (EJ) as ''the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.'' EPA further defines the term fair treatment to mean that ''no group of people should bear a disproportionate burden of environmental harms and risks, including those resulting from the negative environmental consequences of industrial, governmental, and commercial operations or programs and policies.''

The Colorado Air Quality Control Division did not evaluate environmental justice considerations as part of its SIP submittal; the CAA and applicable implementing regulations neither prohibit nor require such an evaluation. EPA performed an environmental justice analysis, as is described above in the section titled, ''Environmental Justice Considerations.'' The analysis was done for the purpose of providing additional context and information about this rulemaking to the public, not as a basis of the action. Due to the nature of the action being taken here, this action is expected to have a neutral to positive impact on the air quality of the affected area. In addition, there is no information in the record upon which this decision is based inconsistent with the stated goal of E.O. 12898 of achieving environmental justice for people of color, low-income populations, and Indigenous peoples.

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a 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. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by January 8, 2024. Filing a petition for reconsideration by the Administrator of this final rule will not affect the finality of this action for the purposes of judicial review, nor will it extend the time within which a petition for judicial review may be filed or postpone the effectiveness of this rule. This action may not be challenged later in proceedings to enforce its requirements (see section 307(b)(2)).

List of Subjects in 40 CFR Part 52

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

Dated: October 26, 2023.

KC Becker,

Regional Administrator, Region 8.

For the reasons set forth in the preamble, 40 CFR part 52 is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

Subpart G—Colorado

■ 2. In § 52.320, the table in paragraph (e) is amended by revising the entry ''2008 Ozone Serious Area Attainment Plan'' to read as follows:

§ 52.320 Identification of plan.

* * * * *

(e) * * *

Title		State effective date	EPA effective date	Final rule citation/date		Comments
*	*	*	*	*	*	*
Maintenance and Attainment Plan Elements						
*	*	*	*	*	*	*
Denver Metropolitan Area						

Title	State effective date	EPA effective date	Final rule citation/date	Comments
* *	*	*	*	* *
2008 Ozone Serious Area Attainment Plan.	2/14/2020	12/7/2023	[insert **Federal Register** citation], 11/7/2023.	Disapproval of contingency measures. RACM and attainment demonstration withdrawn.
* *	*	*	*	* *

[FR Doc. 2023–24230 Filed 11–6–23; 8:45 am]

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R8–ES–2022–0066; FF09E22000 FXES1113090FEDR 223]

RIN 1018–BF51

Endangered and Threatened Wildlife and Plants; Removing Island Bedstraw and Santa Cruz Island Dudleya From the List of Endangered and Threatened Plants

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule; final post-delisting monitoring plans.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), are removing the plants island bedstraw (*Galium buxifolium*) and Santa Cruz Island dudleya (*Dudleya nesiotica*) from the Federal List of Endangered and Threatened Plants on the basis of recovery. Both of these native plant species occur in the Channel Islands National Park off the coast of California. This final rule is based on our review of the best available scientific and commercial data, which indicates that the threats to island bedstraw and Santa Cruz Island dudleya have been eliminated or reduced to the point that these species have recovered and no longer meet the definition of an endangered or threatened species under the Endangered Species Act of 1973, as amended (Act).

DATES: This rule is effective December 7, 2023.

ADDRESSES: This final rule is available on the internet at *https://www.regulations.gov* at Docket No. FWS–R8–ES–2022–0066.

Availability of supporting materials: This final rule and supporting documents, including the 5-year reviews, the Recovery Plan, post-delisting monitoring plans, and the species status assessment (SSA) reports for island bedstraw and Santa Cruz Island dudleya, are available at *https://ecos.fws.gov,* and at *https://www.regulations.gov* under Docket No. FWS–R8–ES–2022–0066 (also see **FOR FURTHER INFORMATION CONTACT**). In addition, the supporting files for this final rule will be available for public inspection by appointment, during normal business hours, at: U.S. Fish and Wildlife Service, Ventura Fish and Wildlife Office, 2493 Portola Road #B, Ventura, CA, 93003; telephone 805–644–1766.

FOR FURTHER INFORMATION CONTACT: Stephen P. Henry, Field Supervisor, U.S. Fish and Wildlife Service, Ventura Fish and Wildlife Office, 2493 Portola Road, Suite B, Ventura, CA 93003; telephone 805–644–1766. Direct all questions or requests for additional information to: Island bedstraw and/or Santa Cruz Island dudleya Questions, to the address above. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION:

Executive Summary

Why we need to publish a rule. Under the Act, a species warrants delisting if it no longer meets the definition of an endangered (in danger of extinction throughout all or a significant portion of its range) or threatened species (likely to become endangered within the foreseeable future throughout all or a significant portion of its range). Island bedstraw is listed as endangered, and Santa Cruz Island dudleya is listed as threatened, and we are delisting both species. We have determined that island bedstraw and Santa Cruz Island dudleya do not meet the Act's definition of an endangered or threatened species. Delisting a species can be completed only by issuing a rule through the Administrative Procedure Act rulemaking process (5 U.S.C. 551 *et seq.*).

What this document does. This rule removes island bedstraw and Santa Cruz Island dudleya from the Federal List of Endangered and Threatened Plants in title 50 of the Code of Federal Regulations (at 50 CFR 17.12(h)) based on their recovery. The prohibitions and conservation measures provided by the Act, particularly through sections 7 and 9, will no longer apply to island bedstraw or Santa Cruz Island dudleya.

The basis for our action. Under the Act, we may determine that a species is an endangered species or threatened species because of any of five factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence. The determination to delist a species must be based on an analysis of the same factors.

Under the Act, we must review the status of all listed species at least once every 5 years. We must delist a species if we determine, on the basis of the best available scientific and commercial data, that the species is neither a threatened species nor an endangered species. Our regulations at 50 CFR 424.11 identify three reasons why we might determine a listed species shall be delisted: (1) The species is extinct; (2) the species does not meet the definition of an endangered species or a threatened species, or (3) the listed entity does not meet the definition of a species. Here, we have determined that the island bedstraw and Santa Cruz Island dudleya do not meet the definition of an endangered species or a threatened species; therefore, we are delisting them.

Previous Federal Actions

Please refer to the proposed delisting rule (87 FR 73722) for island bedstraw and Santa Cruz Island dudleya published on December 1, 2022, for a

detailed description of previous Federal actions concerning these species.

Peer Review

A species status assessment (SSA) team prepared SSA reports for both island bedstraw (Service 2021a, entire) and Santa Cruz Island dudleya (Service 2021b, entire). The SSA team was composed of Service biologists, in consultation with other species experts. These SSA reports represent a compilation of the best scientific and commercial data available concerning the status of these species, including the impacts of past, present, and future factors (both negative and beneficial) affecting both of the species.

In accordance with our joint policy on peer review published in the **Federal Register** on July 1, 1994 (59 FR 34270), and our August 22, 2016, memorandum updating and clarifying the role of peer review in listing and recovery actions under the Act, we solicited independent scientific reviews of the information contained in the SSA reports for island bedstraw and Santa Cruz Island dudleya. As discussed in the proposed rule, we sent the island bedstraw SSA report to three independent peer reviewers and received three responses. We sent the Santa Cruz Island dudleya SSA report to three independent peer reviewers and received one response. The island bedstraw SSA report was also submitted to our Federal, State, Tribal, and other partners for scientific review. We received one partner review from the U.S. Geological Survey (USGS); Channel Islands Field Station in Ventura, California. The dudleya SSA report was also submitted to our Federal, State, Tribal and other partners for scientific review. We received two partner reviews from The Nature Conservancy (TNC) and USGS (Channel Islands Field Station in Ventura, California). The peer reviews can be found at *https://www.regulations.gov* under Docket No. FWS–R8–ES–2022–0066 and *https://ecos.fws.gov.* In preparing this final rule, we incorporated the results of these reviews, as appropriate, into the final SSA reports for both species, which are the foundation for the proposed rule and this final rule. A summary of the peer review comments and our responses can be found in the Summary of Comments and Recommendations below.

Summary of Changes From the Proposed Rule

In preparing this final rule, we reviewed and fully considered the comments received on the proposed rule. We did not receive substantive additional information regarding the proposed actions, and, therefore, we did not make any changes from the proposed rule in this final rule.

Summary of Comments and Recommendations

In the proposed rule published on December 1, 2022, we requested that all interested parties submit written comments on the proposal by January 30, 2023. We also contacted appropriate Federal and State agencies, scientific experts and organizations, and other interested parties and invited them to comment on the proposal. We did not receive any requests for a public hearing, or substantive information during the comment period. We received two public comments that were not substantive.

Peer Reviewer Comments

As discussed in Peer Review above, we received comments from three peer reviewers on the draft SSA reports. We reviewed all comments we received from the peer reviewers for substantive issues and new information regarding the contents of the SSA reports. Peer reviewer comments are addressed in the following summary. As discussed above, because we conducted this peer review prior to publication of our proposed rule, we had already incorporated all applicable peer review comments into the final version of the SSA report, which was the foundation for the proposed rule and this final rule.

The peer reviewers generally concurred with our methods and conclusions and provided additional scientific and editorial suggestions. These suggestions included discussions of climate change effects, competition, genetic variation, possible clonal spread and effects of erosion for island bedstraw, and possible competitive and fire effects for Santa Cruz Island dudleya. The peer reviewer comments were addressed as necessary within the final versions of the SSA reports.

Delisting Determination

Background

The following discussion contains information that was presented in the proposed rule to delist island bedstraw and Santa Cruz Island dudleya (87 FR 73722, December 1, 2022). A thorough discussion of both species' description, habitat, and life history is also found in that proposed rule.

Island Bedstraw

Island bedstraw occurs on Santa Cruz and San Miguel Islands of the Channel Islands in Santa Barbara County, California (figure 1). It is a long-lived, flowering woody shrub that can be more than 1 m (3 ft) tall and may sprawl laterally wider than it is tall. The basal stem diameter can exceed 13 millimeters (mm) (0.5 inch (in)) (McEachern et al. 2019a, p. 20). Stems can be glabrous, scabrous, or sparsely hairy. Its leaves are large for the genus and tend to turn red and be lost under summer drought stress conditions. Flowers are small (3–4 mm or 0.10–0.15 in diameter) and are greenish white, often with darker petal tips or centers. The fruit is a schizocarp (a dry fruit that splits into parts when ripe) comprising two single-seeded mericarps, typically referred to as nutlets. While it is not known how long adult plants can live, they can likely live more than 20 years, if not longer (McEachern 2020, pers. comm.).

Historically, island bedstraw has been characterized as restricted to coastal bluffs, steep rocky slopes, and sea cliffs in the coastal-bluff scrub vegetation (Junak et al. 1995, p. 254; Dempster 1993, p. 982; Soza 2012, p. 1211). However, the plant has also been found in other places, like in pine forest and at interior locations. For Santa Cruz Island, the number of known island bedstraw sites has increased with each successive survey effort, from 13 to 27 to 36 over the course of 20 years and 3 survey efforts. The number of sites on San Miguel Island has remained at six. Each site represents a separate population of island bedstraw for the purposes of this analysis. Where data are available, the estimated number of plants within sites has increased over time, sometimes dramatically. Plant totals have gone from about 100 to about 10,000 for Santa Cruz Island, and the most recent total does not include most of the terraces or cliffs on the coastal sites. The total number of known plants on San Miguel Island has increased from about 500 to about 5,000, again not including most cliff-face plants. Most of the 42 total sites are either extant or presumed to be extant. Island bedstraw seems to be expanding on terraces and other non-cliff habitats; this expansion is demonstrated at several sites. Further information on the basic biology and ecology of island bedstraw is summarized in the SSA report (Service 2021a, entire).

Santa Cruz Island Dudleya

Santa Cruz Island dudleya is a succulent perennial, known from only one population (represented by five subpopulations) on the westernmost tip of Santa Cruz Island in Santa Barbara County, California (figure 1). In general, little is known specifically about the life history of Santa Cruz Island dudleya. The species is a perennial succulent that is known to reproduce only by seed. The seed is extremely small and may be transported only a short distance by wind or water where it may germinate quickly if conditions allow or remain viably dormant for years. Many *Dudleya* species recruit most successfully into a cryptogamic substrate, but it is unknown if this substrate is a requirement for Santa Cruz Island dudleya. Seedlings require open spaces for germination and are not reproductive in their first year. Plants are self-compatible but require pollinators, some of which may be native bees. Seed production is not pollinator limited, and a reproductive plant can produce more than 1,000 seeds per year. Plants can live for at least several years. Older plants that have previously flowered may have years when they do not flower. Santa Cruz Island dudleya is found mostly on the lowest marine terraces from about 20–30 m (66–98 ft) elevation. The soils are sandy and marine sediment derived or have a greater clay fraction derived from basaltic rock (Klinger et al. unpublished, p. 6). The more coastal soils are considered to be more saline (Vivrette 2002, entire). Further information on the basic biology and ecology of Santa Cruz Island dudleya is summarized in the SSA report (Service 2021b, entire).

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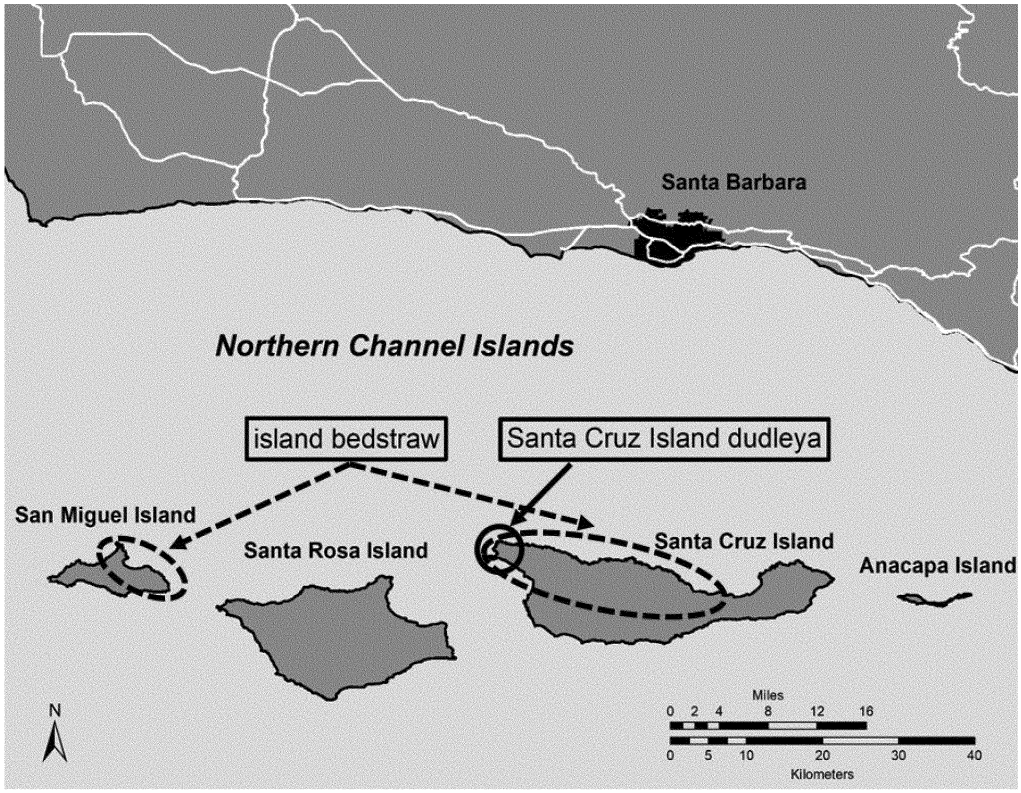

Figure 1. Locations of island bedstraw and Santa Cruz Island dudleya in the Channel Islands National Park off the coast of California.

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Recovery Plan and Recovery Criteria

Section 4(f) of the Act directs us to develop and implement recovery plans for the conservation and survival of endangered and threatened species unless we determine that such a plan will not promote the conservation of the species. Under section 4(f)(1)(B)(ii) of the Act, recovery plans must, to the maximum extent practicable, include objective, measurable criteria which, when met, would result in a determination, in accordance with the provisions of section 4 of the Act, that the species be removed from the Lists of Endangered and Threatened Wildlife and Plants.

Recovery plans provide a roadmap for us and our partners on methods of enhancing conservation and minimizing threats to listed species, as well as measurable criteria against which to evaluate progress towards recovery and assess the species' likely future condition. However, they are not regulatory documents and do not substitute for the determinations and promulgation of regulations required under section 4(a)(1) of the Act. A decision to revise the status of a species or to delist a species is ultimately based on an analysis of the best scientific and commercial data available to determine whether a species is no longer an endangered species or a threatened species, regardless of whether that information differs from the recovery plan.

There are many paths to accomplishing recovery of a species, and recovery may be achieved without all of the criteria in a recovery plan being fully met. For example, one or

more criteria may be exceeded while other criteria may not yet be accomplished. In that instance, we may determine that the threats are minimized sufficiently and that the species is robust enough that it no longer meets the definition of an endangered species or a threatened species. In other cases, we may discover new recovery opportunities after having finalized the recovery plan. Parties seeking to conserve the species may use these opportunities instead of methods identified in the recovery plan. Likewise, we may learn new information about the species after we finalize the recovery plan. The new information may change the extent to which existing criteria are appropriate for identifying recovery of the species. The recovery of a species is a dynamic process requiring adaptive management that may or may not follow all of the guidance provided in a recovery plan.

The recovery plan (Service 2000, p. 62) for island bedstraw and Santa Cruz Island dudleya describes the recovery goals, objectives, and criteria that need to be achieved to consider removing these species from the Federal List of Endangered and Threatened Plants. We summarize the goals and then discuss progress toward meeting the recovery criteria in the following sections.

Recovery Goals and Objectives

In a recovery plan, the overall recovery goal is to improve the status of the species such that the protections of the Act are no longer needed. Preliminary goals and objectives include (1) stabilizing and protecting populations, (2) conducting research necessary to refine recovery criteria, and (3) reclassifying to threatened (downlisting) those species currently listed as endangered (reclassification being appropriate when a taxon is no longer in danger of extinction throughout all or a significant portion of its range). Because data upon which to base decisions about reclassification and recovery were mostly lacking when the recovery plan was developed, downlisting and recovery criteria in the recovery plan are necessarily preliminary (Service 2000, p. 62).

The following recovery criteria that generally apply to both of these species have been met: (1) provide protection and adaptive management of currently known (and in some cases historical) sites; (2) provide evidence that the populations at these sites are stable or increasing over a number of years, which is determined by the life history of the individual species; (3) preserve the genetic diversity of the species by storing seeds in cooperating facilities; and (4) develop reliable seed germination and propagation techniques.

Determining whether a species' current status meets the overall recovery goal and associated objectives requires a broad evaluation of the trends in the observed numbers of occurrences indicated by surveys and monitoring, the abundance and distribution of suitable habitat, evaluation of the seed bank, and the effectiveness of protective measures that have been implemented to reduce threats from human activities such as soil loss and herbivory by feral pigs and ungulates, disturbance by pig rooting, collecting for botanical and horticultural use, and trampling by humans. In addition, we also examine the effectiveness of protective measures that have been implemented to reduce threats from nonnative plants, the risk associated with small population size, climate change, and fire. In order to evaluate threats to the species, we must consider potential impacts within the foreseeable future. The recovery plan (Service 2000, entire) used 10–15 years as the period of time to evaluate population stability because that time period reflects a typical multiyear precipitation cycle (Service 2000, p. 63). Unique recovery criteria for island bedstraw and Santa Cruz Island dudleya are covered in the recovery plan (Service 2000, pp. 64–68) and are discussed below.

Recovery Criteria

Island Bedstraw Downlisting Criteria

The recovery plan identified seven criteria for reclassifying island bedstraw to a threatened species (Service 2000, pp. 64–68):

• *Downlisting Criterion 1: Stabilize or increase populations on Santa Cruz and San Miguel Islands with evidence of natural recruitment for a period of 20 years that includes the normal precipitation cycle.*

Status of achieving recovery criterion: Since the time of listing, researchers have found 23 new sites on Santa Cruz Island, and no new sites on San Miguel Island, and the total number of sites has increased from 19 to 42 (three sites on Santa Cruz Island did not have plants observed in the 2004–2006 surveys and were not relocated or remapped by the 2015 helicopter survey so are considered possibly extirpated). On San Miguel Island, for three of the six historical sites that were surveyed, significant increases in numbers occurred between the time of listing and the most recent survey. Combined numbers for both islands have increased from 512–603 at the time of listing to at least 15,730 individuals at the time of 2015 and 2017 helicopter surveys. We conclude that this criterion has been met.

• *Downlisting Criterion 2: Reintroduce plants to historical locations.*

Status of achieving recovery criterion: No introduction of island bedstraw to any of the historical locations where it is possibly extirpated and no outplantings to augment extant historical sites have occurred. However, at the historical sites, plant numbers are generally increasing without plants being added artificially. Although this criterion has not been met, we conclude it is no longer needed.

• *Downlisting Criterion 3: Seed stored in Center for Plant Conservation (CPC) cooperating facilities.*

Status of achieving recovery criterion: Currently, only a small amount of seed from a few sites on Santa Cruz Island is stored at the Santa Barbara Botanic Garden (SBBG), a CPC facility. Thorough conservation seed banking requires seed in storage from a good representation of sites over the range of the species. A few sites with currently only a small amount of seed is not sufficient to cover that standard. We conclude that this criterion has not been met. While there are plans to bolster the conservation seed bank, with the substantial natural recovery of island bedstraw this criterion no longer has the urgency it did at the time of listing. Because so many new populations have been documented, and the abundance is so great, conservation seed banking is not as important as it was thought to be at the time of the recovery plan.

• *Downlisting Criterion 4: Seed germination and propagation techniques understood.*

Status of achieving recovery criterion: While seeds have been germinated and the resulting plants have grown for several years, the conditions in which the seeds were germinated were fairly general, and optimal protocols have not been developed. We conclude that this criterion has not been met. However, we do not think Downlisting Criterion 4 is needed anymore because the numbers of island bedstraw are increasing naturally.

• *Downlisting Criterion 5: Life-history research conducted.*

Status of achieving recovery criterion: Research over a 10-year period on the life history of the species, particularly flower biology and demography, has shown recruitment episodes and documented transitions through life-history stages. We conclude that this criterion has been met.

• *Downlisting Criterion 6: Surveys of historical locations conducted.*

Status of achieving recovery criterion: Most of the 13 historical sites on Santa Cruz Island have been resurveyed at least once since the time of listing, and plants were found at most of those sites. In addition, most of the 14 new locations found between 2004 and 2006 were either remapped or had plant numbers estimated in 2015 surveys. Most of the six historical sites on San Miguel Island have also been resurveyed, and plants were also found at all of those resurveyed sites. We conclude that this criterion has been met.

• *Downlisting Criterion 7: If declining, determine cause and reverse trend.*

Status of achieving recovery criterion: The species has not been declining on either Santa Cruz or San Miguel Islands. Rather, it has been dramatically increasing, and many new sites have been found since the time of listing. We conclude that this criterion has been met.

Island Bedstraw Delisting Criteria

In addition to the seven downlisting criteria above, the recovery plan identified three criteria for removing island bedstraw from the Federal List of Endangered and Threatened Plants (Service 2000, pp. 64–68):

• *Delisting Criterion 1: Discover or establish five additional populations per island (San Miguel and Santa Cruz).*

Status of achieving recovery criterion: Researchers have discovered 23 previously unknown sites on Santa Cruz Island. No new sites have been discovered or established on San Miguel Island. San Miguel Island lacks the extensive suitable habitat of Santa Cruz Island, and there may not be additional undiscovered populations; however, surveyed populations have increased in numbers of individuals. Based on the lack of extensive suitable habitat on San Miguel Island, this criterion may not be possible for San Miguel Island. We conclude that this criterion has been met for Santa Cruz Island but not for San Miguel Island.

• *Delisting Criterion 2: No decline after downlisting for 10 years.*

Status of achieving recovery criterion: We conclude that this criterion is not relevant since we have not downlisted the species.

• *Delisting Criterion 3: All potential habitat surveyed.*

Status of achieving recovery criterion: Currently, not every part of the north coast of Santa Cruz Island has been surveyed, nor have detailed surveys occurred everywhere on San Miguel Island or in potential habitat on the north coast of Santa Rosa Island. Additionally, historical interior sites have not been resurveyed sufficiently. We conclude that this criterion has not been met. However, this criterion may no longer be relevant because the numbers of island bedstraw plants have increased substantially on the islands from which it is known.

Santa Cruz Island Dudleya Delisting Criteria

The recovery plan identified six criteria for removing Santa Cruz Island dudleya from the Federal List of Endangered and Threatened Plants (Service 2000, pp. 64–68):

• *Delisting Criterion 1: Maintain the existing population as stable with evidence of natural recruitment for a period of 20 years that includes the normal precipitation cycle.*

Status of achieving recovery criterion: Data indicate that the population size is stable at between 40,000 and 200,000 plants estimated per survey over the last 25 years, with the last estimate of 120,000 in 2019. In 2019 a robust repeatable survey protocol was established and baseline data have been collected to assess future trends. This criterion has been met.

• *Delisting Criterion 2: Seed stored in CPC cooperating facilities.*

Status of achieving recovery criterion: An abundance of recently collected seed (19,568 seeds from 78 maternal lines) is stored at the SBBG (California Plant Rescue, 2023). This criterion has been met.

• *Delisting Criterion 3: Seed germination and propagation techniques understood.*

Status of achieving recovery criterion: While no specific work has been done with Santa Cruz Island dudleya, seed germination and plant propagation techniques are well understood for many other *Dudleya* species, including other closely related species in the same subgenus. We conclude that this criterion has been met.

• *Delisting Criterion 4: Weed competition understood and managed.*

Status of achieving recovery criterion: The vegetation of Santa Cruz Island is still changing since the complete removal of feral ungulates. Some aspects of the interactions of nonnative annual grasses and Santa Cruz Island dudleya were investigated more than 20 years ago, but little research has been done recently. We conclude that this criterion has not been met. However, Santa Cruz Island dudleya has not been observed to have been competitively impacted by weeds and is at least stable in population size at 40,000–200,000 individuals over the last 25 years, so while weeds may be a threat, they have not seemed to have had an impact on population stability.

• *Delisting Criterion 5: Pig damage controlled.*

Status of achieving recovery criterion: Pigs were completely removed from Santa Cruz Island by 2006, and substantial passive vegetation recovery has occurred. This criterion has been met.

• *Delisting Criterion 6: Life-history research conducted.*

Status of achieving recovery criterion: While originally planned, no additional life-history research has been conducted specifically on Santa Cruz Island dudleya since the time of listing. However, many life-history characteristics are similar throughout *Dudleya* and applicable to this species. The criterion is considered met through knowledge of the biology of similar species.

Summary of Recovery Criteria

In the recovery plan, the overall recovery goal is to improve the status of the species such that the protections of the Act are no longer needed. Preliminary goals and objectives include stabilizing and protecting populations, conducting research, and reclassifying species to threatened (downlisting) when appropriate. The recovery plan criteria that generally apply to both of these species have been met. The recovery plan's unique recovery criteria for island bedstraw and Santa Cruz Island dudleya (Service 2000, pp. 64–68) are discussed above and summarized below.

Research and survey efforts have clarified the distribution, abundance, and habitat characteristics of island bedstraw and Santa Cruz Island dudleya. This information has resulted in a better understanding of the species' ecology and has shown an increase in the species' range and numbers of sites and individuals for island bedstraw, and has shown population stability and an increase in distribution for Santa Cruz Island dudleya.

Overall, the intent of the recovery criteria has been met in collaboration with our partners. TNC and the National Park Service (NPS) have provided protection and adaptive management of historical and recent sites. USGS, TNC, and others have provided survey evidence that the populations at these sites are stable or increasing over a number of years. TNC and NPS have coordinated to preserve the genetic diversity of both species by conservation banking of seeds in an approved facility. Both species are considered recovered without reliable seed germination and propagation

techniques being developed. Therefore, we conclude that, based on the best available information, the intent of the recovery criteria in the recovery plan has been achieved and the recovery goal identified in the plan has been met for both island bedstraw and Santa Cruz Island dudleya.

Regulatory and Analytical Framework

Regulatory Framework

Section 4 of the Act (16 U.S.C. 1533) and its implementing regulations in title 50 of the Code of Federal Regulations set forth the procedures for determining whether a species is an endangered species or a threatened species, issuing protective regulations for threatened species, and designating critical habitat for endangered and threatened species. In 2019, jointly with the National Marine Fisheries Service, the Service issued a final rule that revised the regulations in 50 CFR part 424 regarding how we add, remove, and reclassify endangered and threatened species and the criteria for designating species' critical habitat (84 FR 45020; August 27, 2019). On the same day the Service also issued final regulations that, for species listed as threatened species after September 26, 2019, eliminated the Service's general protective regulations automatically applying to threatened species the prohibitions that section 9 of the Act applies to endangered species (84 FR 44753; August 27, 2019).

The Act defines an ''endangered species'' as a species that is in danger of extinction throughout all or a significant portion of its range, and a ''threatened species'' as a species that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. The Act requires that we determine whether any species is an endangered species or a threatened species because of any of the following factors:

(A) The present or threatened destruction, modification, or curtailment of its habitat or range;

(B) Overutilization for commercial, recreational, scientific, or educational purposes;

(C) Disease or predation;

(D) The inadequacy of existing regulatory mechanisms; or

(E) Other natural or manmade factors affecting its continued existence.

These factors represent broad categories of natural or human-caused actions or conditions that could have an effect on a species' continued existence. In evaluating these actions and conditions, we look for those that may have a negative effect on individuals of the species, as well as other actions or conditions that may ameliorate any negative effects or may have positive effects. The determination to delist a species must be based on an analysis of the same five factors.

We use the term ''threat'' to refer in general to actions or conditions that are known to or are reasonably likely to negatively affect individuals of a species. The term ''threat'' includes actions or conditions that have a direct impact on individuals (direct impacts), as well as those that affect individuals through alteration of their habitat or required resources (stressors). The term ''threat'' may encompass—either together or separately—the source of the action or condition or the action or condition itself.

However, the mere identification of any threat(s) does not necessarily mean that the species meets the statutory definition of an ''endangered species'' or a ''threatened species.'' In determining whether a species meets either definition, we must evaluate all identified threats by considering the species' expected response and the effects of the threats—in light of those actions and conditions that will ameliorate the threats—on an individual, population, and species level. We evaluate each threat and its expected effects on the species, then analyze the cumulative effect of all of the threats on the species as a whole. We also consider the cumulative effect of the threats in light of those actions and conditions that will have positive effects on the species—such as any existing regulatory mechanisms or conservation efforts. The Secretary determines whether the species meets the definition of an ''endangered species'' or a ''threatened species'' only after conducting this cumulative analysis and describing the expected effect on the species now and in the foreseeable future.

The Act does not define the term ''foreseeable future,'' which appears in the statutory definition of ''threatened species.'' Our implementing regulations at 50 CFR 424.11(d) set forth a framework for evaluating the foreseeable future on a case-by-case basis. The term ''foreseeable future'' extends only so far into the future as we can reasonably determine that both the future threats and the species' responses to those threats are likely. In other words, the foreseeable future is the period of time in which we can make reliable predictions. ''Reliable'' does not mean ''certain''; it means sufficient to provide a reasonable degree of confidence in the prediction. Thus, a prediction is reliable if it is reasonable to depend on it when making decisions.

It is not always possible or necessary to define the foreseeable future as a particular number of years. Analysis of the foreseeable future uses the best scientific and commercial data available and should consider the timeframes applicable to the relevant threats and to the species' likely responses to those threats in view of its life-history characteristics. Data that are typically relevant to assessing the species' biological response include species-specific factors such as lifespan, reproductive rates or productivity, certain behaviors, and other demographic factors.

Analytical Framework

The island bedstraw and Santa Cruz Island dudleya SSA reports document the results of our comprehensive biological review of the best scientific and commercial data regarding the status of these species, including an assessment of the potential threats to both species. The SSA reports do not represent our decision on whether these species should be removed from the List of Endangered and Threatened Plants. However, they provide the scientific basis that informs our regulatory decisions, which involve the further application of standards within the Act and its implementing regulations and policies.

To assess island bedstraw and Santa Cruz Island dudleya viability, we used the three conservation biology principles of resiliency, redundancy, and representation (Shaffer and Stein 2000, pp. 306–310). Briefly, resiliency supports the ability of the species to withstand environmental and demographic stochastic events (for example, wet or dry, warm or cold years), redundancy is the ability of the species to withstand catastrophic events (for example, droughts, large pollution events), and representation is the ability of the species to adapt to both near-term and long-term changes in its physical and biological environment (for example, climate conditions, pathogen). In general, species viability will increase with increases in resiliency, redundancy, and representation (Smith et al. 2018, p. 306). Using these principles, we identified the species' ecological requirements for survival and reproduction at the individual, population, and species levels, and described the beneficial and risk factors influencing the species' viability.

The SSA process can be categorized into three sequential stages. During the first stage, we evaluated the individual species' life-history needs. The next stage involved an assessment of the historical and current condition of the

species' demographics and habitat characteristics, including an explanation of how the species arrived at its current condition. The final stage of the SSA involved making predictions about the species' responses to positive and negative environmental and anthropogenic influences. Throughout all of these stages, we used the best available information to characterize viability as the ability of each species to sustain populations in the wild over time which we then used to inform our regulatory decision.

The following is a summary of the key results and conclusions from the island bedstraw and Santa Cruz Island dudleya SSA reports; the full SSA reports for both species can be found at Docket FWS–R8–ES–2022–0066 on *https://www.regulations.gov* and at *https://ecos.fws.gov.*

Summary of Biological Status and Threats

In this discussion, we briefly review the biological condition of each species and their resources, and the threats that influence the species' current and future condition, in order to assess the species' overall viability and the risks to that viability. The island bedstraw SSA (Service 2021a, entire) and Santa Cruz Island dudleya SSA (Service 2021b, entire) document our comprehensive biological status review for both species, including an assessment of the potential threats to both species.

The following is a summary of those status reviews and the best available information gathered that has informed this decision.

Island Bedstraw Biological Condition

Plants like the island bedstraw, with functionally unisexual flowers, need flowers of opposite gender for successful seed set, requiring one or more pollinators. Seeds need to be able to survive until germination conditions are appropriate, and they need a stable location to germinate and grow. Larger plants also need stable locations for long-term survival. A sufficient amount of moisture is needed for all island bedstraw life stages, and some of this moisture may be provided by fog. Island bedstraw populations need suitable habitat that supports survival and reproduction of an adequate number of individuals with vital rates that maintain self-sustaining populations despite stochastic events. Overall, the species needs sufficiently resilient populations distributed across its range to withstand catastrophic events. Population sizes should be large enough so that the species has the ability to adapt to changing conditions.

At the time of listing, there were 19 known sites of island bedstraw, 13 on Santa Cruz Island and 6 on San Miguel Island. There may have been 44–133 or more plants on Santa Cruz Island and more than 470 on San Miguel Island, with an estimated 515–603 plants on the 2 islands combined.

After listing in 1997, from 2004 through 2006, significant efforts were made to survey Santa Cruz Island for island bedstraw. Of the 13 historical sites, 10 were surveyed, and no plants were found at 3 of those sites. An additional 14 new sites were discovered, expanding the distribution of sites to the west and east of the historical sites. At least 692–792 plants were counted at the historical sites, and at least 459 plants were counted at the new sites, for a total of at least 1,151–1,251 plants. No comparable surveys occurred on San Miguel Island; the only observations were counts at two sites in 1998 (McEachern et al. 2019a, pp. 14–16).

In 2015 on Santa Cruz Island and in 2017 on San Miguel Island, Wildlands Conservation Science (Lompoc, CA) conducted rare plant surveys by helicopter (Ball and Olthof 2017, entire; Ball et al. 2018, entire). Additional observations, not associated with helicopter surveys, were made on both islands. For the helicopter surveys conducted in 2015 on Santa Cruz Island, 28 sites were visited consisting of 9 new sites, the 17 sites surveyed between 2004 and 2006, and 2 previously unsurveyed historical sites. Additional sites discovered during the survey brought the total number of known sites to 36 (13 historical prelisting sites, 14 additional sites discovered from 2004 to 2006, and 9 sites in 2015 helicopter surveys), and expanded the known geographical distribution of island bedstraw on the island eastward. Most sites were only photographed, but percent cover and area was estimated for level terraces at seven sites. And with an average plant canopy area derived from monitoring data, researchers estimated that those 7 sites had 8,421 plants. An additional observation in 2019 estimated another 1,000 or more plants at another terrace site.

The 2017 helicopter surveys conducted on San Miguel Island did not reveal new sites. Three of the six historical sites were visited, and percent cover and area of island bedstraw were estimated for level terraces at those sites. Using the average plant canopy area, researchers estimated that there were 5,339 plants at the 3 sites. A fourth site was previously confirmed to be extant in 2014; the other two historical sites have not been surveyed but are also presumed to have extant plants.

On Santa Cruz Island, the total number of known island bedstraw sites has increased from 13 at the time of listing, to 27 at the time of the 2004–2006 surveys, to 36 after the 2015 helicopter surveys (Service 2021a, table 14, p. 37). On San Miguel Island, the number of known sites is six, which is the same as at the time of listing. Of the 36 total number of known sites on Santa Cruz Island, 28 are known to be extant based on recent helicopter surveys and observations (Service 2021a, table 13, figure 9, pp. 35–36); 5 sites are presumed extant (4 of these sites had plants in the 2004–2006 surveys but were not surveyed thereafter, and 1 site has not been surveyed since before listing); and 3 sites are possibly extirpated (targeted surveys took place in 2004–2006, but sites were not relocated or mapped by the 2015 helicopter surveys). Similarly, of the six known sites on San Miguel Island, four are known to be extant based on the 2017 helicopter survey and 2014 observational data (Service 2021a, table 13, figure 10, pp. 35–36), and the remaining two sites are presumed extant (but have not been surveyed since before listing). There are no known possibly extirpated sites on San Miguel Island.

The current totals, therefore, are 33 known or presumed extant on Santa Cruz Island and 6 on San Miguel Island. The total estimated number of known individuals within those sites on both islands combined has increased from 512–603 before listing to at least 15,730 after recent helicopter surveys.

Currently, island bedstraw appears to have increasing abundance and distribution. At one site studied over a 10-year span, island bedstraw has shown demographic capacity for population growth and adaptive capacity by expansion beyond historically occupied areas into more diverse habitats (*e.g.,* from cliff faces to terraces above the cliffs, and movement into nonnative-dominated vegetation). The species also shows the ability to withstand catastrophic events because it is distributed on two islands, has more sites now than at the time of listing, and has gaps between groups of sites within islands.

Island Bedstraw Threats

In 1997, island bedstraw was listed as an endangered species due to effects (habitat alteration and herbivory) resulting from feral livestock grazing and trampling and subsequent soil erosion (62 FR 40954, July 31, 1997). By the time the recovery plan was signed

in 2000, sheep had been removed from both Santa Cruz and San Miguel Islands, but their residual effects remained. No feral pigs occurred on San Miguel Island after 1900, and TNC and NPS initiated an 18-month program that removed all pigs from Santa Cruz Island by the end of 2006. In the 2009 5-year review, we determined that island bedstraw still met the definition of an endangered species based on the following threats: (1) soil loss and erosion resulting from years of feral pig rooting and sheep grazing, (2) loss of habitat to nonnative, invasive plants, (3) random naturally occurring events due to its limited distribution and small population size, and (4) effects from climate change (Service 2009b, pp. 13–14).

The major threats to island bedstraw at the time of listing, feral livestock grazing, trampling, and resulting erosion, have largely been eliminated, which consequently also reduced the threats of small population size and nonnative vegetation identified in the 2009 5-year review. Effects from climate change remain but are not to the level where we conclude that the species is in danger of extinction. We determined that overutilization, disease, predation (herbivory), and the inadequacy of existing regulatory mechanisms are not threats to island bedstraw, so we do not discuss them in detail in this final rule. For more information, see the island bedstraw SSA report (Service 2021a).

Soil Loss and Erosion

Currently, vegetation cover has increased significantly on Santa Cruz Island since the eradication of herbivores (Beltran et al. 2014, p. 7), leading to reduced erosion. This trend appears similar on San Miguel Island.

Competition From Nonnative Plants

Nonnative invasive plants were not specifically identified as a threat for this species at the time of listing but were discussed in the 2009 5-year review. While the competitive ability of island bedstraw against nonnative plants is unknown, the species seems to be able to colonize areas dominated by relatively short nonnative annuals, such as the terrace at the ''Bluffs East of Prisoners'' site. Island bedstraw may also have an advantage because native perennials in general tend to be at an advantage over nonnatives at sites that are relatively more mesic (Corry 2006, p. 97), such as the north-facing cliffs, terraces, and slopes on the north coasts of Santa Cruz and San Miguel Islands where island bedstraw is found. Additionally, the loss of leaves by island bedstraw during dry summer conditions may give it another edge over nonnatives (Corry 2006, p. 185) by allowing it to survive drier soil conditions through dormancy.

Random Extinctions of Small Populations

On Santa Cruz Island, historical populations with known numbers of plants had 50 or fewer individuals, and 2004–2006 surveyed populations may have had hundreds of plants. While only a few of the 2015 surveyed sites have population estimates, these estimates are in the thousands of individuals, and it is likely that more of the unsurveyed sites also have large numbers of plants. These sites with hundreds or thousands of plants have a greater likelihood of future persistence than sites with fewer than 50 plants. The three possibly extirpated historical sites on Santa Cruz Island that could not be located during the most recent surveys (Service 2021a, table 6, p. 26) probably had small numbers of individuals (Service 2021a, table 4, p. 22). Two of those sites were in relatively interior locations and could have gone undetected because of poor location descriptions. Similarly, the third site, while coastal, is in an area of extremely dense vegetation and could also have been equally difficult to find. Assuming extirpation, we estimate that these sites are exceptions to the general trend of increasing plant numbers at sites and represent only 3 of the 36 Santa Cruz Island sites. San Miguel Island has demonstrated similar trends of increasing numbers of plants within sites, from historical numbers of 250 or less, to estimates of 1,000 or more plants observed during the 2016 surveys (Service 2021a, table 12, p. 34). The general trend of increasing plant numbers at sites suggests that the threat of random extinction of small populations has been reduced.

Climate Change

The northern Channel Islands lie off mainland Santa Barbara and Ventura Counties. Of the two counties, Santa Barbara County is the better model for assessing climate impacts on the species since the flora of the northern Channel Islands, in general, is considered to have more northern affinities (Raven and Axelrod, 1995, pp. 63–64). Annual average (National Oceanic and Atmospheric Administration (NOAA) National Centers for Environmental Information (NCEI) 2019a) and maximum (NOAA NCEI 2019b) temperatures for Santa Barbara County for the period 2014 through 2018 were the highest recorded since 1895. Rainfall does not show such distinct trends. However, except for 2017, annual rainfall for 2011 through 2018 was below the 1885–2018 mean (NOAA NCEI 2109c), with 2013 and 2015 being two of the five driest years since 1885.

These recent increases in annual average and maximum temperatures and lower annual rainfall do not seem to have adversely affected recent island bedstraw survivorship and expansion. The monitoring data at Pelican Bay (McEachern et al. 2019a, figure 13, p. 26) show an increase in the number of reproductive plants in 2014 compared to 2011. No sites are known to have been extirpated between 2004 and 2019. Spread from cliff locations to adjacent terraces has also been confirmed during that time period. It is unknown how further increases in temperature and decreases in rainfall may affect the species.

The threat of fire rises with increases in annual average and maximum temperatures and lower annual rainfall. Neither natural nor anthropogenic fires are as common on the northern Channel Islands as on the adjacent mainland (Carroll et al. 1993, pp. 75–78). Just four natural fires are known to have occurred on the northern Channel Islands in the last 165 years, none of which have affected island bedstraw sites. Changes in future climate may increase this risk; however, we have no evidence that natural wildfires will be such a serious threat in the future that listing continues to be warranted.

Resiliency, Representation, and Redundancy

Resiliency

Resiliency describes the ability of populations to withstand stochastic disturbance. Resiliency is positively related to population size and growth rate and may be influenced by connectivity among populations. Currently, island bedstraw has populations that are increasing in numbers of individuals and spatial extent. Island bedstraw abundances have increased from 512–603 individuals before listing to at least 15,730 currently, the largest recorded abundance. Individual sites are larger than they were at the time of previous surveys, and larger than at the time of listing. Observations show that populations have spread from cliffs to adjacent level terraces. The rate of growth appears to be positive, from both demographic research and observations of increasing areal extent at individual sites. At least 1,000 plants have been documented in a 0.5-hectare area where no known plants occurred 15 years earlier. Recent observations show this pattern repeating at other sites.

Representation

Representation describes the ability of a species to adapt to changing environmental conditions over time. It is characterized by the breadth of genetic and environmental diversity within and among populations. Island bedstraw has historically occupied different parts of the islands, from sea cliff faces to the interior of the islands. It is now colonizing terraces above the cliffs. Given how readily island bedstraw moves off the bluffs, onto flats, and into native and nonnative vegetation, the genetic breadth can be interpreted as sufficiently wide to occupy diverse niches. Finally, although the genetics of island bedstraw have not been similarly analyzed, the close relative San Clemente island bedstraw (*Gallium catalinense* ssp. *acrispum*) has been shown to retain high genetic diversity after a ranching period with a similar grazing history (Riley et al. 2010, pp. 2020–2024) and occupies a similar range of habitats.

Redundancy

Redundancy describes the ability of a species to withstand catastrophic events. Redundancy is characterized by having sufficiently resilient populations distributed within the ecological settings of the species and across its range. Island bedstraw exhibits redundancy at two scales: across the northern islands and within each island where it occurs. First, it is distributed on two islands separated by a third, so the entire species is unlikely to be affected by any one catastrophic event. Second, more sites are known than at the time of listing on Santa Cruz Island, and population sizes are larger on both islands. Sites are distributed across the breadth of the northern shores of each island with gaps between groups of sites such that a single island catastrophe (like fire) would be unlikely to affect all sites at once.

Summary—Current Condition, Threats Influencing Viability

The major threats to island bedstraw at the time of listing were feral livestock grazing, trampling, and the resulting erosion. These major threats are either no longer relevant or have been minimized. The threats of small population size and loss of habitat to nonnative, invasive plants identified at the time of the 2009 5-year review have also been reduced. Additionally, there have been no apparent negative effects since the 2009 5-year review that are attributable to temperature and precipitation patterns associated with projected climate change trends.

Currently, island bedstraw is increasing in abundance and distribution and expanding beyond historically occupied areas and into more diverse habitats (*e.g.,* from cliff faces to terraces above the cliffs and movement into nonnative-dominated vegetation), indicating increasing resiliency, representation, and general overall adaptive capacity. Additionally, with a distribution on two islands (separated by a third) and more sites now than at the time of listing with gaps between groups of sites within islands, a single island catastrophe would be unlikely to affect all sites at once. The catastrophic loss on one island would not affect the other islands, and the populations are spread out enough that there is some redundancy within islands.

The major remaining potential factor influencing island bedstraw population viability is climate change. Our current data do not show that the species is experiencing any significant effects from changing climate conditions.

Future Condition

Of the threats that have been discussed above, climate change remains the most reasonably foreseeable threat to persist and potentially affect island bedstraw. It is a potential catalyst of change for other threats and is expected to have multiple effects in the California Central Coast region, including an increase in temperatures, changes in precipitation, sea level rise, and an increase in fire frequency (Langridge 2018, pp. 12–23). Fifty years is the evaluation timeframe for climate change because the best available information presented in the current integrated climate assessment for the Central California Coast forecast uses 2069 as its climate change analysis interval (Langridge 2018, pp. 12–23). The 50-year period integrates a wide amount of interannual variability in temperature and rainfall and contains typical drought cycles (NOAA NCEI 2019a, 2019b, 2019c). Sea level rise projections are from Griggs et al. 2017 (pp. 24–27), which is cited by Langridge 2018 (p. 24) as the latest California-focused sea level rise projections; Griggs et al. 2017 uses an 80-year timeframe.

We developed two future scenarios that capture the range of plausible effects to the species from a projected change in the factors influencing its viability over a 50-year period.

Future scenario 1 summarizes effects of representative concentration pathway (RCP) 4.5, and future scenario 2 summarizes effects of RCP 8.5. The RCPs are based on alternate projections for climate change in the California Central Coast region based on Langridge (2018, pp. 12–22, 29–31) and Griggs et al. (2017, p. 27). RCP 4.5 and RCP 8.5 are described more fully in the SSA report (Service 2021a, entire).

Under future scenario 1, the combination of increased temperature and increased rainfall support continued recruitment and expansion of island bedstraw over the next 50 years. Most vegetation is recovering island wide, and as it recovers, leaf litter depth and area of cover increase, as do subsurface roots. These factors protect the soil from direct impact and allow increased percolation of water into the soil. Surface flows are moderated and erosion is reduced. Therefore, increasing rainfall does not substantially increase erosion, largely because most vegetation would benefit from the moderate additional rainfall and vegetation reduces the intensity of runoff. Moderate sea level rise could cause minor impacts from landslides on some Santa Cruz Island sites but not at the population level. If sea level rise is only a few feet, it will not directly impact many plants or sites because they are substantially higher in elevation. Because most sites are on relatively tough igneous rock, enough erosion will not occur to undermine and cause collapse of these coastal sites. Moreover, the negative effects of fire frequency on the species are not expected to increase, as vegetation flammability and ignition sources are not projected to increase. Few minor negative and some potential positive effects of climate change would occur under this future scenario, and sites are likely to persist while the species' abundance and range will continue to expand. Overall, future scenario 1 projects increases in abundance and expansion, which suggests resiliency would increase and representation and redundancy would remain stable for island bedstraw.

Under future scenario 2, during the next 50 years, temperatures are projected to increase over the current baseline even more than under scenario 1, with rainfall also increasing over baseline but less than under scenario 1. In addition, there is a projected increase in year-to-year variability with an increase in extreme dry events, drought conditions, and extreme rain events. The increase in extreme rain events would lead to flashier, more intense runoff.

Increased drying and drought events could lead to decreased soil moisture that will affect recruitment and adult survival, leading to less population expansion and possibly smaller increases in abundance, relative to

scenario 1. Rainfall events may increase the severity of runoff, which may dislodge or cover plants and lead to decreases in abundance. If conditions are severe enough, sites could be extirpated. The effects of sea level rise could be greater than in scenario 1 for sites on sedimentary cliffs on the eastern end of the species' distribution on Santa Cruz Island. Undercutting from surf could increase landslides, eliminating some if not all plants in cliff sites. Fire frequency and size could increase on Santa Cruz Island because of warmer temperatures, drier vegetation, windier conditions, increased lightning strikes, and increased visitor use over time that may lead to increased wildfire starts by the public. Fires could reduce abundance and eliminate sites. Overall, future scenario 2 projects decreases in abundance and expansion and potentially extirpation of sites, which suggests resiliency, representation, and redundancy could decrease for island bedstraw; however, given the improved habitat conditions for the species and increasing baseline distribution and abundance, we do not expect these threats to affect the species at the population level.

Summary of Species Potential Future Condition

Under future scenario 1, changes in abundance and distribution of island bedstraw continue on their current positive trajectory, with increasing numbers and site expansion. Under scenario 2, some sites may decline and possibly become extirpated. Decreased soil moisture and drought are likely to negatively affect the species because recruitment, survivorship, and the rate of expansion would be slower than under future scenario 1, reducing resiliency. Increased soil and shoreline erosion and fire would also negatively affect island bedstraw by killing individuals and degrading habitat, reducing representation and redundancy. Given the improved habitat conditions for the species and increasing baseline distribution and abundance, we do not expect threat levels under either future scenario to affect the island bedstraw at the species level.

Island Bedstraw Overall Synthesis

Island bedstraw occurs on Santa Cruz and San Miguel Islands. At the time of listing, there were 19 known sites of island bedstraw, 13 on Santa Cruz Island and 6 on San Miguel Island. Currently, the number of sites known or presumed to be extant is 33 on Santa Cruz Island and 6 on San Miguel Island. The total estimated number of known individuals within those sites on both islands combined has increased from 512–603, at the time of listing, to at least 15,730, after recent helicopter surveys. This number (15,730) is likely an underestimate because helicopter surveys were conducted at a subset of known sites. Given the increase in the number of individuals at sites where plant number estimates were conducted during the helicopter surveys, the sites that were last counted in the mid-2000s likely have more individuals.

The major threats to island bedstraw at the time of listing, feral livestock grazing, trampling, and resulting erosion, are either no longer relevant or have been minimized. The threats of small population size and nonnative vegetation identified at the time of the 2009 5-year review have also been minimized. Currently, island bedstraw is increasing in abundance and distribution. It has shown demographic capacity for population growth at one site studied over a 10-year span and adaptive capacity by expansion beyond historically occupied areas and into more diverse habitats (*e.g.,* from cliff faces to terraces above the cliffs and movement into nonnative-dominated vegetation). The species also shows the ability to withstand some catastrophic events with its distribution on two islands (separated by a third), having more sites now than at the time of listing, and gaps between groups of sites within islands.

Potentially negative effects of future climate change remain, and we developed two future scenarios that capture the range of plausible effects to the species from projected changes in the factors influencing viability over a 50-year period. Climate change is expected to have multiple effects in the California Central Coast region, including an increase in temperatures, change in precipitation, sea level rise, and increase in fire frequency. Future scenarios 1 and 2 summarize effects of RCP 4.5 and RCP 8.5, respectively, based on projections for climate change in the California Central Coast region derived from Langridge (2018, entire). Under future scenario 1, changes in abundance and distribution of island bedstraw continue on their current positive trajectory, with increasing numbers and site expansion. Under future scenario 2, some sites may decline and possibly become extirpated. Decreased soil moisture and drought are likely to negatively affect the species because recruitment, survivorship, and the rate of expansion would be slower than under future scenario 1. Increased erosion and fire would also negatively affect island bedstraw by killing individuals and reducing habitat. Given the improved habitat conditions for the species and increasing baseline distribution and abundance, we do not expect threat levels under either future scenario to affect the species at the population level.

Cumulative and synergistic interactions are possible between the effects of climate change and the effects of other potential threats, such as small population size, fire, and nonnative plant invasion. Increases in temperature and changes in precipitation are likely to cause increases in nonnative grasses, which are abundant in island bedstraw habitat. Increased grass abundance has the potential to carry fire more readily, which could affect the geographically limited population of island bedstraw. Uncertainty about how different plant species will respond under climate change, combined with uncertainty about how changes in plant species composition would affect suitability of island bedstraw habitat, make projecting possible cumulative and synergistic effects of climate change on island bedstraw challenging.

Our post-delisting monitoring plans will provide guidelines for evaluating both species following delisting to detect substantial declines that may lead to consideration of re-listing to threatened or endangered. Changes in land use will still be subject to State and Federal environmental review.

Santa Cruz Island Dudleya Biological Condition

The genus *Dudleya* is typically considered to be made up of three subgenera: Dudleya, Stylophyllum, and Hasseanthus, each of which at some time has been considered a distinct genus; Santa Cruz Island dudleya is in subgenus Hasseanthus.

Santa Cruz Island dudleya needs the right combination of position in soil, litter depth, and light to emerge from seed and survive to and past the seedling stage. Seedlings and larger plants need seasonal soil moisture, light availability, and space to survive the dry season, in order to reach a reproductive size and successfully reproduce. The species, comprising a single population, needs a sufficiently broad distribution to adapt to changing environmental conditions and withstand catastrophic events. Finally, Santa Cruz Island dudleya needs a sufficient community of generalist pollinators to ensure effective pollination and seed set.

Santa Cruz Island dudleya is composed of one population and five subpopulations that occur in a general area of about 200 hectares (ha) (approximately 494 acres), although the

total occupied area within that general area is about 13.7 ha (approximately 34 acres) (Schneider and Carson 2019, p. 10). The best information available suggests that, over the last 25 years, the population has fluctuated between at least 40,000 and 200,000 individuals and the current abundance is in the middle of that range (approximately 120,000 individuals). Past survey methods were not standardized, which limits our ability to confirm a definitive trend in abundance over time. However, the population at 120,000 is stable, and the most recent survey (Schneider and Carson 2019, entire) established robust survey methods that can be used in the future to detect changes in distribution and abundance.

Santa Cruz Island Dudleya Threats

At the time of listing, soil loss, herbivory by feral pigs, disturbance by pig rooting, and collecting for botanical or horticultural use were identified as threats to the species. The recovery plan identified the additional threats of competition from nonnative grasses, trampling by humans, and an increased risk of extinction from naturally occurring random events due to the species' limited distribution (Service 2000, p. 35). The 2009 5-year review also considered the effects of low genetic variability, climate change, and fire (Service 2009a, p. 12).

Soil Loss, Herbivory by Feral Pigs, Disturbance by Pig Rooting

In the original listing, the source of soil loss is specified as the result of feral ungulate activities (62 FR 40954 at 40966, July 31, 1997). All feral ungulates were removed from Santa Cruz Island by 2006 (McEachern et al. 2016, pp. 759–760), eliminating that source of soil loss. Vegetation cover has increased significantly on Santa Cruz Island since 2006 (Beltran et al. 2014, p. 7), leading to reduced erosion and mitigating this threat.

Collecting for Botanical and Horticultural Use, Trampling by Humans

While Santa Cruz Island dudleya has a limited geographical range, it is very abundant where it is found. While Moran (1979, entire) considered collecting to be a threat, McCabe (2004, p. 269) did not. The species is in cultivation (*e.g.,* Trager 2004, entire) but is not often available for sale. It may be that the seasonal ephemerality of plants in the subgenus Hasseanthus makes Santa Cruz Island dudleya a plant not sought out for personal collections.

Trampling by humans is still a possible threat to the species, but it is unlikely to be a primary threat. TNC maintains a permit system for boaters that plan to land on TNC property (TNC 2020, p. 2), and offroad travel in the Fraser Point/Forney Cove area is prohibited to protect resources. TNC has erected signage in the area to reinforce the closure (Knapp 2021, pers. comm.). Trespass occurs infrequently, and its effects on Santa Cruz Island dudleya are likely to be light, especially in grassland locations away from the immediate coast because trespassers are more likely to stay close to the ocean.

Competition From Nonnative Annual Plants

Klinger et al. (unpublished, entire) investigated the effects of nonnative grasses on Santa Cruz Island dudleya density. While the study offered no data about trends in overall abundance, Santa Cruz Island dudleya density declined in study plots in which annual grass density and litter increased. The study occurred before a major increase in the nonnative annual grass *Aegilops cylindrica* and does not explain a seemingly steady abundance of Santa Cruz Island dudleya over the years despite that increase. These differing findings suggest that the interactions among nonnative annual grasses and Santa Cruz Island dudleya are complex.

Moran (1979, p. 1) lists the nonnative annual succulent *Mesembryanthemum crystallinum* (crystalline ice plant) as found with Santa Cruz Island dudleya at Fraser Point. McCabe (2004, p. 269) lists *M. crystallinum* as a threat to Santa Cruz Island dudleya but does not define how it is a threat. *M. crystallinum* can dominate coastal vegetation by increasing soil salinity to levels higher than that tolerated by some native plants (Vivrette and Muller 1977, pp. 315–317), but it is unknown if this situation is a threat to Santa Cruz Island dudleya. *M. crystallinum* has been reported to be periodically abundant in the coastal bluff scrub vegetation, cycling with *Lasthenia gracilis* (common goldfields), depending on rainfall and temperature combinations (Vivrette 2002, entire). Schneider and Carson (2019, entire) do not report *M. crystallinum* as common in their surveys. The data do not indicate if *M. crystallinum* is at a low abundance in a cycle or if there has been a major change in vegetation that may have disrupted the cycle.

Random Extinctions of Small Populations

The recovery plan identified randomly occurring natural events as threats to Santa Cruz Island dudleya (Service 2000, p. 35) because the species has a single population with a limited distribution over a small range. The 2009 5-year review (Service 2009a, p. 12) specified low genetic variability (inferred by small population size), climate change, and fire and emphasized their importance as threats to the continued existence of Santa Cruz Island dudleya, given its single population and limited distribution.

Low Genetic Variability

Because Santa Cruz Island dudleya has a single population with a small range, the genetic variability and the resiliency of the species to human-caused or natural disasters may be low (Ellstrand and Elam 1993, pp. 232–237). No studies have been done on genetic variability in Santa Cruz Island dudleya, but the 2009 5-year review speculated that the species might have inherently low genetic diversity. If so, this situation has likely been the case throughout the existence of this species, and there is no indication that this level of genetic variability is a threat to the species or contributes to low population resiliency or viability.

Climate Change

Santa Cruz Island lies off mainland Santa Barbara and Ventura Counties. Of the two counties, Santa Barbara County is the better model for assessing climate impacts on the species since the flora of the northern Channel Islands is generally considered to have similar affinities (Raven and Axelrod 1995, pp. 63–64). Annual average (NOAA NCEI 2019a) and maximum (NOAA NCEI 2019b) temperatures for Santa Barbara County for 2014 to 2018 have been the highest recorded since 1895. Rainfall does not show such distinct trends. However, except for 2017, annual rainfall for 2011 to 2018 has been below the 1885 to 2018 mean (NOAA NCEI 2109c), with 2013 and 2015 being two of the five driest years since 1885.

In general, increased temperature and decreased rainfall could negatively affect survival and reproduction of the species. However, these recent increases in annual average and maximum temperatures and lower annual rainfall (combined with the removal of nonnative herbivores) do not seem to have adversely affected Santa Cruz Island dudleya abundance or distribution. The most recent survey (Schneider and Carson 2019, p. 11) shows an increased overall abundance and an additional subpopulation since the last surveys of 2006 (McEachern et al. 2010, p. 12), although one subpopulation did decrease in abundance.

A new threat to the species may be sea level rise. Sea level rise has been slow over the 20th century but has accelerated and is expected to keep accelerating (Sievanen et al. 2018, pp. 16–18). Sea level is expected to rise 0.4 to 1.1 m (16–43 in) by 2100 (Griggs et al. 2017, pp. 24–27). Sea level rise could affect Santa Cruz Island dudleya in two ways. First, some plants are close enough to the ocean that they can be directly impacted and dislodged by surf action. However, most plants are high enough up on the marine terrace that direct impacts of the surf would not affect them. Second, rising sea level and larger waves could undercut the sea cliffs and bluffs, causing slumps and landslides, and disturbing or destroying whole groups of plants. Most plants, however, are sufficiently inland that they would not be affected.

Fire

Neither natural nor anthropogenic fires are as common on the northern Channel Islands as on the adjacent mainland (Carroll et al. 1993, pp. 82–85). Just four natural fires have been known to occur on the northern Channel Islands in the last 165 years. More human-caused fires, mostly from machinery operation or uncontrolled campfires, have occurred. Campfires are prohibited in Channel Islands National Park, but they occasionally happen on isolated beaches on TNC property on Santa Cruz Island (Knapp 2020, pers. comm.), and clandestine prohibited smoking is frequent. Three human-caused brush fires have occurred on Santa Cruz in the last 15 years: a vehicle-caused fire in 2007 (Knapp 2020, pers. comm.), a biomass reduction burn escape in 2018 (Knapp 2020, pers. comm.), and a construction-related fire in 2020 (KEYT 2020).

While no fires are known to have impacted the species, fire has been and remains a concern for land managers (Knapp 2020, pers. comm.). Passive restoration after removal of feral ungulates (Beltran et al. 2014, entire) has increased fuel loads, and the results of a fire could be severe. With five distinct subpopulations across different vegetation types, the chance of a fire causing the extinction of the entire population of the species is reduced. However, each subpopulation is still within 400 m of another subpopulation, which is relatively close in the event of a wind-driven wildfire.

Resiliency, Representation, Redundancy

Resiliency

Resiliency describes the ability of populations to withstand stochastic events. Resiliency is positively related to population size and growth rate and may be influenced by connectivity among populations. Recent research and survey efforts have shown Santa Cruz Island dudleya is at least stable in population size at 40,000–200,000 individuals over the last 25 years with an increase in distribution (Schneider and Carson 2019, entire). Currently, the single Santa Cruz Island dudleya population appears to have no trend of increasing or decreasing abundance, but the lack of standardized surveys makes it difficult to draw conclusions about changes in species abundance and distribution. Additional surveys over an appropriate time span and area are needed to document changes in abundance and further changes in distribution.

Threats to the species identified at listing have been removed, including soil loss, herbivory by feral pigs, disturbance by pig rooting, and collecting for botanical or horticultural use (62 FR 40954 at 40959, July 31, 1997). We have found no evidence to show that trampling by humans or low genetic variability are currently affecting abundance, and resiliency is not increasing or decreasing. Remaining potential threats include competition from nonnative grasses, climate change, and fire. These threats may affect sparsely vegetated areas, suitable temperatures, and adequate soil moisture/rainfall needed for survival and reproduction, thereby decreasing the abundance and distribution of Santa Cruz Island dudleya. Except for negative effects of nonnative grasses (Klinger unpublished, entire), the effects of these factors on resiliency have not been studied, but they do not appear to be currently adversely affecting the species.

Representation

Representation describes the ability of a species to adapt to changing environmental conditions over time. It is characterized by the breadth of genetic, phenotypic, and ecological diversity within and among populations. No genetic analysis has been conducted to reveal the genetic diversity within Santa Cruz Island dudleya compared to other *Dudleya,* especially other members of subgenus Hasseanthus. Santa Cruz Island dudleya is limited to a small area, but within that area, plants are growing in a variety of combinations of distance from the ocean, substrate type, and vegetation type, which may reflect some amount of adaptive capacity within the population. It is unknown whether representation has changed for this species since it was first described.

Redundancy

Redundancy describes the ability of a species to withstand catastrophic events. Redundancy is characterized by having multiple, sufficiently resilient populations distributed within the ecological settings of the species and across its range. Santa Cruz Island dudleya has inherently low redundancy as a narrow endemic with only a single population in a relatively small geographic range. However, there are physical gaps between subpopulations, and the subpopulations occur in different vegetation types that could carry fire differently. Subpopulations also occur at different elevations, and some are protected from extreme wave events. Although germinable seeds are found in natural soil samples, the amount of seed in the natural soil seed bank is unknown (Wilken 1996, p. 25). Redundancy is somewhat bolstered by a high number of seeds that have recently been seed-banked at the SBBG (California Plant Rescue 2023).

Additionally, an active grant issued under section 6 of the Act (Schneider 2017, pp. 4–6, 13) calls for bulking that banked seed (in progress) and establishing two new ''populations'' on Santa Cruz Island (planned but delayed because of the Covid–19 pandemic). These activities will continue with additional NPS funding (McEachern et al. 2019b, pp. 9, 11).

Summary—Current Condition, Threats Influencing Viability

Several major threats to Santa Cruz Island dudleya identified at the time of listing, including soil loss, herbivory by feral pigs, and disturbance by pig rooting, have been removed or are no longer occurring. Collecting for botanical and horticultural use and trampling by humans also no longer pose threats to the species due to controls on access to the island. Nonnative plants continue to occur with the species and do not seem to have affected population size, although no recent study on the specific effects of particular nonnatives or how changes in the nonnative assemblage might alter those effects has been undertaken. The threat of small population size still exists, as does concern about climate change and fire, but since the 2009 5-year review, there is no evidence that these potential threats have affected the species.

Santa Cruz Island dudleya abundance is apparently not increasing or decreasing in an obvious way, but data over time are lacking. Recent research

and survey efforts have shown Santa Cruz Island dudleya is at least stable in population size over the last 25 years with an increase in distribution (Schneider and Carson 2019, entire).

Some amount of adaptive capacity is demonstrated in the variation in vegetation types and elevation where Santa Cruz Island dudleya is found. While the elevational range seems small and vegetation differences may seem negligible if gauged simply by absolute plant height, the locations where individuals of the species grow are remarkably varied. At the lowest elevations, the plants are in open native forb scrub that are likely subjected to relatively high amounts of salt spray. Soils here are influenced by the wind and are somewhat rocky. We suspect that here the primary stressors on the plants are from the physical environment. By contrast, higher up on the terraces, plants are in dense nonnative grassland with deeper soil that is less affected by salt spray. Given how dense the grasses are, we suspect that the primary stressor to the species must be competition. The two habitats grade into each other at some sites. In both situations, the species seems to be doing fine, and robust plants are showing good reproductive effort. The adaptability of this plant through disparate habitat zones is similar to a large species of tree capable of growing in open deserts or savanna to dense forests with similar-sized trees. We suspect there must be sufficient phenotypic plasticity or genetic variability (adaptive capacity) to enable the species to do well in such different conditions.

With only one population, redundancy is inherently low, but that issue may be mitigated somewhat by the diversity of the locations in which the species occurs, the presence of a seed bank, and the limited potential and extent of the most likely catastrophic threat—fire. Fire has affected some mainland *Dudleya* species dramatically, while others seem to endure little mortality from being burned. We do not have specific fire data for Santa Cruz Island dudleya. While fire could be carried in areas where it occurs in dense grass, lower elevation areas are so open that fire is unlikely to spread, so there is redundancy for the species, even over its small geographic range.

Future Condition

Of the threats that have been discussed above, climate change remains the most reasonably foreseeable threat to persist and potentially affect Santa Cruz Island dudleya. It is a potential catalyst of change for other threats and is expected to have multiple effects in the California Central Coast region, including an increase in temperature, change in precipitation, sea level rise, and increase in fire frequency (Langridge 2018, pp. 12–23). Fifty years is the evaluation timeframe for climate change because the best available information presented in the current integrated climate assessment for the California Central Coast forecast uses 2069 as its climate change analysis interval (Langridge 2018, pp. 12–23). The 50-year period integrates a wide amount of interannual variability in temperature and rainfall and contains typical drought cycles (NOAA NCEI 2019a, 2019b, 2019c). Sea level rise projections are from Griggs et al. 2017 (pp. 24–27), which is cited by Langridge 2018 (p. 24) as the latest California-focused sea level rise projections; Griggs et al. 2017 uses an 80-year timeframe.

We developed two future scenarios that capture the range of plausible effects to the species from projected changes in the factors influencing its viability over a 50-year period. Future scenario 1 summarizes effects of RCP 4.5, and Future Scenario 2 summarizes effects of RCP 8.5. The RCPs are alternate projections for climate change in the California Central Coast region based on Langridge (2018, pp. 12–22, 29–31) and Griggs et al. (2017, p. 27). Under future scenario 1 (RCP scenario 4.5 for climate change), the combination of increased temperature and rainfall continue over the next 50 years but not at levels anticipated to affect current levels of recruitment and survivorship. Moderate sea level rise could cause minor impacts from coastal bluff undercutting at the lowest elevation sites. Under RCP 4.5, anticipated sea level rise is less than 1 m, which is less likely to cause damage than the sea level rise under RCP 8.5. Negative effects of fire frequency on the species are not expected to increase, as vegetation flammability and ignition sources are not projected to increase. Because there are few negative effects of climate change under RCP 4.5, the population is likely to maintain viability, if not expand. Overall, under scenario 1, we project stability or increases in abundance and distribution, which suggests resiliency, representation, and redundancy would remain similar to the current condition for Santa Cruz Island dudleya.

Under future scenario 2 (RCP scenario 8.5 for climate change), temperature and rainfall increase, with fewer, more intense rain events, with a net result that soil moisture decreases over the next 50 years. The decreased soil moisture affects recruitment and adult survival, leading to decreases in expansion, and possibly abundance. If conditions are severe enough, subpopulations could be extirpated. The effects of competition with nonnative annual grasses will increase with rising temperatures and likely affect recruitment and expansion of the species. The effects of sea level rise could be substantial for plants on coastal bluffs. Undercutting from surf and erosion from episodic rainfall could increase the occurrence of landslides, eliminating some if not all plants on coastal bluffs. Fire frequency and size could increase because of warmer temperatures, drier vegetation, windier conditions, increased lightning strikes, and increased visitor use over time due to increases in human population. Fires could reduce abundance and distribution of the species. Overall, under scenario 2, we project a decrease in abundance and a reduced rate of expansion, and potentially the extirpation of subpopulations, which suggests resiliency, representation, and redundancy could decrease for Santa Cruz Island dudleya. Given the improved habitat conditions for the species and apparently stable baseline distribution and abundance, we do not expect threat levels under either future scenario to affect the species at the population level.

Summary of Species Potential Future Condition

Under future scenario 1, maintenance of recruitment and survivorship continue over the next 50 years. Because few negative effects of climate change are expected under scenario 1, the population is likely to maintain viability, if not expand. Overall, scenario 1 predicts little or no change in abundance and distribution, which suggests resiliency, representation, and redundancy would remain comparable to current levels for Santa Cruz Island dudleya. Under scenario 2, decreases in abundance and reduced geographic expansion and potentially extirpation of subpopulations could occur, which suggests resiliency, representation, and redundancy could decrease for Santa Cruz Island dudleya. Given the improved habitat conditions for the species and apparently stable baseline distribution and abundance, we do not expect threat levels under either future scenario to affect the species at the population level.

Santa Cruz Island Dudleya Overall Synthesis

Santa Cruz Island dudleya is composed of one population containing five subpopulations that occur in a total

occupied area of 13.7 ha (34 acres) in a general area of about 200 ha (494 acres) (Schneider and Carson 2019, p. 10) on the westernmost tip of Santa Cruz Island. Over the last 25 years, the population has fluctuated between at least 40,000 and 200,000 individuals, and abundance is currently approximately 120,000 individuals.

Several major threats to Santa Cruz Island dudleya identified at the time of listing have been removed or are no longer occurring. Collecting for botanical and horticultural use and trampling by humans also no longer pose threats to the species due to controls on access to the island. Nonnative plants continue to occur with the species. The risk associated with small population size still exists, as does concern about climate change and fire, but since the 2009 5-year review, there is no evidence that these risk factors have affected the species. Santa Cruz Island dudleya abundance is apparently not increasing or decreasing in an obvious way, nor is resiliency increasing or decreasing. Some amount of representation is demonstrated in variation in vegetation types and elevation where Santa Cruz Island dudleya is found. Redundancy is inherently low with only one population, but that issue may be mitigated somewhat by the diversity of the locations in which the species occurs and the presence of a seed bank, and the limited potential and extent of wildfire. We do not have specific fire data for Santa Cruz Island dudleya. While fire could be carried in areas where it occurs in dense grass, lower elevation areas are so open that fire is unlikely to spread there, so there is redundancy for the species, even over its small geographic range.

Under future scenario 1 (RCP scenario 4.5 for climate change), the combination of increased temperature and rainfall continue over the next 50 years but not at levels anticipated to affect current levels of recruitment and survivorship. Moderate sea level rise could cause minor impacts from coastal bluff undercutting at the lowest elevation sites. The effects of fire on the species are not expected to increase. Because few negative effects of climate change are expected under RCP 4.5, the population is likely to maintain viability, if not expand. Overall, under scenario 1, we project stability or increases in abundance and distribution, which suggests resiliency, representation, and redundancy would remain similar to the current condition for Santa Cruz Island dudleya.

Under future scenario 2 (RCP scenario 8.5 for climate change), temperature and rainfall increase, with fewer, more intense rain events, with a net result that soil moisture decreases (due to drought) over the next 50 years. The decreased soil moisture affects recruitment and adult survival, leading to decreases in expansion, and possibly abundance. If conditions are severe enough, subpopulations could be extirpated. The effects of competition with nonnative annual grasses will increase and likely affect recruitment and expansion of the species. The effects of sea level rise could be substantial for plants on coastal bluffs. Undercutting from surf and erosion from episodic rainfall could increase the occurrence of landslides, eliminating some if not all plants on coastal bluffs. Fire frequency and size could increase because of warmer temperatures, drier vegetation, windier conditions, increased lightning strikes, and increased visitor use over time with increases in the human population. Fires could reduce abundance and distribution of the species. Overall, under scenario 2, we project a decrease in abundance and a reduced rate of expansion, and potentially the extirpation of subpopulations, which suggests resiliency, representation, and redundancy could decrease for Santa Cruz Island dudleya. Given the improved habitat conditions for the species and apparently stable baseline distribution and abundance, we do not expect threat levels under either future scenario to affect the species at the population level.

Cumulative and synergistic interactions are possible between the effects of climate change and the effects of other potential threats, such as small population size, fire, and nonnative plant invasion. Increases in temperature and changes in precipitation are likely to cause increases in nonnative grasses, which are abundant in Santa Cruz Island dudleya habitat. Increased grass abundance can possibly more readily carry fire, which could affect the geographically limited population of Santa Cruz Island dudleya. Uncertainty about how different plant species will respond under climate change, combined with uncertainty about how changes in plant species composition would affect suitability of Santa Cruz Island dudleya habitat, make projecting possible cumulative and synergistic effects of climate change on Santa Cruz Island dudleya challenging.

We note that, by using the SSA framework to guide our analysis of the scientific information documented in the SSA report, we have analyzed the cumulative effects of identified threats and conservation actions on the species. To assess the current and future condition of the species, we evaluate the effects of all the relevant factors that may be influencing the species, including threats and conservation efforts. Because the SSA framework considers not just the presence of the factors, but to what degree they collectively influence risk to the entire species, our assessment integrates the cumulative effects of the factors and replaces a standalone cumulative-effects analysis.

Our post-delisting monitoring plans will provide guidelines for evaluating both species following delisting to detect substantial declines that may lead to consideration of re-listing to threatened or endangered. Changes in land use will still be subject to State and Federal environmental review.

Island Bedstraw and Santa Cruz Island Dudleya Conservation Efforts and Regulatory Mechanisms

State Protections

Island bedstraw and Santa Cruz Island dudleya are both listed as State Rare by the State of California under the Native Plant Protection Act of 1977 (Fish and Game Code chapter 10, sections 1900–1913) and the California Endangered Species Act of 1984 (California Code of Regulations, title 14, chapter 6, sections 783.0–787.9; Fish and Game Code chapter 1.5, sections 2050–2115.5) and so they receive special considerations for their protection by the State of California under the California Environmental Quality Act (CEQA) for California permitted projects on private TNC land. The official California listing of endangered and threatened species is contained in the California Code of Regulations, title 14, section 670.5.

Island bedstraw is listed as 1B.2 by the California Native Plant Society (CNPS), meaning it is considered rare, threatened, or endangered in California or elsewhere and moderately threatened in California. Santa Cruz Island dudleya is listed as 1B.1 by the CNPS, meaning it is considered rare, threatened, or endangered in California or elsewhere and seriously threatened in California. A cooperative relationship exists between the California Department of Fish and Wildlife (CFDW)—California Natural Diversity Database (CNDDB) (the State) and CNPS. The ''threatened'' category means two different things in the CNPS rankings. The first ''threatened category'' (''considered rare, threatened, or endangered in California or elsewhere'') refers to a government agency (*e.g.,* Service, CDFW) or nongovernmental organization (*e.g.,* CNPS, NatureServe) having formally

declared a plant in some sense to be rare, threatened, or endangered. The second threatened category (''moderately threatened in California'' for island bedstraw and ''seriously threatened in California'' for Santa Cruz Island dudleya) are estimates at the time of listing (by CNPS or CDFW) about the degree to which the species is under threat (in the sense that something might harm the species). CNPS and CDFW have different ranking systems for rare plants but work together on them. Because of the efforts of the CNDDB program and CNPS to bring attention to rare plants through these parallel ranking systems, these plants receive some attention via the CEQA and the National Environmental Policy Act (CNDDB and CNPS, 2020, entire).

Federal and Federal Partner Protections

We evaluated whether any existing regulatory mechanisms or other voluntary conservation efforts may have ameliorated any of the threats acting on island bedstraw and Santa Cruz Island dudleya. All of the land on which both species occur is managed by TNC or NPS for conservation of unique island species and habitats. The most significant single action has been the elimination of feral ungulates and feral pigs by TNC and NPS, as discussed above. The elimination of feral ungulates and feral pigs has eliminated the major sources of soil loss, habitat alteration, and herbivory affecting the species. This effort has resulted in passive restoration of the vegetation. It is likely that the positive effects of the feral ungulate and feral pig removal will continue into the future.

Determination of Status for Island Bedstraw and Santa Cruz Island Dudleya

Section 4 of the Act (16 U.S.C. 1533) and its implementing regulations (50 CFR part 424) set forth the procedures for determining whether a species meets the definition of an endangered species or a threatened species. The Act defines an ''endangered species'' as a species that is in danger of extinction throughout all or a significant portion of its range and a ''threatened species'' as a species that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. The Act requires that we determine whether a species meets the definition of an endangered species or a threatened species because of any of the following factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) Overutilization for commercial, recreational, scientific, or educational purposes; (C) Disease or predation; (D) The inadequacy of existing regulatory mechanisms; or (E) Other natural or manmade factors affecting its continued existence.

Status Throughout All of Its Range

Island Bedstraw

After evaluating threats to the species and assessing the cumulative effect of the threats under the Act's section 4(a)(1) factors, we have found that the major threats to island bedstraw at the time of listing, feral livestock grazing (Factor A), trampling (Factor A), and the resulting erosion (Factor A), have either been removed or have been minimized. The threats of risk from small population size (Factor E) and loss of habitat to nonnative invasive plants (Factor A) identified in the 2009 5-year review have also been minimized.

At the time of listing, there were 19 known sites of island bedstraw, 13 on Santa Cruz Island and 6 on San Miguel Island. Currently, the number of sites known or presumed to be extant has grown to 33 on Santa Cruz Island and continues at 6 on San Miguel Island. The total estimated number of known individuals within those sites on both islands combined has increased from 512–603 before listing to at least 15,730. Currently, island bedstraw is increasing in abundance and distribution. It has shown demographic capacity for population growth and adaptive capacity by expansion beyond historically occupied areas into more diverse habitats (*e.g.,* from cliff faces to terraces above the cliffs and movement into nonnative-dominated vegetation), indicating increasing resiliency, representation, and generally overall adaptive capacity. The species also shows the ability to withstand catastrophic events because it is distributed on two islands, has more sites now than at the time of listing, and has gaps between groups of sites within islands. A single island catastrophe would be unlikely to affect all sites at once.

Although climate change (Factor E) has had no apparent effects since the 2009 5-year review, the potentially negative effects of climate change remain and may still impact the species, but such impacts are not currently causing the species to be in danger of extinction. The best available information indicates that overutilization (Factor B), disease (Factor C), predation (herbivory) (Factor C), and the inadequacy of existing regulatory mechanisms (Factor D) are not currently affecting the species throughout its range. The existing regulatory mechanisms will remain in place to ensure the continued persistence of island bedstraw occurrences and suitable potential habitat even when the species is delisted and protections under the Act are removed.

All of the occurrences of island bedstraw are on Federal and private lands that are protected and managed for conservation by the NPS and TNC. Both NPS and TNC have natural resource conservation as part of their mission. For example, the mission of TNC is to conserve the lands and waters on which all life depends. The TNC vision is a world where the diversity of life thrives and people act to conserve nature for its own sake and its ability to fulfill our needs and enrich lives. The NPS preserves unimpaired the natural and cultural resources and values of the NPS System for the enjoyment, education, and inspiration of this and future generations. The NPS cooperates with partners to extend the benefits of natural and cultural resource conservation and outdoor recreation throughout this country and the world.

Thus, after assessing the best available information, we conclude that island bedstraw is not currently in danger of extinction throughout all of its range and, therefore, does not meet the definition of an endangered species.

In order to assess whether the species is likely to become in danger of extinction within the foreseeable future, we evaluated any remaining future threats. The major remaining potential threat influencing island bedstraw viability in the future is climate change. Future climate change is expected to have multiple effects in the California Central Coast region, including increases in temperatures, changes in precipitation, sea level rise, and increases in fire frequency (Langridge 2018, pp. 12–23). Fifty years is the evaluation timeframe for climate change because the best available information presented in the current integrated climate assessment for the California Central Coast forecast uses 2069 as its climate change analysis interval (Langridge 2018, pp. 12–23). The 50-year period integrates a wide amount of interannual variability in temperature and rainfall and contains typical drought cycles (NOAA NCEI 2019a, 2019b, 2019c). Sea level rise projections are from Griggs et al. 2017 (pp. 24–27), which is cited by Langridge 2018 (p. 24) as the latest California-focused sea level rise projections; Griggs et al. 2017 uses an 80-year timeframe.

We developed two future scenarios that capture the range of plausible

effects to the species from projected changes in factors influencing viability over a 50-year period. Future scenario 1 summarizes effects of RCP 4.5, and future scenario 2 summarizes effects of RCP 8.5 projections for climate change in the California Central Coast Region based on Langridge (2018, entire). Under future scenario 1, changes in abundance and distribution of island bedstraw continue on their current positive trajectory, with increasing numbers and site expansion. Under future scenario 2, some sites may decline and possibly become extirpated. Decreased soil moisture and drought are likely to negatively affect the species because recruitment, survivorship, and the rate of expansion would be lower. Increased erosion and fire would also negatively affect island bedstraw by killing individuals and reducing habitat. Negative impacts to individuals may occur under RCP 8.5 but given the current improvement in habitat and increases in distribution and abundance, we do not think that the impacts will rise to a population level such that the species is likely to become endangered in the foreseeable future throughout its range. Therefore, the currently predicted changes in climate do not indicate that the species may become endangered due to those changes in the foreseeable future throughout its range. Thus, after assessing the best available information, we conclude that island bedstraw is not currently in danger of extinction or likely to become so within the foreseeable future throughout all of its range.

Santa Cruz Island Dudleya

Through this final rule, we have assessed the section 4(a)(1) factors by evaluating the best scientific and commercial information available regarding the past, present, and future threats faced by Santa Cruz Island dudleya. We have found that the major threats to Santa Cruz Island dudleya identified at the time of listing have either been removed or have been minimized, due to the removal of feral pigs from Santa Cruz Island by NPS and TNC. Those prior threats included soil loss (Factor A), herbivory by feral pigs (Factor A), and disturbance by pig rooting (Factor A). The threats of collecting for botanical and horticultural use (Factor B) and trampling by humans (Factor A) also have been reduced by conservation and protection measures implemented by TNC and no longer appear to pose threats to the species. At the time of listing, nonnative plants (Factor A) as a whole were considered a threat to island native plant species in general, though there have been no recent studies of the effects of individual nonnative species or of the shifting composition of nonnatives on the persistence of Santa Cruz Island dudleya. However, nonnative plants are not considered to be a concern as they were at the time of listing because the species is stable.

The threats presented by the risk of small population size (Factor E), climate change (Factor E), and fire (Factor E) still exist, but since the 2009 5-year review there is no evidence that these threats have affected Santa Cruz Island dudleya. We determined that disease (Factor C), predation (herbivory) (Factor C), and the inadequacy of existing regulatory mechanisms (Factor D) are not currently affecting Santa Cruz Island dudleya throughout its range. The existing regulatory mechanisms in place ensure the continued persistence of Santa Cruz Island dudleya occurrences and suitable potential habitat even when the species is delisted and protections under the Act are removed; the single population is on private land and is protected and managed for conservation by TNC. Thus, after assessing the best available information, we conclude that Santa Cruz Island dudleya is not currently in danger of extinction throughout all of its range and, therefore, does not meet the definition of an endangered species.

In order to assess whether the species is likely to become in danger of extinction within the foreseeable future, we evaluated any remaining future threats. Similar to island bedstraw, as discussed above, the major remaining potential factor influencing Santa Cruz Island dudleya viability in the future is climate change. Santa Cruz Island dudleya occurs with nonnative plants (Factor A), which are still considered a threat, though there have been no comprehensive studies that project the future effects of individual nonnative species or of the shifting composition of nonnatives on the persistence of Santa Cruz Island dudleya. However, nonnative plants are not considered to be a concern as they were at the time of listing because the species is projected to be either increasing or stable in the future.

The threats presented by the risk of small population size (Factor E), climate change (Factor E), and fire (Factor E) may continue into the future, but since the 2009 5-year review, there is no evidence that these threats have significantly affected Santa Cruz Island dudleya, and we do not think this situation will change in the foreseeable future. Negative impacts to individuals may occur under climate change RCP 8.5, but given the improvement in habitat conditions and apparent baseline population stability, we find that the impacts will not likely rise to a population level such that the species would be likely to become endangered in the foreseeable future. Therefore, the currently predicted changes in climate do not indicate that the species may become endangered due to those changes in the foreseeable future.

Thus, after assessing the best available information, we conclude that Santa Cruz Island dudleya is not currently in danger of extinction or likely to become so within the foreseeable future throughout all of its range.

Status Throughout a Significant Portion of Their Ranges

Under the Act and our implementing regulations, a species may warrant listing if it is in danger of extinction or likely to become so in the foreseeable future throughout all or a significant portion of its range. Having determined that island bedstraw and Santa Cruz Island dudleya are not in danger of extinction or likely to become so in the foreseeable future throughout all of its range, we now consider whether these species may be in danger of extinction (*i.e.,* endangered) or likely to become so in the foreseeable future (*i.e.,* threatened) in a significant portion of their ranges—that is, whether there is any portion of these species' ranges for which both (1) the portion is significant; and, (2) the species is in danger of extinction or likely to become so in the foreseeable future in that portion. Depending on the case, it might be more efficient for us to address the ''significance'' question or the ''status'' question first. We can choose to address either question first. Regardless of which question we address first, if we reach a negative answer with respect to the first question that we address, we do not need to evaluate the other question for that portion of the species' range.

In undertaking this analysis for island bedstraw and Santa Cruz Island dudleya, we choose to address the status question first. We began by identifying portions of their range where the biological status of these species may be different from their biological status elsewhere in their ranges. For this purpose, we consider information pertaining to the geographic distribution of (a) individuals of these species, (b) the threats that these species face, and (c) the resiliency condition of populations.

We evaluated the range of the island bedstraw and Santa Cruz Island dudleya to determine if either species is in danger of extinction now or likely to

become so in the foreseeable future in any portion of their ranges. The range of a species can theoretically be divided into portions in an infinite number of ways. We focused our analysis on the portions of these species' ranges that may meet the definition of an endangered species or a threatened species.

For island bedstraw, we considered whether the threats or their effects on the species are greater in any biologically meaningful portion of the species' range than in other portions such that the species is in danger of extinction now or likely to become so in the foreseeable future in that portion. We examined the threats to determine if they are geographically concentrated in any portion of the species' range at a biologically meaningful scale. Island bedstraw consists of 33 sites on Santa Cruz Island and 6 sites on San Miguel Island where each site is treated as a separate population. The total estimated number of known individuals is at least 15,730 after recent helicopter surveys occurred in a general area of about 6,000 ha (15,000 acres), although the total occupied area within that general area is much less (has not been estimated). We examined the following threats to island bedstraw: feral livestock grazing, trampling, erosion, small population size, and climate change including cumulative effects.

We found that the major threats to island bedstraw at the time of listing, feral livestock grazing, trampling, and resulting erosion, have largely been eliminated on both Santa Cruz and San Miguel Islands. The elimination of these threats also minimized the threats of small population size and nonnative vegetation on both islands. The major remaining potential factor influencing island bedstraw population viability is climate change. Our current analysis does not show that the species is experiencing any significant effects from changing climate conditions in any of the populations on either island, or that the species will do so in the foreseeable future.

We found no biologically meaningful portion of island bedstraw's range where the condition of the species differs from its condition elsewhere in its range such that the status of the species in that portion differs from any other portion of the species' range.

Therefore, we find that the species is not in danger of extinction now or likely to become so in the foreseeable future in any significant portion of its range. This does not conflict with the courts' holdings in *Desert Survivors* v. *U.S. Department of the Interior,* 336 F. Supp. 3d 1131 (N.D. Cal. 2018), and *Center for Biological Diversity* v. *Jewell,* 248 F. Supp. 3d 946, 959 (D. Ariz. 2017) because, in reaching this conclusion, we did not apply the aspects of the Final Policy on Interpretation of the Phrase ''Significant Portion of Its Range'' in the Endangered Species Act's Definitions of ''Endangered Species'' and ''Threatened Species'' (79 FR 3758, July 1, 2014), including the definition of ''significant'' that those court decisions held to be invalid.

For Santa Cruz Island dudleya, we considered whether the threats or their effects on the species are greater in any biologically meaningful portion of the species' range than in other portions such that the species is in danger of extinction now or likely to become so in the foreseeable future in that portion. We examined the threats to determine if they are geographically concentrated in any portion of the species' range at a biologically meaningful scale. Santa Cruz Island dudleya occurs in a general area of about 200 ha (494 acres), although the total occupied area within that general area is about 13.7 ha (34 acres) (Schneider and Carson 2019 p. 10). The area can be divided into five subpopulations, each within 400 m of another, that function as a single, contiguous population. Therefore, according to the definition of the California Natural Diversity Database (CNDDB 2018 p. 3), these sites comprise a single occurrence. Previous work on gene flow in a population of another member of the subgenus Hasseanthus, *Dudleya multicaulis* (Marchant et al. 1998, pp. 217–219), that is similarly dispersed, suggests that all Santa Cruz Island dudleya subpopulations probably comprise a single mixing population. Thus, due to being a narrow endemic that functions as a single, contiguous population and occurs within a very small area, there is no biologically meaningful way to break the limited range of Santa Cruz Island dudleya into notable portions, and the threats that the species faces affect the species throughout its entire range. As a result, we found no biologically meaningful portion of the Santa Cruz Island dudleya's range where the condition of the species differs from its condition elsewhere in its range such that the status of the species in that portion differs from its status in any other portion of the species' range.

Therefore, we find that the species is not in danger of extinction now or likely to become so in the foreseeable future in any significant portion of the species' range. This does not conflict with the courts' holdings in *Desert Survivors* v. *U.S. Department of the Interior,* 336 F. Supp. 3d 1131 (N.D. Cal. 2018), and *Center for Biological Diversity* v. *Jewell,* 248 F. Supp. 3d. 946, 959 (D. Ariz. 2017) because, in reaching this conclusion, we did not apply the aspects of the Final Policy on Interpretation of the Phrase ''Significant Portion of Its Range'' in the Endangered Species Act's Definitions of ''Endangered Species'' and ''Threatened Species'' (79 FR 37578; July 1, 2014), including the definition of ''significant'' that those court decisions held to be invalid.

Determination of Status

Our review of the best scientific and commercial data available indicates that island bedstraw and Santa Cruz Island dudleya do not meet the definition of an endangered species or a threatened species in accordance with sections 3(6) and 3(20) of the Act. In accordance with our regulations at 50 CFR 424.11(e)(2) currently in effect, island bedstraw and Santa Cruz Island dudleya do not meet the definition of an endangered or threatened species. Therefore, we are removing island bedstraw and Santa Cruz Island dudleya from the Federal List of Endangered and Threatened Plants.

Effects of This Rule

This final rule revises 50 CFR 17.12(h) by removing island bedstraw and Santa Cruz Island dudleya from the Federal List of Endangered and Threatened Plants. On the effective date of this rule (see **DATES**, above), the prohibitions and conservation measures provided by the Act, particularly through sections 7 and 9, will no longer apply to these species. Federal agencies will no longer be required to consult with the Service under section 7 of the Act in the event that activities they authorize, fund, or carry out may affect island bedstraw and Santa Cruz Island dudleya. There is no critical habitat designated for these species, so there will be no effect to 50 CFR 17.96.

Post-Delisting Monitoring

Section 4(g)(1) of the Act requires us, in cooperation with the States, to implement a monitoring program for not less than 5 years for all species that have been delisted due to recovery. Post-delisting monitoring (PDM) refers to activities undertaken to verify that a species delisted due to recovery remains secure from the risk of extinction after the protections of the Act no longer apply. The primary goal of PDM is to monitor the species to ensure that its status does not deteriorate, and if a decline is detected, to take measures to halt the decline so that proposing it as endangered or threatened is not again

needed. If at any time during the monitoring period data indicate that protective status under the Act should be reinstated, we can initiate listing procedures, including, if appropriate, emergency listing.

We are delisting island bedstraw and Santa Cruz Island dudleya based on our analysis in the SSA report, expert opinions, and conservation and recovery actions taken. Since delisting would be, in part, due to conservation actions taken by stakeholders, we have prepared PDM plans for island bedstraw and Santa Cruz Island dudleya. The PDM plans: (1) Summarize the status of island bedstraw and Santa Cruz Island dudleya at the time of proposed delisting; (2) describe frequency and duration of monitoring; (3) discuss monitoring methods and potential sampling regimes; (4) define what potential triggers will be evaluated to address the need for additional monitoring; (5) outline reporting requirements and procedures; (6) establish a schedule for implementing the PDM plans; and (7) define responsibilities. It is our intent to work with our partners towards maintaining the recovered status of island bedstraw and Santa Cruz Island dudleya. With the publication of the proposed rule, we sought public and peer reviewer comments on the draft PDM plans, including their objectives and procedures, and have incorporated these comments as appropriate into the final PDM plans, which will be posted to *https://www.regulations.gov* under Docket No. FWS–R8–ES–2022–0066 and are available as indicated above in **ADDRESSES**.

Required Determinations

National Environmental Policy Act (42 U.S.C. 4321 et seq.)

We have determined that environmental assessments and environmental impact statements, as defined under the authority of the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*), need not be prepared in connection with determining a species' listing status under the Endangered Species Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244).

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994 (Government-to-Government Relations with Native American Tribal Governments; 59 FR 22951), Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments), and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with federally recognized Tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal–Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with Tribes in developing programs for healthy ecosystems, to acknowledge that Tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to Tribes. No Tribal lands are associated with this final rule, and we did not receive any comments from any Tribes or Tribal members on the proposed rule (87 FR 73722, December 1, 2022).

References Cited

A complete list of references cited in this rulemaking is available on the internet at *https://www.regulations.gov* and upon request from the Ventura Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

Authors

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

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Plants, Reporting and recordkeeping requirements, Transportation, Wildlife.

Regulation Promulgation

Accordingly, we hereby amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

■ 1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 1531–1544; and 4201–4245, unless otherwise noted.

§ 17.12 [Amended]

■ 2. In § 17.12, amend paragraph (h) in the List of Endangered and Threatened Plants by removing the entries for ''*Dudleya nesiotica*'' and ''*Galium buxifolium*'' under Flowering Plants.

Martha Williams,

Director, U.S. Fish and Wildlife Service.

[FR Doc. 2023–23937 Filed 11–6–23; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 231101–0256]

RIN 0648–BM12

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Snapper-Grouper Fishery of the South Atlantic; Amendment 52

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

ACTION: Final rule.

SUMMARY: NMFS issues regulations to implement Amendment 52 to the Fishery Management Plan for the Snapper-Grouper Fishery of the South Atlantic (FMP), as submitted by the South Atlantic Fishery Management Council (the Council). For golden tilefish, this final rule revises the annual catch limits (ACLs), commercial longline component fishing season, and recreational accountability measures (AMs). For blueline tilefish, this final rule reduces the recreational bag limit, modifies the possession limits, and revises the recreational AMs. In addition, Amendment 52 updates the acceptable biological catch (ABC), overfishing limit (OFL), and annual optimum yield (OY). The purpose of this final rule and Amendment 52 is to respond to the most recent stock assessment for golden tilefish, and to prevent recreational landings from exceeding the recreational ACLs for golden tilefish and blueline tilefish.

DATES: This final rule is effective December 7, 2023.

ADDRESSES: Electronic copies of Amendment 52, which includes a fishery impact statement and a regulatory impact review, may be obtained from the Southeast Regional Office website at *https://www.fisheries.noaa.gov/action/amendment-52-changes-catch-levels-allocations-accountability-measures-and-management.*

FOR FURTHER INFORMATION CONTACT: Karla Gore, telephone: 727–824–5305, or email: *karla.gore@noaa.gov.*

SUPPLEMENTARY INFORMATION: The South Atlantic snapper-grouper fishery, which includes golden tilefish and blueline tilefish, is managed under the FMP. The FMP was developed by the Council and implemented through regulations at 50 CFR part 622 under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act).

Background

The Magnuson-Stevens Act requires that NMFS and the regional fishery management councils prevent overfishing and achieve, on a continuing basis, the OY from federally managed fish stocks. These mandates are intended to ensure that fishery resources are managed for the greatest overall benefit to the Nation, particularly with respect to providing food production and recreational opportunities, and protecting marine ecosystems. To further this goal, the Magnuson-Stevens Act requires fishery managers to minimize bycatch and bycatch mortality to the extent practicable.

On August 3, 2023, NMFS published a notice of availability for Amendment 52 and requested public comment (88 FR 51255). On August 24, 2023, NMFS published a proposed rule for Amendment 52 and requested public comment (88 FR 57916). NMFS approved Amendment 52 on October 30, 2023. The proposed rule and Amendment 52 outline the rationale for the actions contained in this final rule. A summary of the management measures described in Amendment 52 and implemented by this final rule is provided below.

All weights described in this final rule are in gutted weight unless otherwise specified.

The South Atlantic stock of golden tilefish was first assessed through the Southeast Data, Assessment, and Review (SEDAR) process in 2004 (SEDAR 4). In response to the assessment, the Council submitted management measures in Amendment 13C to the FMP. The final rule to implement Amendment 13C specified a commercial quota for golden tilefish of 295,000 lb. (133,810 kg); a commercial trip limit for golden tilefish of 4,000 lb (1,814 kg), and, if 75 percent of the quota is landed on or before September 1, then a reduction of the trip limit to 300 lb (136 kg); and a recreational bag limit of one golden tilefish per person per day included within the five-grouper aggregate bag limit (71 FR 55096, September 21, 2006). The Council submitted sector allocations for golden tilefish in Amendment 17B to the FMP, allocating 97 percent of the ACL to the commercial sector and 3 percent of the ACL to the recreational sector. In addition, for golden tilefish, the final rule for Amendment 17B specified: a total ACL of 291,566 lb (132,252 kg), a commercial ACL of 282,819 lb (128,285 kg), and a recreational ACL of 1,578 fish; commercial and recreational AMs; and a longline endorsement for the commercial component of golden tilefish (75 FR 82280, December 30, 2010).

In 2011, a new stock assessment was completed for golden tilefish (SEDAR 25 2011) and the Council submitted Regulatory Amendment 12 to the FMP in response to the assessment. In the final rule for Regulatory Amendment 12, the total ACL was set at 558,036 lb. (253,121 kg), the existing allocations were applied to revise the sector ACLs to 541,295 lb (245,527 kg) for the commercial sector and 3,019 fish for the recreational sector, and the recreational annual catch target and sector AMs were revised (77 FR 61295, October 9, 2012). In Amendment 18B to the FMP, the golden tilefish commercial ACL was divided between two commercial fishing gear components, assigning 75 percent of the ACL to the longline component with a 4,000 lb (1,814 kg) trip limit and 25 percent of the ACL to the hook-and-line component with a 500 lb (227 kg) trip limit (78 FR 23858, April 23, 2013).

In 2016, an update to the SEDAR 25 stock assessment indicated that golden tilefish were undergoing overfishing (SEDAR 25 Update 2016). Following two interim rules that took action to reduce overfishing (83 FR 65, January 2, 2018; 83 FR 28387, June 19, 2018), the final rule for Regulatory Amendment 28 to the FMP implemented long-term measures that reduced the golden tilefish ACLs. The existing allocations were applied to revise the sector ACLs to 331,740 lb (150,475 kg) for the commercial sector (further divided with 75 percent to the longline component and 25 percent to the hook-and-line component) and 2,316 fish for the recreational sector (83 FR 62508, December 4, 2018).

The Council submitted Amendment 52 in response to a new stock assessment for golden tilefish. The new assessment, SEDAR 66, was completed in 2020 and it indicated that the stock was not undergoing overfishing and was not overfished. SEDAR 66 includes recreational landings estimates using the Marine Recreational Information Program (MRIP) Fishing Effort Survey (FES) as discussed below. The revised catch levels recommended by the Council in Amendment 52 and in this final rule are based on their Scientific and Statistical Committee's (SSC) recommended ABC and the results of SEDAR 66. The Council received the results of the assessment and the SSC's recommendations for the OFL and ABC at the June 2021 Council meeting.

In response to golden tilefish commercial longline vessel fishermen's concerns about avoiding oversupplying the market in the first part of January and allowing such vessels to remain fishing for golden tilefish during the Lenten season when prices tend to be relatively high, this final rule changes the starting date of the fishing season for the commercial longline component from January 1st to January 15th.

For blueline tilefish managed under the FMP, recreational landings exceeded the recreational ACL every year from 2015–2020. Revising certain management measures for blueline tilefish is expected to help keep the recreational sector within its ACL. The most recent stock assessments for blueline tilefish were completed in 2017 and did not indicate that the stock was undergoing overfishing or was being overfished.

The Council and NMFS intend that the actions in Amendment 52 and this final will achieve OY while minimizing, to the extent practicable, adverse social and economic effects.

Management Measures Contained in This Final Rule

For golden tilefish, this final rule revises the sector ACLs, commercial component quotas, commercial longline component fishing season, and recreational AMs. For blueline tilefish, this final rule revises the recreational bag and possession limits and recreational AMs.

Golden Tilefish Total ACL

As implemented through Regulatory Amendment 28 to the FMP, the current total ACL and annual OY for golden tilefish are equal to the current ABC of 342,000 lb. (155,129 kg.) (83 FR 62508, December 4, 2018). In Amendment 52, the ABC is revised based on SEDAR 66 and the recommendation of the SSC, and the ABC, ACL, and annual OY is set equal to each of these values.

Amendment 52 revises the total ACL and annual OY equal to the recommended ABC of 435,000 lb (197,313 kg) for 2023; 448,000 lb (203,209 kg) for 2024; 458,000 lb (207,745 kg) for 2025; 466,000 lb

(211,374 kg) for 2026 and subsequent fishing years.

Golden Tilefish Sector Allocations and ACLs

Amendment 52 revises the sector allocations and this final rule revises the sector ACLs for golden tilefish. The current sector ACLs for golden tilefish are based on the commercial and recreational allocations of the total ACL at 97 percent and 3 percent, respectively. The current allocations are based on the allocation formula [ACL = ((mean landings 2006–2008) * 0.5)) + ((mean landings 1986–2008) * 0.5))] adopted by the Council in the Comprehensive ACL Amendment to the FMP, which considered past and present participation (77 FR 15915, March 16, 2012). The Council established those allocations based on balancing long-term catch history with more recent catch history and believed that approach to be a fair and equitable method to allocate fishery resources.

The revised golden tilefish sector allocations in Amendment 52 result in commercial and recreational allocations of 96.70 percent and 3.30 percent, respectively. The revised sector allocations were determined by applying the allocation formula (described above) to the recreational MRIP FES estimates used in SEDAR 66. Utilizing these revised recreational estimates results in a slight shift of allocation to the recreational sector, with the percentages of annual catch increasing from the current 3 percent to the revised 3.30 percent. The limited recreational effort for, and harvest of, golden tilefish, were considered in determining that allocating 3.30 percent of the revised total ACL for golden tilefish to the recreational sector is a fair and equitable allocation that is reasonably calculated to promote conservation and does not give any entity an excessive share of harvest privileges based on the historical and current harvest of golden tilefish. In addition, this allocation division will encourage a rational and well-managed use of the golden tilefish resource, which optimizes social and economic benefits.

This final rule revises the commercial ACLs (commercial sector hook-and-line and longline components combined) to 420,645 lb (190,801 kg) for 2023; 433,216 lb (196,503 kg) for 2024; 442,886 lb (200,890 kg) for 2025; and 450,622 lb (204,399 kg) for the 2026 and subsequent fishing years.

This final rule revises the recreational ACLs (in numbers of fish) to 2,559 for the 2023 fishing year; 2,635 for the 2024 fishing year; 2,694 for the 2025 fishing year; 2,741 for the 2026 and subsequent fishing years.

Golden Tilefish Commercial Component Allocations

As discussed above, the commercial ACL is allocated between two gear components: 25 percent is allocated to the hook-and-line component and 75 percent to the longline component (77 FR 23858, April 23, 2013). The allocation percentages between the hook-and-line and longline components were not modified in Amendment 52. However, this final rule revises the hook-and-line and longline component ACLs (quotas) based on the revised commercial ACL. The commercial hook-and-line ACL is 105,161 lb (47,700 kg) for 2023; 108,304 lb (49,126 kg) for 2024; 110,722 lb (50,223 kg) for 2025; and 112,656 lb (51,100 kg) for 2026 and subsequent fishing years.

The ACLs for the longline component are 315,484 lb (143,101 kg) for 2023; 324,912 lb (147,378 kg) for 2024; 332,165 lb (150,668 kg) for 2025; and 337,967 lb (153,299 kg) for the 2026 and subsequent fishing years.

Golden Tilefish Commercial Longline Component Fishing Season

This final rule changes the start date for the fishing season for the commercial longline component from January 1st to January 15th. A closed season will be established for the commercial longline component annually from January 1 through January 14. Starting the commercial season on January 15th for the longline component will help to avoid oversupplying the market in the first part of January and should allow commercial longline vessels to remain fishing for golden tilefish during the Lenten season when prices tend to be relatively high.

Blueline Tilefish Recreational Bag and Possession Limits

In August 2016, Regulatory Amendment 25 to the FMP established the current recreational bag limit of three fish per person per day (81 FR 45245, July 13, 2016). As discussed above, recreational landings for blueline tilefish have exceeded the recreational ACL every year from 2015–2020. This final rule reduces the recreational bag limit for blueline tilefish from three to two fish per person per day to help prevent recreational landings from exceeding the recreational ACL in future fishing years.

Additionally, the captain and crew of a for-hire vessel with a valid Federal South Atlantic Charter/Headboat Snapper-Grouper Permit are currently allowed to retain bag limit quantities of all snapper-grouper species during the open recreational season. In addition to reducing the recreational bag and possession limits to two fish per person per day, this final rule prohibits the retention of blueline tilefish by the captain and crew. A bag limit of two blueline tilefish per person per day and prohibiting retention of the bag limit by captain and crew will result in an overall 12.2 percent reduction in harvest for the recreational sector. The measures to reduce the blueline tilefish bag limit from three to two fish per person per day and prohibit the retention of the bag limit by for-hire captain and crew will, in combination, be expected to keep the recreational landings of blueline tilefish within the recreational ACL.

Golden Tilefish and Blueline Tilefish Recreational AMs

This final rule also revises the recreational AMs for golden tilefish and blueline tilefish. The current recreational AMs for golden tilefish were established through the final rule for Amendment 34 to the FMP (81 FR 3731, January 22, 2016). The current recreational AMs for blueline tilefish were established through the final rule for Amendment 32 to the FMP (80 FR 16583, March 30, 2015). The current AMs for both species include an in-season closure for the remainder of the fishing year if recreational landings reach or are projected to reach their respective recreational ACL. The current post-season AMs state that if the recreational ACL is exceeded, then during the following fishing year recreational landings will be monitored for a persistence in increased landings. Additionally, during that following fishing year, if the total ACL is exceeded and the species is overfished, the length of the recreational fishing season is reduced and the recreational ACL is reduced by the amount of the recreational ACL overage.

This final rule revises the recreational AMs for both golden tilefish and blueline tilefish to remove the current in-season closure if the recreational ACL is reached or is projected to be reached, and the post-season AM that is tied to the overfished status of the stock. The revised recreational AM will have NMFS projecting the length of the recreational season based on catch rates from the previous fishing year to determine when the recreational ACL would be expected to be met. NMFS will announce the length of the recreational season and its ending date annually in the **Federal Register**.

The current AMs are being revised because of the delayed availability of

recreational landings information to use for in-season actions for species with short fishing seasons or relatively small amounts of fish. For blueline tilefish, the current recreational fishing season is 4 months long, from May through August, and the recreational ACL for golden tilefish is 2,316 fish. In these circumstances, the current in-season AMs will not be effective in keeping landings from exceeding the recreational ACL. As previously discussed, the recreational landings for blueline tilefish exceeded the recreational ACL every year from 2015–2020. The golden tilefish recreational ACL has also frequently been exceeded, with the recreational sector exceeding its ACL every year since 2010, except for 2014 and 2017.

The current post-season recreational AMs that would apply corrective action for ACL overages were not being triggered because they were tied to a determination that the stock was overfished, and neither blueline nor golden tilefish is considered to be overfished. Consequently, any overages of the recreational ACL would be likely to continue to occur.

In addition, the Magnuson-Stevens Act Guidelines under National Standard 1 advise Councils to reevaluate the system of ACLs and AMs when overages of a stock's ACL occur more than once in 4 consecutive years. The purpose of the revised AMs is to prevent recreational landings from exceeding the respective recreational ACLs for both golden tilefish and blueline tilefish. The revised recreational AMs will be more effective at restraining landings to the recreational ACL. For blueline tilefish, Amendment 52 will both modify the recreational AM and reduce the recreational retention limit to further ensure recreational landings will not exceed the ACL. Amendment 52 and this final rule do not adjust the commercial AMs for either species.

Management Measures in Amendment 52 Not Codified by This Final Rule

In addition to the measures within this final rule, Amendment 52 revises the OFL and updates other biological reference points and revises the ABC, OY, and sector allocations for golden tilefish.

Golden Tilefish ABC and Annual OY

The current OFL and ABC are inclusive of MRIP Coastal Household Telephone Survey (CHTS) estimates of private recreational and charter landings. The Council's SSC reviewed the latest stock assessment (SEDAR 66) and recommended new ABC levels as determined by SEDAR 66. The assessment and associated ABC recommendations incorporated the revised estimates for recreational catch and effort from the MRIP Access Point Angler Intercept Survey (APAIS) and the updated FES. MRIP began incorporating a new survey design for APAIS in 2013 and replaced the CHTS with FES in 2018. Prior to the implementation of MRIP in 2008, recreational landings estimates were generated using the Marine Recreational Fisheries Statistics Survey (MRFSS). As explained in Amendment 52, total recreational fishing effort estimates generated from MRIP FES are generally higher than both the MRFSS and MRIP CHTS estimates. This difference in estimates is because MRIP FES is designed to measure fishing activity more accurately and not because there was a sudden increase in fishing effort. The MRIP FES is considered a more reliable estimate of recreational effort by the Council's SSC, the Council, and NMFS, and is a more robust method when compared to the MRIP CHTS method. The new ABC recommendations within Amendment 52 also represent the best scientific information available as determined by the SSC.

The OY for golden tilefish will be specified on an annual basis and will be set equal to the ABC and total ACL in accordance with the guidance provided in the Magnuson-Stevens Act National Standard 1 Guidelines at 50 CFR 600.310(f)(4)(iv).

Comments and Reponses

NMFS received 11 comment submissions from individuals on the amendment and proposed rule for Amendment 52. Three comments were in support of the actions in Amendment 52, and NMFS agrees with those comments. Comments received that were outside the scope of the actions in Amendment 52 and the proposed rule included comments on offshore wind development and are not responded to in this final rule. Comments that opposed the actions in Amendment 52 and the proposed rule are summarized below, along with NMFS' responses. No changes were made to this final rule as a result of public comment.

Comment 1: The revised allocation of golden tilefish between the commercial and recreational sector is extremely unfair. The commercial sector receives 96.7 percent of the total allocation and the recreational sector only receives 3.30 percent. Consideration should have been given to allocate a greater portion of the total ACL to the recreational sector.

Response: NMFS disagrees that the allocations are unfair. In the golden tilefish fishery, the recreational sector accounts for a fairly constant but small portion of the harvest, given that golden tilefish is a deep-water species that is caught further from shore and in greater depths than most of the other species in the snapper grouper complex. The actions related to golden tilefish in Amendment 52 are responding to the most recent stock assessment for golden tilefish (SEDAR 66), which included the change to MRIP estimates from CHTS units to the new FES units. The recreational landings estimates have been revised to adopt the new FES methodology, and the conversion to FES units did not substantially change historical recreational landings for golden tilefish. However, with the change of MRIP from CHTS units to FES units, the allocation distribution between the commercial and recreational sectors needed to be recalculated based on the revised units. The allocation percentages were previously calculated by applying the formula: sector annual catch limit = ((mean landings 2006–2008) * 0.5)) + ((mean landings 1986–2008) * 0.5). When the same allocation formula is applied using the new MRIP–FES data, the recreational allocation increases from 3 to 3.30 percent. The Council also considered the effects of the new catch limits, along with estimates of the commercial and recreational sectors' economic impacts, as measured by full-time equivalent jobs, income, value-added, and sales, as part of the allocation decision in Amendment 52. Considering the limited recreational effort for, and harvest of, golden tilefish, NMFS has determined that allocating 3.30 percent of the revised total ACL for golden tilefish to the recreational sector is a fair and equitable allocation that is reasonably calculated to promote conservation, and that does not give any entity an excessive share of harvest privileges, based on the historical and current harvest of golden tilefish. This allocation division encourages a rational and well-managed use of the golden tilefish resource.

Comment 2: Recreational fishermen spend a significant amount of money on vessels, fuel, and gear to harvest golden tilefish and this should result in a greater allocation of the golden tilefish total ACL to the recreational sector. Also, a lower recreational allocation leads to shorter recreational seasons.

Response: Although recreational fishing expenditures are meaningful to the estimation of economic impacts and the distribution of those impacts regionally and by industry, they are not,

on their own, a measure of net economic benefits. NMFS conducted a cost-benefit analysis for Amendment 52 that examined the effects of the new catch limits and allocation and provided an estimate of the change in net economic benefits resulting from the actions in Amendment 52. This information, along with estimates of the commercial and recreational sectors' economic impacts, were considered as part of the allocation decision in Amendment 52. Further, the recreational allocation is actually increased by a small amount in Amendment 52 compared to the status quo. The selected sector allocation in Amendment 52 is expected to generate positive net economic benefits in the recreational sector relative to the current sector allocation.

As previously explained, the final rule increases, rather than decreases, the recreational allocation and ACL. NMFS notes that this final rule removes the current inseason recreational closure based on the recreational ACL being reached or projected to be reached. Instead, the new recreational AM will have NMFS annually announce the length of the recreational fishing season based on catch rates from the previous season. The fishing season will start on January 1 and end on the date NMFS projects the recreational ACL will be met. Within Amendment 52, this recreational AM was determined to provide the most biological benefits to the stock by being the most likely to prevent recreational ACL overages. While the recreational season end date for golden tilefish may shift each year, announcing the length of the season at the beginning of the season would allow private anglers and for-hire businesses to plan their activities around the seasonal closure in advance.

Comment 3: Adequate opportunities need to be provided for fishermen to express their views and concerns on the proposed actions through public hearings, surveys, interviews, focus groups, or other appropriate methods, specifically with regard to sector allocation.

Response: NMFS agrees that opportunity for public comment is important during the development of an FMP amendment and specifically for Amendment 52. At its June 2021 meeting, the Council received the results of SEDAR 66 and the SSC's recommendations for the overfishing limit and ABC. While the Council then developed Amendment 52 during 2021 and 2022, the public had opportunities to comment on the actions in Amendment 52 during the Council scoping process, during public hearings and Snapper Grouper Advisory Panel meetings, as well as during the Council meetings. A summary of the public comments received are included in Chapter 5 of the amendment, and all comments from the public were reviewed by the Council prior to its final action on Amendment 52. In addition, NMFS has also reviewed all public comments received on the notice of availability for Amendment 52 that was published in the **Federal Register** on August 8, 2023, with the public comment period open through October 2, 2023, and all public comments received on the proposed rule for Amendment 52 that was published in the **Federal Register** on August 23, 2023, with the public comment period open through September 25, 2023.

Therefore, consistent with the Magnuson-Stevens Act and other applicable law, NMFS has determined that fishermen and other members of the public have had numerous opportunities to review the actions in Amendment 52, including sector allocations, and provide comment.

Comment 4: The rule should incorporate the best available science on climate change and its effects on the snapper-grouper fishery. The Council should develop adaptive management strategies to cope with the uncertainty and variability of the future climate conditions.

Response: NMFS has determined that Amendment 52 contains the best scientific information available, consistent with the Magnuson-Stevens Act. Within Amendment 52, Chapter 6 addresses the cumulative impacts of the actions in the amendment and includes a summary of known or possible climate change impacts in the South Atlantic region. As described in Amendment 52, climate change may impact snapper-grouper species in the future, but the level of impacts cannot be quantified at this time, nor is the time frame known in which these impacts would occur.

Comment 5: Amendment 52 should revise the existing section on the social impact assessment to include more comprehensive and inclusive criteria that capture the diverse values and preferences of the fishermen and fishing communities, including subsistence and traditional fishermen.

Response: Data are not readily available on values and preferences of fishermen and fishing communities. However, NMFS conducted a social impact assessment using the best scientific information available, which is included in Amendment 52. The social impact assessment in Amendment 52 includes the social environment, environmental justice, and social effects sections of the document. These sections within Chapters 3 and 4 of Amendment 52 include a description of the social characteristics of the fishery; community level data on fishing participants, community quotient-fishing landings and value (*i.e.,* the share of each community's landings and ex-vessel values divided by the landings and values for the region), local quotient (*i.e.,* the proportion of a community's commercial landings for a given species relative to commercial landings of all species by persons affiliated with that community during a given time period), fishing engagement and reliance, and social vulnerability indicators. In addition, within the discussion for each specific action in Amendment 52, the sections contain an analysis and description of the likely social changes due to the alternatives under consideration along with an evaluation of the potential social effects of the proposed actions in comparison to the *status quo.* As explained in the Response to *Comment 3,* snapper-grouper fishermen's and stakeholders' perspectives and input are gathered through the scoping and public comment process and were utilized in the evaluation and determination of social effects contained in Amendment 52. NMFS has determined that social impact assessment in Amendment 52 meets the requirements of the Magnuson-Stevens Act and other applicable law.

Classification

Pursuant to section 304(b)(3) of the Magnuson-Stevens Act, the NMFS Assistant Administrator has determined that this final rule is consistent with Amendment 52, the FMP, other provisions of the Magnuson-Stevens Act, the U.S. Constitution, and other applicable law.

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

The Magnuson-Stevens Act provides the legal basis for this proposed rule. No duplicative, overlapping, or conflicting Federal rules have been identified.

A description of this final rule, why it is being considered, and the purpose of this final rule are contained in the **SUMMARY** and **SUPPLEMENTARY INFORMATION** sections of this final rule. The objective of this final rule is to base conservation and management measures for golden and blueline tilefish on the best scientific information available and achieve OY, consistent with the Magnuson-Stevens Act and its National Standards.

The Chief Counsel for Regulation of the Department of Commerce certified

to the Chief Counsel for Advocacy of the Small Business Administration (SBA) during the proposed rule stage that this action would not have a significant economic impact on a substantial number of small entities. The factual basis for the certification was published in the proposed rule and is not repeated here. NMFS did not receive any comments from SBA's Office of Advocacy or the public regarding the certification in the proposed rule. As a result, a final regulatory flexibility analysis was not required and none was prepared.

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

List of Subjects in 50 CFR Part 622

Blueline tilefish, Commercial, Fisheries, Fishing, Golden tilefish, Recreational, South Atlantic.

Dated: November 1, 2023.

Samuel D. Rauch, III,

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

For the reasons set out in the preamble, NMFS amends 50 CFR part 622 as follows:

PART 622—FISHERIES OF THE CARIBBEAN, GULF OF MEXICO, AND SOUTH ATLANTIC

■ 1. The authority citation for part 622 continues to read as follows:

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

■ 2. In § 622.183, add paragraph (b)(11) to read as follows:

§ 622.183 Area and seasonal closures.

* * * * *

(b) * * *

(11) *Golden tilefish commercial longline component.* The golden tilefish commercial longline component in or from the South Atlantic EEZ is closed from January 1 through January 14, each year. During a closure, no vessel with a valid or renewable golden tilefish longline endorsement as described at 50 CFR 622.191(a)(2)(ii), and no person, may fish for, harvest, or possess golden tilefish from the South Atlantic EEZ with longline gear on board.

■ 3. In § 622.187, add paragraph (b)(2)(iv) to read as follows:

§ 622.187 Bag and possession limits.

* * * * *

(b) * * *

(2) * * *

(iv) No more than two fish may be blueline tilefish. However, no blueline tilefish may be retained by the captain or crew of a vessel operating as a charter vessel or headboat. The bag limit for such captain and crew is zero.

* * * * *

■ 4. In § 622.190, revise paragraph (a)(2) to read as follows:

§ 622.190 Quotas.

* * * * *

(a) * * *

(2) *Golden tilefish*—(i) *Commercial sector* (*hook-and-line and longline components combined*). (A) For the 2023 fishing year—420,645 lb (190,801 kg).

(B) For the 2024 fishing year—433,216 lb (196,503 kg).

(C) For the 2025 fishing year—442,886 lb (200,890 kg).

(D) For the 2026 and subsequent fishing years—450,622 lb (204,399 kg).

(ii) *Hook-and-line component.* (A) For the 2023 fishing year—105,161 lb (47,700 kg).

(B) For the 2024 fishing year—108,304 lb (49,126 kg).

(C) For the 2025 fishing year—110,722 lb (50,223 kg).

(D) For the 2026 and subsequent fishing years—112,656 lb (51,100 kg).

(iii) *Longline component.* (A) For the 2023 fishing year—315,484 lb (143,101 kg).

(B) For the 2024 fishing year—324,912 lb (147,378 kg).

(C) For the 2025 fishing year—332,165 lb (150,668 kg).

(D) For the 2026 and subsequent fishing years—337,967 lb (153,299 kg).

* * * * *

■ 5. Amend § 622.193 by revising paragraphs (a)(1)(iii) and (a)(2), adding paragraph (a)(3), and revising paragraph (z)(2) to read as follows:

§ 622.193 Annual catch limits (ACLs) and accountability measures (AMs).

(a) * * *

(1) * * *

(iii) If all commercial landings of golden tilefish, as estimated by the SRD, exceed the commercial ACL (including both the hook-and-line and longline component quotas) specified in § 622.190(a)(2)(i), and the combined commercial and recreational ACL specified in paragraph (a)(3) of this section is exceeded during the same fishing year, and golden tilefish are overfished based on the most recent Status of U.S. Fisheries Report to Congress, the AA will file a notification with the Office of the Federal Register to reduce the commercial ACL for that following fishing year by the amount of the commercial ACL overage in the prior fishing year.

(2) *Recreational sector.* The recreational ACL for golden tilefish is 2,559 fish for the 2023 fishing year; 2,635 fish for the 2024 fishing year; 2,694 for the 2025 fishing year; 2,741 fish for the 2026 and subsequent fishing years. NMFS will project the length of the recreational fishing season based on catch rates from the previous fishing year and when NMFS projects the recreational ACL specified in this paragraph (a)(2) is expected to be met, and annually announce the recreational fishing season end date in the **Federal Register**. On and after the effective date of the recreational closure notification, the bag and possession limit for golden tilefish in or from the South Atlantic EEZ is zero.

(3) *Combined commercial and recreational ACL.* The combined commercial and recreational ACL is 435,000 lb (197,313 kg), gutted weight, for the 2023 fishing year; 448,000 lb (203,209 kg), gutted weight, for the 2024 fishing year; 458,000 lb (207,745 kg), gutted weight, for the 2025 fishing year; and 466,000 lb (211,374 kg), gutted weight, for the 2026 and subsequent fishing years.

* * * * *

(z) * * *

(2) *Recreational sector.* The recreational ACL for blueline tilefish is 116,820 lb (52,989 kg), round weight. NMFS will project the length of the recreational fishing season based on catch rates from the previous fishing year and when NMFS projects the recreational ACL specified in this paragraph (z)(2) is expected to be met, and annually announce the recreational fishing season end date in the **Federal Register**. On and after the effective date of the recreational closure notification, the bag and possession limit for blueline tilefish in or from the South Atlantic EEZ is zero.

* * * * *

[FR Doc. 2023–24468 Filed 11–6–23; 8:45 am]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register

Vol. 88, No. 214

Tuesday, November 7, 2023

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

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Parts 701, 741,746, 748, and 752

[NCUA–2023–0023]

RIN: 3133–AF55

Fair Hiring in Banking

AGENCY: National Credit Union Administration (NCUA).

ACTION: Notice of proposed rulemaking.

SUMMARY: The NCUA Board (Board) proposes to incorporate its ''Second Chance'' Interpretive Ruling and Policy Statement 19–1 (IRPS 19–1) and the Fair Hiring in Banking Act (FHBA) into its regulations. The Federal Credit Union Act prohibits, except with the Board's prior written consent, any person who has been convicted of certain criminal offenses involving dishonesty or breach of trust (a covered offense), or who has entered into a pretrial diversion or similar program in connection with a prosecution for such offense (program entry), from participating in the conduct of the affairs of an insured credit union.

DATES: Comments must be received by January 8, 2024.

ADDRESSES: You may submit written comments, identified by RIN 3133–AF55, by any of the following methods (Please send comments by one method only):

- *Federal eRulemaking Portal: https://www.regulations.gov.* The docket number for this proposed rule is NCUA–2023–0023. Follow the instructions for submitting comments. A plain language summary of the proposed rule is also available on the docket website.
- *Mail:* Address to Melane Conyers-Ausbrooks, Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314–3428.
- *Hand Delivery/Courier*: Same as mailing address.

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

FOR FURTHER INFORMATION CONTACT: Rachel Ackmann, Senior Staff Attorney, Office of General Counsel, and Pamela Yu, Special Counsel to the General Counsel, Office of General Counsel, at the above address or telephone (703) 518–6540.

SUPPLEMENTARY INFORMATION:

I. Background

Section 205(d) of the Federal Credit Union Act (Section 205(d))

Prior to December 23, 2022, section 205(d)(1) of the Federal Credit Union Act (FCU Act) provided that, except with the prior written consent of the Board, a person who has been convicted of any criminal offense involving dishonesty or breach of trust, or has agreed to enter into a pretrial diversion or similar program in connection with a prosecution for such offense, may not:

- Become, or continue as, an institution-affiliated party (IAP) with respect to any insured credit union; or
- Otherwise participate, directly or indirectly, in the conduct of the affairs of any insured credit union.[1]

Section 205(d)(1)(B) further provides that an insured credit union may not allow any person described above to participate in the conduct of the affairs of the credit union without Board consent. Section 205(d)(2) restricts the Board from approving a consent application related to a person convicted of certain crimes enumerated in Title 18 of the United States Code for 10 years, absent a motion by the Board and approval by the sentencing court. Finally, section 205(d)(3) states that ''whoever knowingly violates'' section (d)(1)(A) or (d)(1)(B) commits a felony, punishable by up to 5 years in prison or a fine of up to $1,000,000 a day, or both. Section 205(d) prohibitions have existed in some form since 1970, and since then federally insured credit unions have been required to make a diligent inquiry as to whether prospective employees or IAPs[2] are subject to a section 205(d) prohibition.[3]

In 2008, the Board adopted Interpretive Rule and Policy Statement 08–1 (IRPS 08–1) to provide direction and guidance to federally insured credit unions and those persons who may be affected by section 205(d).[4] The Board specifically sought comments as to whether the format of the guidance as an IRPS was appropriate or whether a regulation would be more suitable.[5] The Board received some comments supporting guidance in the form of an IRPS and others supporting a regulation, but ultimately chose to issue the guidance through an IRPS.[6]

IRPS 08–1 outlined the actions prohibited under the FCU Act and the procedures for applying the Board's consent on a case-by-case basis. Recognizing that certain offenses are so minor and dated that they would not presently pose a substantial risk to the insured credit union, IRPS 08–1 excluded certain *de minimis* offenses that met specified requirements and juvenile offenses from the need to

[1] 12 U.S.C. 1785(d)(1).

[2] The NCUA has made its administrative orders against IAPs available in a searchable database on the agency's website. *See https://ncua.gov/news/enforcement-actions/administrative-orders.*

[3] 73 FR 48399, 48401 (Aug. 19, 2008).

[4] *Id.*

[5] The Board had not previously adopted any policies or regulations on section 205(d), as the statute at that time imposed no guidance or limitations on the information that the Board may consider, and the Board received a limited number of applications under section 205(d). However, due to an increasing number of applications requesting the Board's consent under section 205(d), the Board believed it was appropriate to issue guidance on the topic.

[6] Two commenters believed that a regulation was the more appropriate format for the guidance. One of the commenters who favored a regulation thought a regulation provided greater protection to a credit union that might be challenged by a prospective employee. Another commenter believed a regulation was preferable because it would help reinforce a credit union's right to appeal an adverse decision and subject future changes to public notice and comment. The Board concluded that the source of the requirement stems from federal statute, namely section 205(d). Therefore, the Board believed that the need to comply with federal law, as augmented by guidance in the form of an IRPS, was sufficient to protect a credit union. The Board believed that credit union officials should be able to adequately understand and apply the guidance styled as an IRPS and that the right to request a hearing contained in the IRPS provided a credit union a sufficient right to appeal a denial of consent by the Board. Additionally, the Board noted that it would not amend its IRPS without providing the public notice and an opportunity to comment. For all these reasons, the Board believed it appropriate to issue the final guidance in the form of an IRPS.

request consent from the Board. In effect, the IRPS gave automatic consent for these offenses without requiring a consent application or any notice.

In 2019, the Board rescinded IRPS 08–1 and issued IRPS 19–1, a revised and updated IRPS to reduce regulatory burden (also known as the Second Chance IRPS).[7] IRPS 19–1 amended IRPS 08–1 to expand the definition of *de minimis* offenses to reduce the scope and number of offenses that would require submission of a consent application to the Board. Specifically, the IRPS did not require a consent application for convictions involving insufficient funds checks of moderate aggregate value, small-dollar simple theft, false identification, simple drug possession, and isolated minor offenses committed by covered persons as young adults. The Board recognized that many Americans faced hiring barriers due to a criminal record, a great number of whom are not violent or career criminals, but rather people who made poor choices early in life who have since paid their debt to society. The Board found that offering second chances to those who are truly penitent was consistent with our nation's shared values of forgiveness and redemption. In keeping with this spirit of clemency, the Board expanded career opportunities for those who had demonstrated remorse and responsibility for past indiscretions and who wished to set forth on a path to productive living.

On December 23, 2022, Congress passed the National Defense Authorization Act for Fiscal Year 2023 (NDAA), which amended section 205(d).[8] The NDAA included the FHBA—which became immediately effective on December 23, 2022. The FHBA amends section 205(d) to expand employment opportunities for those with a previous minor or older criminal offense, among other provisions. Generally, the amendments codify a number of elements already contained in the NCUA's current policy regarding section 205(d) but also extend greater relief than what is currently available to certain individuals with prior convictions seeking employment with an insured credit union, particularly individuals with older convictions, expunged convictions, or prior convictions for a misdemeanor, any drug-related possession offense, or certain designated ''lesser offenses.'' The FHBA also clarifies several definitions and the procedures for processing a consent application. The specific provisions of the FHBA are discussed in detail later in this preamble.

Section 19 of the Federal Deposit Insurance Act

Section 19 of the Federal Deposit Insurance Act (FDI Act) (section 19) contains a prohibition provision similar to section 205(d) of the FCU Act.[9] Before 2020, the Federal Deposit Insurance Corporation (FDIC) provided the public with guidance relating to section 19 and the FDIC's application thereof through a Statement of Policy similar to the NCUA's IRPS 19–1.[10] Similar to the NCUA's IRPS, the FDIC's Statement of Policy, among other things, instituted a set of criteria to provide for blanket approval of certain low-risk crimes and for persons convicted of such *de minimis* crimes to forgo filing a section 19 consent application.

In 2020, the FDIC revised and incorporated its then existing Statement of Policy into its regulations to, among other purposes, provide for greater transparency as to its section 19 application, provide greater certainty as to the FDIC's application process, and to assist both insured depository institutions and individuals who may be affected by section 19 with understanding its impact and potentially seek relief from its provisions.[11]

In December 2022, the FHBA made amendments to section 19 that are comparable to the amendments made in section 205(d). The FDIC proposed to implement these changes through a notice-and-comment rulemaking in October 2023.

Coordination With the FDIC

In the past, the NCUA has drawn extensively on the FDIC's guidance related to section 19 due to the FDIC's greater experience processing section 19 consent applications. Further, in the Board's view it is beneficial to both insured financial institutions and covered individuals for the NCUA's section 205(d) related requirements to be consistent, to the extent possible, with the FDIC's section 19 requirements. Consistent guidelines between the two agencies with respect to these parallel statutory provisions help streamline the consent application process, particularly for those individuals seeking consent from both the NCUA and the FDIC to allow for potential employment at federally insured financial institutions. The FHBA formalizes the expectation that the agencies implement these comparable statutory provisions similarly and requires the NCUA and the FDIC to consult and coordinate to promote consistent procedures, where appropriate.[12] The Board finds that adopting similar definitions, terminology, and procedures in all aspects of this proposed rule will promote consistent implementation of consent applications because even those provisions that fall outside the scope of consent applications are likely to affect how the agency administers those applications. Staffs of the NCUA and the FDIC have consulted and coordinated on this proposed rulemaking as directed by the FHBA.

Additionally, in developing this proposed rule, NCUA staff has consulted with staffs at the Board of Governors of the Federal Reserve Board and the Office of the Comptroller of the Currency.

II. The Proposed Rule

Section-by-Section Analysis

The Board is now issuing a proposed rule to codify IRPS 19–1, along with significant changes that are consistent with the FHBA amendments to section 205(d) and the FDIC's comparable implementing regulations.[13] The proposed rule would address, among other topics, the individuals and types of offenses covered by section 205(d), as well as the NCUA's procedures for reviewing a consent application. The proposed rule would add new part 752 to Chapter VII of Title 12 of the U.S. Code of Federal Regulations. A section-by-section analysis of the proposed rule follows.

1. Section 752.1—What is section 205(d) of the FCU Act?

This section sets out the scope of proposed new part 752. Paragraph (a) would generally describe the requirements of section 205(d).

Paragraph (b) would set out insured credit unions' obligations under section 205(d), including that insured credit unions would be required to make a reasonable inquiry regarding an applicant's history to ensure that a

[7] 84 FR 65907 (Dec. 2, 2019).

[8] Public Law 117–263 (Dec. 23, 2022).

[9] 12 U.S.C. 1829(a).

[10] *See* 84 FR 68353 (Dec. 16, 2019).

[11] *Id.;* 85 FR 51312 (Aug. 20, 2020) (FDIC 2020 final rule).

[12] 12 U.S.C. 1785(d)(5)(I), and 12 U.S.C. 1829(f)(9).

[13] The NCUA is issuing a proposed rule to codify its policy regarding section 205(d) consent applications due to the FDIC's recent codification of its similar section 19 Statement of Policy. The NCUA believes codifying IRPS 19–1 will provide for greater transparency as to its application, provide greater certainty as to the NCUA's application process, and help both credit unions and individuals who may be affected by section 205(d) to understand its impact and potentially seek relief from its provisions.

person who is subject to the prohibition provision of section 205(d) is not hired or permitted to participate in the conduct of credit unions' affairs without the written consent of the NCUA. Paragraph (b) also would set out that insured credit unions would be permitted to make conditional offers of employment to prospective applicants.

Paragraph (c) would address the need for a consent application and establishes the standard for an application's approval. The NCUA would evaluate a consent application to determine if a person is fit to participate in the conduct of the affairs of an insured credit union without posing a risk to its safety and soundness or impairing public confidence in that credit union. The burden is upon the applicant to establish that the application warrants approval. Section 752.1 includes no substantive changes as compared to IRPS 19–1.

2. Section 752.2—Who is covered by section 205(d)?

This section identifies who is covered by section 205(d). Paragraph (a) would state that IAPs, as defined by 12 U.S.C. 1786(r), would be covered. Similar to IRPS 19–1, volunteer and *de facto* employees would be deemed covered under section 205(d) as well.

Whether other persons who are not IAPs, such as certain independent contractors, are covered depends upon their degree of influence or control over the management or affairs of an insured credit union. Those who exercise major policymaking functions of an insured credit union are deemed to be covered by section 205(d). The proposed rule includes less detail than IRPS 19–1 regarding how the NCUA would determine whether a person participates in the conduct of the affairs of an insured credit union. For example, the proposed rule would not state that the NCUA would analyze each individual's conduct on a case-by-case basis and make a determination or that agency and court decisions will provide the guide as to what standards will be applied. The Board does not intend any substantive changes by these omissions. Instead, the proposed rule includes more streamlined language regarding persons who participate in the conduct of the affairs of an insured credit union, consistent with the FDIC's comparable part 303. The NCUA intends to publish guidance that further clarifies its intent about other persons who are not IAPs. The guidance would include language similar to IRPS 19–1.

The proposed rule would also state directors and officers of affiliates, or joint ventures of an insured credit union, would be covered if they participate in the conduct of affairs of the insured credit union or are in a position to influence or control the management or affairs of the insured credit union. IRPS 19–1 does not specifically state these persons would be covered if they participate in the conduct of affairs of the insured credit union; however, this is not a policy change because these persons would have been covered under the IRPS if they participated in the conduct of affairs of the credit union.

Paragraph (b) would define the term ''person'' for the purposes of section 205(d) as an individual only and not a legal entity.

3. Section 752.3—Which offenses qualify as ''Covered Offenses'' under section 205(d)?

This section addresses what constitutes a covered offense under section 205(d).[14] Paragraph (a) would state that a conviction or program entry must have been for a criminal offense involving dishonesty or breach of trust. The paragraph would define criminal offenses involving dishonesty and breach of trust. The FHBA defines ''criminal offense involving dishonesty'' as ''an offense under which an individual, directly or indirectly, cheats or defrauds or wrongfully takes property belonging to another in violation of a criminal statute.'' The FHBA further provides that the term includes an offense that federal, state, or local law defines as dishonest or for which dishonesty is an element of the offense. However, the term does not include a misdemeanor criminal offense committed more than 1 year before the date on which an individual files a consent application, excluding any period of incarceration, or an offense involving the possession of controlled substances.

The FHBA does not define breach of trust. Under the proposed rule, breach of trust would mean a wrongful act, use, misappropriation, or omission with respect to any property or fund that has been committed to a person in a fiduciary or official capacity, or the misuse of one's official or fiduciary position to engage in a wrongful act, use, misappropriation, or omission. This definition is identical to the definition in IRPS 19–1.

As discussed previously, the FHBA excludes from the scope of such offenses ''an offense involving the possession of controlled substances.'' The Board interprets this phrase concerning controlled substances to exclude from the scope of the prohibition, at a minimum, criminal offenses involving the simple possession of controlled substances and possession with intent to distribute a controlled substance. This exclusion may also apply to other drug-related offenses depending on the statutory elements of the offenses or court determinations that the statutory provisions of the offenses involve dishonesty or breach of trust, as noted in paragraph (b) of proposed § 752.3. The Board notes that in processing other applications, such as change in official or senior executive officer in credit unions that are newly chartered or are in troubled condition, the NCUA may still consider excluded offenses as appropriate. For example, an offense that is not covered under section 205(d) may bear on an individual's competence, experience, character, or integrity under 12 U.S.C. 1790a and 12 CFR 701.14.

Potential applicants may contact their appropriate NCUA Regional Office or the Office of National Examinations and Supervision (ONES) if they have questions about whether their offenses are covered under section 205(d).

This language marks a shift from IRPS 19–1, which requires consent applications for certain simple misdemeanor drug possession offenses. Under IRPS 19–1, a consent application for a simple misdemeanor drug possession offense is required except if the conviction or program entry was classified as a misdemeanor at the time of conviction or program entry, the person had no other conviction or program entry described in section 205(d), and it had been 5 years since the conviction or program entry (or 30 months in the case of a person 21 years or younger at the time of the conviction or program entry), and the conviction did not involve the illegal distribution (including an intent to distribute), sale, trafficking, or manufacture of a controlled substance or other related offense. The Board believes that the proposed revision is consistent with the text and purposes of the FHBA, would align the Board's interpretation of section 205(d) as to offenses involving controlled substances more closely with other federal banking regulators, and would continue to recognize that a drug-

[14] The Board notes that the approach to criminal offenses mandated by the statute and rulemaking would not have an impact on other processes related to criminal convictions. For example, the NCUA may consider a more expansive scope of convictions related to controlled substances under section 212 of the Federal Credit Union Act in disapproving directors, committee members, and senior executive officers of troubled or newly chartered insured credit unions. *See* 12 CFR 701.14 for the NCUA's implementation of this provision, also addressed elsewhere in this proposed rule.

related offense could potentially involve dishonesty or breach of trust.[15] The Board also notes that this proposed provision would *not* affect its ability to consider drug-related offenses as they pertain to the suitability of an individual under other statutory provisions, including section 212 of the FCU Act.[16]

Paragraph (b) would require that, to determine if the criminal offense is one of dishonesty or breach of trust, the NCUA would look to the statutory elements of the criminal offense or to court decisions in the relevant jurisdiction that have interpreted these statutory elements. This policy is similar to IRPS 19–1.

Paragraph (c) would include new language reflecting the FHBA's exclusion of certain older offenses from the scope of section 205(d).[17] The FHBA provides that individuals are not subject to a prohibition under section 205(d) if they committed a covered offense and it has been 7 years or more since the offense occurred; or if the individual was incarcerated with respect to the offense, it has been 5 years or more since the individual was released from incarceration; or the individual committed the offense when they were 21 years of age or younger, and it has been more than 30 months since the sentencing occurred.[18]

The Board considers the phrases ''offense committed''—noted previously—and ''offense occurred'' to be substantially similar. Accordingly, the Board interprets the term ''offense occurred'' to mean the ''last date of the underlying misconduct.'' In instances with multiple offenses, ''offense occurred'' means the last date of any of the underlying offenses.

Paragraph (c) would track the FHBA's language concerning offenses committed by individuals 21 years of age or younger. The FHBA states that, for individuals who committed an offense when the individual was 21 years of age or younger, section 205(d) shall not apply to the offense if it has been more than 30 months since the sentencing occurred.[19] The Board interprets ''sentencing occurred'' to mean the date on which a court imposed the sentence, not the date on which all conditions of sentencing were completed. Moreover, paragraph (c) notes that its exclusions—which are derived from the FHBA—do not apply to the enumerated offenses described under 12 U.S.C. 1785(d)(2).

The FHBA also excludes designated lesser offenses, including the use of fake identification, shoplifting, trespass, fare evasion, driving with an expired license or tag (and such other low-risk offenses as the NCUA may designate), if 1 year or more has passed since the applicable conviction or program entry. Paragraph (d) would exclude these ''designated lesser offenses'' to reflect the revised statutory language.

Paragraph (e) would add language that reflects the FDIC's long-held position that individuals who are convicted of or enter into a pretrial diversion program for a criminal offense involving dishonesty or breach of trust in foreign jurisdictions are subject to section 19, unless the offense is otherwise excluded by 12 CFR 303, subpart L, as stated in the FDIC's parallel proposed rule. The Board has not previously had a position on foreign offenses; however, given the congressional mandate to consult and coordinate to promote consistent implementation on consent application procedures where appropriate, the Board is proposing to adopt the FDIC's interpretation. Under the proposed rule, for example, if an insured credit union has operations outside the United States, the credit union could conduct a reasonable, documented inquiry to verify an applicant's history by inquiring about potential covered offenses that may have occurred in that foreign country (or countries) in which the credit union conducts operations, as well as the United States. As another example of such an inquiry, if an insured credit union plans to hire someone in the United States who is from a foreign country, the credit union could inquire about potential covered offenses that may have occurred in the United States and in that foreign country.

4. Section 752.4—What constitutes a conviction under section 205(d)?

Paragraph (a) would state that there must have been a conviction of record for section 205(d) to apply, and that section 205(d) would not apply to arrests, pending cases not brought to trial (unless the person has a program entry as set out in § 752.5), or any conviction reversed on appeal unless the reversal was for the purpose of re-sentencing. The Board notes, however, that covered offenses that have been pardoned—and which are not otherwise excluded by § 752.8—would still require a consent application. Paragraph (a) is substantively similar to IRPS 19–1.

Paragraph (b) would clarify that, absent a program entry, when an individual is charged with a covered offense but is subsequently convicted of an offense that is not a covered offense, that conviction is not subject to section 205(d). IRPS 19–1 does not have this clarification; however, it is included in the FDIC's current part 303. The NCUA's provision would merely clarify that the conviction, not the originally charged offense, is relevant under section 205(d).

Paragraph (c) would exclude covered offenses that have been expunged or sealed by a court of competent jurisdiction or by operation of law. Under IRPS 19–1, a conviction that has been completely expunged is not considered a conviction of record and does not require a consent application. However, IRPS 19–1 further noted that where an order of expungement has been issued and is intended to be a complete expungement, the jurisdiction cannot allow the conviction or program entry to be used for any subsequent purpose including, but not limited to, an evaluation of a person's fitness or character. Also, the failure to destroy or seal the records will not prevent the expungement from being considered complete for the purposes of section 205(d). This caveat to the general premise that an expunged conviction is not considered a conviction of record is not included in the FDIC's current part 303.

The FHBA provides a two-pronged test to determine whether a covered offense should be considered expunged, dismissed, or sealed and therefore excluded from the scope of section 205(d). First, there must be an ''order of expungement, sealing, or dismissal that has been issued in regard to the conviction in connection with such offense''; second, it must be ''intended by the language in the order itself, or in the legislative provisions under which the order was issued, that the conviction shall be destroyed or sealed from the individual's state, tribal, or federal record, even if exceptions allow the conviction to be considered for certain character and fitness evaluation purposes.''[20]

The FHBA does not address expungements, sealings, or dismissals by operation of law, and the Board has sought to provide a more comprehensive framework as to such records. The Board has added language to the second (intent) proposed prong of the expungement framework to encompass the language in the expungement order itself, the legislative

[15] *See* House Rpt. No. 117–314 (May 10, 2022), available at *https://www.congress.gov/congressional-report/117th-congress/house-report/314/1.*

[16] 12 U.S.C. 1790a.

[17] *See* 12 U.S.C. 1785(d)(4)(A).

[18] Note that these exceptions do not apply to the offenses described under 12 U.S.C. 1785(d)(2).

[19] 12 U.S.C. 1785(d)(4)(A)(ii).

[20] 12 U.S.C. 1785(d)(4)(B)(ii).

provisions under which the order was issued, *and other legislative provisions.* The Board believes that the additional language is consistent with the purposes of the statute and congressional intent to provide relief to individuals with older or minor offenses.

Paragraph (d) would exclude ''youthful offender'' judgments for minors from the scope of section 205(d). The proposed rule would clarify that it encompasses the term ''youthful offender'' *and similar terms,* because paragraph (d) may apply even if a court does not specifically use the term ''youthful offender'' in an adjudication.

5. Section 752.5—What constitutes a pretrial diversion or similar program under section 205(d)?

Paragraph (a) would define what constitutes a pretrial diversion or similar program (a program entry). A pretrial diversion or similar program means a program characterized by a suspension or eventual dismissal or reversal of charges or criminal prosecution upon agreement by the accused to restitution, drug or alcohol rehabilitation, anger management, or community service. The FHBA establishes this definition.

Paragraph (b) would clarify that when a covered offense either is reduced by a program entry to an offense that would otherwise not be covered by section 205(d) or is dismissed upon successful completion of a program entry, the offense remains a covered offense for purposes of section 205(d). The covered offense will require a consent application unless it is *de minimis* as provided by § 752.8. This language is new as compared to IRPS 19–1 and comes from the FDIC's part 303.

Paragraph (c) would state that expungements or sealings of program entry records will be treated the same as expungements or sealings of convictions. This language is new as compared to IRPS 19–1 and comes from the FDIC's part 303.

6. Section 752.6—What are the types of consent applications that can be filed?

The FHBA codifies procedures for consent applications filed with the NCUA. Specifically, the proposed rule would provide that the NCUA will accept applications from an individual or an insured credit union applying on behalf of an individual. The Board notes the FHBA uses the terms ''national office'' and ''regional office,'' which are inconsistent with the NCUA's organization.[21] The Board is contemplating addressing those technical inconsistencies in the final rule.

Paragraph (b) would provide that an individual consent application or a credit union-sponsored consent application may be filed separately or contemporaneously with the appropriate NCUA Regional Office or ONES.

7. Section 752.7—When must a consent application be filed?

This section states that a consent application is not required for covered offenses that are considered *de minimis* under this part or where another exception under the part applies. A consent application would not be considered by the NCUA until all sentencing requirements associated with a conviction have been met or all requirements of the program entry have been completed. The Board proposes to include this revised language to accord with several of the FHBA's exclusions from section 205(d) that are not tied to the completion of sentencing requirements.

Furthermore, the FHBA requires the NCUA to ''make all forms and instructions related to consent applications available to the public, including on [its] website.''[22] These forms and instructions ''shall provide a sample cover letter and a comprehensive list of items that may accompany the consent application, including clear guidance on evidence that may support a finding of rehabilitation.''[23] While the proposed rule would not codify these requirements, the agency will comply with the statutory mandate to make appropriate forms and instructions available to the public. The proposed rule would provide generally that the NCUA's consent application forms as well as additional information concerning section 205(d) can be accessed at the NCUA's Regional Offices or on the NCUA's website.

8. Section 752.8—*De Minimis Offenses*

IRPS 19–1 includes several offenses that would be otherwise covered under section 205(d), but do not require a consent application because they are considered *de minimis.* For these *de minimis* offenses, a person is deemed automatically approved to serve in an insured credit union, and no consent application is required.

IRPS 19–1 updated the general criteria for the *de minimis* offenses to better align with developments in criminal reform and sentencing guidelines. The FHBA largely codified the conditions included in IRPS 19–1; however, in several cases the FHBA expanded upon the relief included in IRPS 19–1. The proposed rule generally would retain the *de minimis* factors included in IRPS 19–1 but would amend the factors to reflect the FHBA.

Paragraph (a)(1) would state an individual who has been convicted of 2 or fewer covered offenses need not file if the individual could have been sentenced to a term of confinement in a correctional facility of 3 years or less and/or a fine of $2,500 or less, and the individual actually served 3 days or less of jail time for each, provided that all of the sentencing requirements associated with the conviction have been completed, each conviction or program entry was entered at least 3 years prior to the date of a consent application (assuming there are 2 convictions or program entries for a covered offense), and each covered offense was not committed against an insured depository institution or insured credit union. Jail time would be calculated based on the time an individual spent incarcerated as a punishment or a sanction—not as pretrial detention—and would not include probation or parole where an individual was restricted to a particular jurisdiction or was required to report occasionally to an individual or a specific location. Jail time would include confinement to a psychiatric treatment center in lieu of a jail, prison, or house of correction on mental competency grounds. The definition is not intended to include any of the following: persons who are restricted to a substance-abuse treatment program facility for part or all of the day; and persons who are ordered to attend outpatient psychiatric treatment.

A consent application would also not be required if there are 2 convictions or program entries for a covered offense, and the actions that resulted in both convictions or program entries all occurred when the individual was 21 years of age or younger and the convictions or program entries were entered at least 18 months prior to the date of a consent application.

A consent application would also not be required under the proposed rule if an individual has convictions or program entries of record based on the writing of ''bad'' or insufficient funds checks and the following conditions apply: (i) the aggregate total face value of all ''bad'' or insufficient funds checks cited across all the convictions or

[21] *See* 12 CFR 790.2. The NCUA is composed of the Board with a Central Office; Field Offices, consisting of 3 Regional Offices and ONES; the Asset Management and Assistance Center; the Community Development Revolving Loan Program; and the NCUA Central Liquidity Facility.

[22] 12 U.S.C. 1785(d)(5)(E)(i).

[23] 12 U.S.C. 1785(d)(5)(E)(ii).

program entries for ''bad'' or insufficient funds checks is $2,000 or less; (ii) no insured depository institution or insured credit union was a payee on any of the ''bad'' or insufficient funds checks that were the basis of the convictions or program entries; and (iii) the individual has no more than 1 other *de minimis* offense.

The FHBA and the proposed rule would also not require a consent application for convictions or program entries for small-dollar, simple theft. Under the proposed rule, convictions or program entries based on the simple theft of goods, services, or currency (or other monetary instrument) would be considered *de minimis* offenses if the following conditions apply: (i) the value of the currency, goods, or services taken is $1,000 or less; (ii) the theft was not committed against an insured depository institution or insured credit union; (iii) the individual has no more than 1 other *de minimis* offense under this section; and (iv) if there are 2 *de minimis* offenses under this section, each conviction or program entry was entered at least 3 years prior to the date a consent application would otherwise be required, or at least 18 months prior to the date a consent application would otherwise be required if the actions that resulted in the conviction or program entry all occurred when the individual was 21 years of age or younger. This exception excludes burglary, forgery, robbery, identity theft, and fraud.

Paragraph (c) would provide that individuals must be covered by a fidelity bond to the same extent as others in similar positions. This policy is consistent with IRPS 19–1.[24]

Paragraph (d) would state that any conviction or program entry for specific criminal offenses under Title 18 set out in 12 U.S.C. 1785(d)(2) cannot qualify for a *de minimis* exemption.

Finally, the Board notes that the FHBA includes ''designated lesser offenses'' in addition to *de minimis* offenses. Designated lesser offenses, including use of fake identification, shoplifting, trespass, fare evasion, or driving with an expired license or tag, are low-risk offenses statutorily excluded from the scope of section 205(d).

9. § 752.9—How To File a Consent Application

This section would provide that consent applications filed by a credit union should be filed with the NCUA's Regional Office where the credit union's home office is located (or with ONES for credit unions that office supervises), and consent applications filed by an individual should be filed with the NCUA's Regional Office where the person lives. States covered by each NCUA Regional Office are listed in 12 CFR 790.2.

When the proposed rule is finalized, the Board will revise delegations of authority related to consent applications. Under the revised delegations, Regional Directors and the ONES Director will have authority to act on both individual and credit union-sponsored applications. Currently, the Regional Directors and the ONES Director only have delegated authority to act on credit union-sponsored applications, and the Board has retained the authority to approve/disapprove individual applications.

10. Section 752.10—How a Consent Application Is Evaluated

Paragraph (a) would set out the factors the NCUA would assess to determine the level of risk the applicant poses to an insured credit union and whether the NCUA would consent to the person's participation in a credit union's affairs. The paragraph reflects new statutory requirements related to the NCUA's review process, including the requirement that the NCUA primarily rely on the criminal history record of the Federal Bureau of Investigation in its review and provide such record to the applicant to review for accuracy.[25] The Board interprets the term ''criminal history record'' to mean ''identity history summary checks,'' which are commonly known as ''rap sheets.'' Under paragraph (a)—and in accordance with the FHBA—the NCUA, in reviewing a consent application, would provide ''such record'' to the individual to review for accuracy.[26] The NCUA would not provide it to the credit union, but only to the individual. In evaluating the risk posed by the person's participation, the Board has proposed 8 considerations that it would evaluate. These considerations are substantively similar to factors under IRPS 19–1.

Paragraph (b) would state that the NCUA would not require an applicant to provide certified copies of criminal history records unless the NCUA determines that there is a clear and compelling justification to require additional information to verify the accuracy of the criminal history record of the Federal Bureau of Investigation.

Paragraph (c) would state that the determining factors in assessing a consent application would be whether the person has demonstrated their fitness to participate in the conduct of the affairs of an insured credit union, and whether the affiliation, or participation by the person in the conduct of the affairs of the credit union, may constitute a threat to the safety and soundness of the credit union or the interests of its members or threaten to impair public confidence in the credit union.

Paragraph (d) would set forth the considerations the NCUA would evaluate in conducting an individualized assessment. The proposed rule also clarifies how the NCUA will evaluate evidence of rehabilitation and other evidence, as required by the FHBA.[27]

Paragraph (e) would provide that the question of whether a person, who was convicted of a crime or who agreed to a program entry, was guilty of that crime shall not be at issue in a proceeding under this subpart or under 12 CFR part 746, subpart B.

Paragraph (f) would provide that the NCUA will also apply the considerations in paragraph (d) to determine whether the interests of justice are served in seeking an exception in the appropriate court when a consent application is made prior to 10 years after the final conviction or agreement to program entry for certain federal offenses.[28]

Paragraph (g) would provide that all approvals and orders will be subject to the condition that the person be covered by a fidelity bond to the same extent as others in similar positions.

Paragraph (h) would provide that when deemed appropriate by the NCUA, credit union-sponsored consent applications are intended to allow the individual to work for the same employer and across positions. NCUA consent would be required for any proposed significant changes in the individual's security-related duties or responsibilities, such as promotion to an officer or other positions that the employer determines will require higher security-screening credentials.

Paragraph (i) would provide that when a person who has received approval under section 205(d) subsequently seeks to participate in the conduct of the affairs of another insured credit union, another consent application must be submitted.

[24] *See* 12 CFR 713 (Fidelity bond and insurance coverage for federally insured credit unions).

[25] *See* 12 U.S.C. 1785(d)(5)(F).

[26] *Id.*

[27] While the statute uses the terms ''rehabilitation'' and ''mitigating'' as separate categories of evidence, the terms appear to be substantially similar in the context of section 205 consent applications, and the use of both terms in these regulations may create confusion. Therefore, the proposed rule uses the term rehabilitation, not mitigating.

[28] *See* 12 U.S.C. 1785(d)(2)(A).

11. Section 752.11—What will the NCUA do if the consent application is denied?

Paragraph (a) would provide that the NCUA would provide a written denial that would summarize or cite the relevant factors from the proposed § 752.10. Paragraph (b) would provide that the applicant can file a written request for reconsideration or appeal under the process contained in 12 CFR part 746, subpart B. That subpart includes uniform procedures by which petitioners may appeal initial agency determinations to the Board.

Under part 746, subpart B, prior to submitting an appeal to the Board, the petitioner may make a written request to the appropriate Regional Office or, if appropriate, ONES, to reconsider an initial agency determination within 30 calendar days of the date of that determination. Within 60 calendar days of the date of an initial agency determination or, as applicable, a determination by the Regional Office or, if appropriate, ONES, on any request for reconsideration, a petitioner may file an appeal seeking review of the determination by the Board. Under part 746, subpart B, a petitioner may also request an oral hearing before the Board. These procedures meet the statutory requirement for ''national office review'' of any consent application that is denied by a Regional Office, if the individual requests a review by the Board.[29] This option is also substantially similar to the FDIC's current parts 303 and 308, except that under those regulations, an oral hearing is conducted unless the applicant or the insured depository institution waives it in writing and instead makes a written submission.[30]

NCUA Practice on Section 205(d)

In general, the proposed rule would mirror the FDIC's part 303 with minimal, non-substantive changes. Additionally, while there were a few differences between the FDIC's part 303 and IRPS 19–1 before the FHBA, such as some details on *de minimis* offenses, expungements, and treatment of drug-related offenses, the enactment of the FBHA resolved most discrepancies between the two agencies' rules and created a more uniform standard. However, there are a few areas in which IRPS 19–1 provided additional context and discussion on its policy and procedures related to section 205(d) compared to part 303. In general, the additional information does not provide any substantive difference from part 303 and instead provides additional clarifying information.

The Board has chosen to omit much of the clarifying information in the proposed rule to ensure its uniformity with part 303; however, the Board also believes credit unions generally have less experience with section 205(d) than insured depository institutions and are typically smaller in size with fewer resources, so additional guidance would help insured credit unions to discharge their responsibilities under section 205(d). Therefore, in finalizing and implementing this rule, the NCUA will prepare guidance that provides insured credit unions additional information about section 205(d). The guidance will include portions of IRPS 19–1 that were not incorporated into the proposed rule.

For example, IRPS 19–1 provides that when the credit union learns that a prospective employee has a prior conviction or entered into a pretrial diversion program for a covered offense, the credit union should document in its files that a consent application is not required because the covered offense is considered *de minimis* and meets all of the criteria for the exception, or—if the credit union is willing to sponsor the prospective employee's consent application—submit an application requesting the Board's consent. The credit union could also extend a conditional offer of employment and notify the prospective employee that it is contingent upon a satisfactory background check to determine whether the individual is prohibited under section 205(d). The Board intends no change of position regarding these policies even though they are not included in the proposed rule.

IRPS 19–1 also states that persons who will occupy clerical, maintenance, service, or purely administrative positions generally can be approved without an extensive review. A more detailed analysis, however, would be performed in the case of persons who will be in a position to influence or control the management or affairs of the insured credit union. The proposed rule would not include a similar delineation between how the NCUA intends to approve consent applications for different types of positions. The Board continues to believe that applications for clerical, maintenance, service, or purely administrative positions do not require the same review as applications for other positions that have access to more of the day-to-day financial operations of a credit union. The NCUA will address this issue in future guidance.

Waiting Time for a Subsequent Consent Application if a Consent Application Is Denied

The FDIC's current part 303 states that an applicant will need to wait one year from the date of the denial or decision of the FDIC Board, or its designee, before resubmitting a consent application. The Board is not proposing to include similar language for several reasons. First, the NCUA does not receive a significant volume of section 205(d) consent applications and does not believe allowing credit unions or individuals to resubmit consent applications at any time would present a burden on the agency and its resources. Second, the NCUA would not want to unfairly delay an individual from seeking employment if the consent application was denied for a reason that could be immediately addressed by the applicant. For example, if the consent application was denied due to insufficient support showing rehabilitation, the individual could immediately refile with additional evidence, such as employment history, letters of recommendation, documentation of participation in substance-abuse programs or job preparation and educational programs, or other relevant evidence.

Other Conforming Amendments

Both the standard FCU Bylaws in appendix A of part 701 and the criteria for determining the insurability of a credit union in 12 CFR 741.3(c) reference section 205(d). In general, both sections prohibit a person who has been convicted of any criminal offense involving dishonesty or breach of trust from serving at an insured credit union, except with the written consent of the Board. The Board believes these references are incomplete because not all convictions of criminal offenses involving dishonesty or breach of trust now serve as the valid basis for a section 205(d) prohibition. Therefore, the proposed rule would replace the current reference to ''any crime involving dishonesty or a breach of trust'' to refer to the specific crimes covered under section 205(d). Referring directly to the FCU Act would also automatically incorporate future statutory changes to section 205(d). The Board may make other similar conforming amendments in finalizing this proposed rule if it identifies other provisions that should be clarified simply to reflect the changes that the FHBA made to the statutory prohibitions.

Additionally, as required by the Gramm-Leach-Bliley Act, appendix B to part 748 (Appendix B) contains

[29] 12 U.S.C. 1785(d)(5)(D).

[30] 12 CFR 308.158(d).

guidance on creating an effective incident response plan in the event of unauthorized access to member information and the requirements of the notices distributed to the affected members.[31] Appendix B states that credit unions should also conduct background checks of employees to ensure that the credit union does not violate 12 U.S.C. 1785(d). The proposed rule would require a background check in § 752.1(b), which is consistent with current expectations, as discussed in the introductory portion of this preamble.[32] Therefore, the proposed rule would amend this footnote to state that insured credit unions must also conduct background checks of employees.

Proposed Amendments to § 701.14 on Change in Official or Senior Executive Officer in Credit Unions That Are Newly Chartered or Are in Troubled Condition

In addition to the prohibition on certain individuals participating in the conduct of the affairs of a credit union included in section 205(d), the FCU Act also sets forth conditions under which certain insured credit unions must notify the NCUA in writing of any proposed changes in its board of directors, committee members, or senior executive staff (section 212).[33] The Board implements section 212 through § 701.14 of its rules.[34] Section 701.14 requires generally that insured credit unions that are newly chartered or troubled file notice with the NCUA before adding, replacing, or changing the duties of a board or committee member or a senior executive officer. The Board has not substantively amended § 701.14 since 2012 when the Board revised the definition of troubled condition.[35] The proposed rule would make minor amendments to § 701.14 and would clarify when a notice is required, how the NCUA would process the notice, and what information must be included in the NCUA's notice of disapproval to the applicant.

First, the proposed rule would clarify when notice is required. Currently, § 701.14 specifies that notice is required whenever there is ''any addition or replacement of a member of the board of directors or committee member or the employment or change in responsibilities of an individual to a position of senior executive officer.'' NCUA staff has received questions on whether notice is required when a member of the board or a committee moves to another position, such as when an existing board member switches to the board chair position. For clarity, the proposed rule would specify that a credit union must provide notice when adding or replacing any member of its board of directors or committees, employing any person as a senior executive officer of the credit union, or changing the responsibilities of a board member, committee member, or a senior executive officer so that the person would assume a different position. The Board solicits comment on whether this proposed change provides clarity or increases burden on credit unions.

Second, the proposed rule would increase the amount of time the NCUA has to initially review a notice. Currently, in § 701.14(c)(3)(iii), the NCUA has 10 calendar days after receiving the notice to inform the credit union that the notice is complete or that additional information is needed. The 10-day notification requirement is not specified in the statute, and NCUA staff has found the 10-day timeframe difficult to meet, as additional information to analyze the request may be required. The Board does not believe that the additional 5 calendar days would unduly delay the start or change in position of board members, committee members, or senior executive officers. However, the Board solicits comments on whether insured credit unions believe this change would pose any significant operational burden, in addition to the general solicitation for comments included in this proposed rule.

The proposed rule would also specify that Regional Director and ONES Director communications under § 701.14 may be done through email. This is not a substantive change but rather a clarification of existing practices and common use of electronic communications in time-sensitive matters.

Finally, the proposed rule would explicitly state that the notice of disapproval will identify the reason(s) for the denial. On occasion, when appealing such a denial, the NCUA has received complaints that applicants were not provided sufficient information in the notice of disapproval about the reason for the decision. Appellants have expressed frustrations that they could not adequately support their appeal without sufficient information on the rationale for the NCUA's decision. The Board believes any notice of disapproval should explicitly state the reason(s) for denial and has included clarifying language in the proposed rule.

Other Relevant Authorities on Prohibitions

Under section 206(i) of the FCU Act (section 206(i)), the Board is authorized to suspend or prohibit an IAP from further participation in the conduct of the affairs of any credit union if: (1) an IAP is charged in any information, indictment, or complaint with a crime involving dishonesty or breach of trust which is punishable by imprisonment for a term exceeding 1 year under state or federal law or certain specific violations of federal criminal law relating to anti-money laundering provisions; and (2) continued service or participation by the IAP may pose a threat to the interests of the credit union's members or may threaten to impair public confidence in the credit union.[36] Despite the similar language between section 206(i) and section 205(d), the FHBA did not make similar amendments to section 206(i) as were made to section 205(d). Section 206(i) is narrower in scope than section 205(d), as it applies to current IAPs and requires an additional showing by the agency to suspend or prohibit an IAP. Because the FHBA did not amend section 206(i), the Board retains statutory authority to suspend or prohibit an IAP for all crimes involving dishonesty or breach of trust, provided that the IAP's continued service or participation may pose a threat to the interests of the credit union's members or may threaten to impair public confidence in the credit union.

The Board also notes that the Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (commonly known as the S.A.F.E. Act) mandates a nationwide licensing and registration system for residential mortgage loan originators.[37] The S.A.F.E. Act includes certain requirements related to minimum standards for state-licensed loan originators—including those working at credit union service organizations—and related to felonies involving dishonesty and breach of trust.[38] Additionally, regulations implementing the S.A.F.E. Act impose an obligation on depository institutions to adopt certain policies, including a requirement that the depository institution review employee criminal background reports, including the criminal background standards for employees in section 206(i) of the FCU Act, 12 U.S.C. 1786(i). The Board notes

[31] 12 CFR 748, App. B.

[32] The Board notes that insured credit unions may extend a conditional offer of employment contingent on the completion of a background check satisfactory to the credit union to determine if the applicant is barred under section 205(d).

[33] 12 U.S.C. 1790a.

[34] 12 CFR 701.14.

[35] 77 FR 45285 (July 31, 2012).

[36] 12 U.S.C. 1786(i)(1)(A).

[37] 12 U.S.C. 5101 *et seq.*

[38] 12 U.S.C. 5104.

these requirements are not included in the FHBA and remain applicable to credit unions and credit union service organizations.

Similarly, under the Anti-Money Laundering Act of 2020, individuals who are found to have committed an ''egregious violation'' of the Bank Secrecy Act or its rules are barred from serving on a U.S. financial institution's board of directors for 10 years from the date of conviction or judgment.[39] The FHBA does not affect this separate statutory prohibition, and it remains applicable to credit unions.

III. Request for Comments

The Board seeks comments on all aspects of this proposed rule and its approach to section 205(d) and more specifically on the questions that follow.

1. *Scope.* Should the final rule include additional information on who may fall within the scope of section 205(d), including persons who participate in the conduct of the affairs of an insured credit union?

2. *Offense date.* Section 205(d)(4)(A)(i) provides for an exception for an offense if ''it has been 7 years or more since the offense occurred.''[40] There is a similar provision that removes from the definition of ''criminal offense involving dishonesty'' ''a misdemeanor criminal offense committed more than 1 year before the date on which an individual files a consent application, excluding any period of incarceration[.]''[41] Historically, the NCUA's position has been that actions do not amount to a covered ''offense,'' for section 205(d) purposes, until there has been either a conviction via a guilty plea, finding of guilt, or an entry into a pretrial-diversion program. This is because culpability and responsibility for the actions do not attach until one of those events occurs.[42] However, for purposes of evaluating whether the 7-year or 1-year exception applies, the Board must evaluate if it has been 7 years or more since the ''offense occurred'' or if an ''offense [was] committed more than one year before the date on which an individual files a consent application, excluding any period of incarceration.'' The Board proposes to interpret the phrases ''offense occurred'' and ''offenses committed'' as the ''last date of the underlying misconduct'' given the text of the statute. In instances with multiple offenses, ''offense occurred'' or ''offense committed'' would mean the last date of any of the underlying offenses. However, the Board acknowledges that there may be other, supportable interpretations of this phrase. For example, the Board is aware of legislative history indicating that the timeframes established by the FHBA were chosen because of their relation to an individual's likelihood of rehabilitation and that an individual's rehabilitation likely begins only with conviction or program entry, rather than the date of their misconduct. As such, the Board seeks public comment on the following topic: Is the Board's interpretation of the phrases ''offense occurred'' and ''offense committed'' as the ''last date of underlying misconduct'' appropriate, or are there other interpretations the Board should consider? What support do commenters have for other interpretations given the language of the statute?

3. ''*Sentencing occurred.*'' The FHBA exempts offenses committed by individuals 21 years of age or younger if it has been more than 30 months since the sentencing occurred.[43] However, the statute does not define the phrase ''sentencing occurred.'' The Board proposes to interpret ''sentencing occurred'' to mean the date on which a court imposed the sentence, not the date on which all conditions of sentencing were completed. The Board seeks public comment on the following topic: Is the Board's proposed interpretation of the phrase ''sentencing occurred'' appropriate?

4. *Foreign convictions.* Section 205(d) applies to any person who has been convicted of any criminal offense involving dishonesty or a breach of trust, or has agreed to enter into a pretrial diversion or similar program in connection with a prosecution for such offense.[44] The phrase ''criminal offense involving dishonesty'' is defined in the statute but is silent as to whether it includes convictions and pretrial diversions for criminal offenses prosecuted by foreign authorities (foreign convictions).[45] The statute does not define ''offense involving . . . breach of trust.'' The FDIC's position has been that foreign convictions and pretrial diversions are included within the scope of section 19. The Board believes it is reasonable to follow and adopt the FDIC's long-held position given the statutory mandate for consistency and the FDIC's greater experience with section 19 consent applications. In addition, there are strong public policy rationales for prohibiting a person who has been convicted of certain foreign criminal offenses (or entered into a pretrial diversion program in connection with such an offense) from becoming or continuing as an IAP or participating in the affairs of an insured credit union. However, the Board acknowledges that there may be case law, statutory construction, and other arguments that support a reading of section 205(d) that would exclude foreign convictions and pretrial diversions from the scope of section 205(d). Therefore, the Board seeks public comment on the following topic: Does section 205(d) encompass foreign convictions and pretrial diversions? What support do commenters have for their position?

5. *Expungements, sealings, and dismissals.* The FHBA establishes a new statutory exemption for expunged, sealed, and dismissed convictions (collectively, ''expungements'').[46] The statutory language does not mention expungements ''by operation of law''—as opposed to through a court order. The proposed rule incorporates the new statutory language but also includes a broad interpretation of ''expungement'' to encompass covered offenses that have been expunged by operation of law. The Board seeks public comment on the following topic: Given the new statutory exemption for expunged offenses, is the Board's more expansive proposed interpretation of expungement—which term includes records that have been expunged by application of law—appropriate?

6. *Offenses involving controlled substances.* The FHBA states that an ''offense involving the possession of controlled substances'' is not included within the definition of ''criminal offense involving dishonesty'' and, therefore, are not subject to the section 205(d) prohibition.[47] The proposed rule includes this definitional exclusion and notes that the Board interprets the phrase ''offenses involving the possession of controlled substances'' to include, at a minimum, the offenses of simple possession of controlled substances and possession with intent to distribute controlled substances. This interpretation would mark an expansion from IRPS 19–1. At the same time, this interpretation would track the statutory language of ''offenses involving the possession of controlled substances'' by encompassing the offense of *possession*

[39] Public Law 116–283, codified at 31 U.S.C. 5321(g).

[40] 12 U.S.C. 1785(d)(4)(A).

[41] 12 U.S.C. 1785(d)(6)(B)(iii).

[42] *See* 84 FR 65907, 65917 (Dec. 2, 2019) (''There must be a conviction of record. Section 205(d) does not apply to arrests, pending cases not brought to trial, acquittals, or any conviction which has been reversed on appeal.'')

[43] 12 U.S.C. 1785(d)(4)(A)(ii).

[44] 12 U.S.C. 1785(d)(1).

[45] *See* 12 U.S.C. 1785(d)(6).

[46] 12 U.S.C. 1785(d)(4)(B).

[47] 12 U.S.C. 1785(d)(6)(B)(iii)(II).

with intent to distribute controlled substances. The Board seeks public comment on the following topic: Is the Board's interpretation of ''offense[s] involving the possession of controlled substances'' as applying, at a minimum, to simple possession and possession with intent to distribute appropriate?

7. *De minimis offenses.* The FHBA states that the NCUA may exempt by rule certain *de minimis* offenses from the section 205(d) prohibition. The NCUA considers *de minimis* offenses to be covered offenses for which a consent application is not required because the NCUA deems the application automatically granted. The NCUA has previously promulgated IRPS 19–1, which specified *de minimis* offenses under section 205(d). However, given this new statutory language, the Board is reevaluating its current approach to *de minimis* offenses. Accordingly, the Board seeks public comment on the following topic: Is the Board's current approach to *de minimis* offenses appropriate? Are there additional offenses that the Board should consider *de minimis* under section 19? Commenters should provide support for such a designation.

8. *Conforming changes.* The Board also requests comments on other conforming changes or updates that it should make to its regulations or guidance to implement the new statutory provisions. As noted, in the final rule, the Board may adopt additional conforming amendments to its regulations if it finds that other provisions should be changed solely to indicate the new, more limited scope of the section 205(d) prohibitions. The Board would not anticipate making substantive changes to these provisions that would create new standards beyond those in the statutory amendments.

IV. Regulatory Procedures

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA) applies to rulemakings in which an agency creates a new or amends existing information collection requirements.[48] For purposes of the PRA, an information collection requirement may take the form of a reporting, recordkeeping, or a third-party disclosure requirement. The NCUA may not conduct or sponsor and the respondent is not required to respond to an information collection, unless it displays a valid Office of Management and Budget (OMB) control number.

The proposed rule would extend greater relief than what is currently available to certain individuals with prior convictions seeking employment with an insured credit union, thereby eliminating the need to submit consent applications for certain offenses, particularly older or expunged convictions, prior misdemeanors, drug possession offenses, and other lesser offenses. The proposed rule should reduce the number of respondents applying for consent, but it may also increase the number of applications because of a renewed awareness of the statutory prohibition. Thus, the estimated number of respondents applying for consent would remain at one. The proposed rule continues to require credit unions to document when an application is not required. This recordkeeping requirement is minimal and only impacts those credit unions or individuals who would otherwise have submitted an application for consent.

These program changes would revise the information collection requirement currently approved OMB control number 3133–0203, as follows:

Title of Information Collection: IRPS 19–1, Guidance Regarding Prohibitions Imposed by Section 205(d) of the Federal Credit Union Act.

Estimated Number of Respondents: 4.

Estimated Number of Responses per Respondent: 1.

Estimated Annual Frequency of Response: 1.

Estimated Hours per Response: 0.75.

Estimated Total Annual Burden Hours: 3.

Affected Public: Private Sector: Not-for-profit institutions; Individual or Household.

The NCUA invites comments on: (a) whether the collections of information are necessary for the proper performance of the agencies' functions, including whether the information has practical utility; (b) the accuracy of the estimates of the burden of the information collections, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the information collections on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

All comments are a matter of public record. Comments regarding the information collection requirements should be sent to (1) Jennifer Harrison, NCUA PRA Clearance Officer, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314, or email at *PRAcomments@ncua.gov* and the (2) Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for NCUA, New Executive Office Building, Room 10235, Washington, DC 20503, or email at *OIRA_Submission@OMB.EOP.gov.*

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires that when an agency issues a proposed rule or a final rule pursuant to the Administrative Procedure Act or another law, the agency must prepare a regulatory flexibility analysis that meets the requirements of the RFA and publish such analysis in the **Federal Register**. Specifically, the RFA normally requires agencies to describe the impact of a rulemaking on small entities by providing a regulatory impact analysis. For purposes of the RFA, the Board considers credit unions with assets less than $100 million to be small entities.[49] A regulatory flexibility analysis is not required, however, if the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities and publishes its certification and a short, explanatory statement in the **Federal Register** together with the rule.

The Board does not believe the proposed rule would have a significant economic impact on a substantial number of small entities. In the period from 2019 through 2023, the NCUA received 4 consent applications. This averages to one application a year. Therefore, on average, only about one small entity—at most—would be affected by the proposed rule annually.

As discussed in the **SUPPLEMENTARY INFORMATION** section, the proposed rule would align the NCUA's regulations with the FHBA's provisions and more closely align the NCUA's section 205(d) regulations with those of other federal financial regulators. Most of the proposed changes were precipitated by the FHBA—which was effective immediately upon passage—and the proposed rule aligns the NCUA's regulations with these elements of the FHBA; therefore, most of the associated changes in the proposed rule will have no direct effect on individuals or credit unions. Further, since the NCUA estimates that on average approximately one NCUA-insured institution could be affected by the proposed rule annually, any direct effects realized because of the proposed rule are likely to be small and

[48] 44 U.S.C. 3507(d); 5 CFR part 1320.

[49] NCUA IRPS 15–1, 80 FR 57512 (Sept. 24, 2015).

affect a relatively small number of entities.

In light of the foregoing, the NCUA certifies that the proposed rule would not have a significant economic impact on a substantial number of small entities. The NCUA invites comments on all aspects of the supporting information provided in this section. In particular, would this proposed rule have any significant effects on small entities that the NCUA has not identified?

Executive Order 13132

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

This proposed rule would apply to all insured credit unions, including federally insured, state-chartered credit unions. The Board has determined that the proposed amendments would not have a substantial direct effect on the states, on the connection between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Further, the proposed rule would implement a statutory amendment, and the NCUA does not have discretion in implementing the statutory changes to section 205(d). In particular, the Board does not believe that these changes will affect its existing agreements and division of supervisory responsibilities with state regulatory agencies. The Board expects to continue to coordinate with these agencies as appropriate in carrying out its responsibilities under section 205(d) and related provisions. Therefore, the Board has determined that this rule does not constitute a policy that has federalism implications for purposes of the executive order.

Assessment of Federal Regulations and Policies on Families

The NCUA has determined that this proposed rule may affect family well-being positively within the meaning of section 654 of the Treasury and General Government Appropriations Act, 1999, Public Law 105–277, 112 Stat. 2681 (1998). In particular, the NCUA has reviewed the criteria specified in section 654(c)(1) of that act, by evaluating whether this proposed regulatory action (1) impacts the stability or safety of the family, particularly in terms of marital commitment; (2) impacts the authority of parents in the education, nurture, and supervision of their children; (3) helps the family perform its functions; (4) affects disposable income or poverty of families and children; (5) only financially impacts families, if at all, to the extent such impacts are justified; (6) may be carried out by State or local government or by the family; or (7) establishes a policy concerning the relationship between the behavior and personal responsibility of youth and the norms of society. Under this statute, if the agency determines the proposed regulation may negatively affect family well-being, then the agency must provide an adequate rationale for its implementation.

The proposed rule would implement legislative amendments that increase employment opportunities for individuals with certain older or minor criminal offenses involving dishonesty or breach of trust. These increased employment opportunities may strengthen the stability of families, help families perform their functions, and increase disposable income. These changes are not likely to affect the rights of parents in the education or nurture of their children. The changes call for federal rather than state or local government action because the legislation affects the federal statute governing all federally insured credit unions. The Board also notes that it has limited discretion in whether and how to implement the legislative amendments and thus cannot substantially vary from the legislation. The Board has determined that this proposed rule may affect family well-being positively within the meaning of this statute.[50] As with all aspects of the proposed rule, commenters are invited to offer their opinion on this issue.

Providing Accountability Through Transparency Act of 2023

The Providing Accountability Through Transparency Act of 2023 (5 U.S.C. 553(b)(4)) (Act) 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) (commonly known as *regulations.gov*). The Act, under its terms, applies to notices of proposed rulemaking and does not expressly include other types of documents that the Board publishes voluntarily for public comment, such as notices and interim-final rules that request comment despite invoking ''good cause'' to forgo such notice and public procedure. The Board, however, has elected to address the Act's requirement in these types of documents in the interests of administrative consistency and transparency.

In summary, the proposal would incorporate the ''Second Chance'' Interpretive Ruling and Policy Statement 19–1 and the Fair Hiring in Banking Act into the NCUA's regulations. Section 205(d) of the Federal Credit Union Act prohibits, except with the Board's prior written consent, any person who has been convicted of certain criminal offenses involving dishonesty or breach of trust, or who has entered into a pretrial diversion or similar program in connection with a prosecution for such an offense, from participating in the conduct of the affairs of an insured credit union.

The proposal and the required summary can be found at *https://www.regulations.gov.*

List of Subjects

12 CFR Part 701

Administrative practice and procedure, Credit, Credit unions.

12 CFR Part 741

Bank deposit insurance, Credit unions, Reporting and recordkeeping requirements.

12 CFR Part 746

Administrative practice and procedure, Claims, Credit unions, Investigations.

12 CFR Part 748

Computer technology, Confidential business information, Credit unions, internet, Personally identifiable information, Privacy, Reporting and recordkeeping requirements, Security measures.

12 CFR Part 752

Administrative practice and procedure.

By the NCUA Board on October 19, 2023.

Melane Conyers-Ausbrooks,

Secretary of the Board.

For the reasons discussed in the preamble, the Board proposes to amend 12 CFR chapter VII as follows:

PART 701— ORGANIZATION AND OPERATION OF FEDERAL CREDIT UNIONS

■ 1. The authority citation for part 701 continues to read as follows:

[50] Public Law 105–277, 112 Stat. 2681 (1998).

Authority: 12 U.S.C. 1752(5), 1755, 1756, 1757, 1758, 1759, 1761a, 1761b, 1766, 1767, 1782, 1784, 1785, 1786, 1787, 1788, 1789. Section 701.6 is also authorized by 15 U.S.C. 3717. Section 701.31 is also authorized by 15 U.S.C. 1601 *et seq.;* 42 U.S.C. 1981 and 3601–3610. Section 701.35 is also authorized by 42 U.S.C. 4311–4312.

■ 2. In 701.14, revise paragraphs (c)(1), (c)(3)(iii), and the second sentence in paragraph (e) as follows:

§ 701.14 Change in official or senior executive officer in credit unions that are newly chartered or are in troubled condition.

(c) * * * (1) *Prior Notice Requirement.* An insured credit union must give the NCUA written notice at least 30 days before the effective date of adding or replacing any member of its board of directors or committee member, employing any person as a senior executive officer of the credit union, or changing the responsibilities of a board member, committee member, or a senior executive officer so that the person would assume a different position if:

(i) The credit union has been chartered for less than 2 years; or

(ii) The credit union meets the definition of troubled condition in paragraph (b)(3) or (4) of this section.

* * * * *

(3) * * *

(iii) *Processing.* Within 15 calendar days after receiving the notice, the Regional Director will inform the credit union either that the notice is complete or that additional, specified information is needed and must be submitted within 30 calendar days. If the initial notice is complete, the Regional Director will issue a written decision of approval or disapproval to the individual and the credit union within 30 calendar days of receipt of the notice. If the initial notice is not complete, the Regional Director will issue a written decision within 30 calendar days of receipt of the original notice plus the amount of time the credit union takes to provide the requested additional information. If the additional information is not submitted within 30 calendar days of the Regional Director's request, the Regional Director may either disapprove the proposed individual or review the notice based on the information provided. If the credit union and the individual have submitted all requested information and the Regional Director has not issued a written decision within the applicable time period, the individual is approved. Regional Director communications may be done through electronic mail.

* * * * *

(e) * * * The Notice of Disapproval will identify the reason(s) for the denial and advise the parties of their rights to request reconsideration from the Regional Director and/or file an appeal with the NCUA Board in accordance with the procedures set forth in 12 CFR part 746, subpart B.

■ 3. In the Official Commentary to Appendix A to part 701, under ''Article V. Elections,'' revise paragraph *i.*(b) to read as follows:

Appendix A to Part 701—Federal Credit Union Bylaws

Official NCUA Commentary—Federal Credit Union Bylaws

Article V. Elections

* * * * *

i. Eligibility Requirements: * * *

(b) The individual cannot have been convicted of a crime covered under section 205(d) of the Federal Credit Union Act (12 U.S.C. 1785(d)) unless the NCUA Board has waived the prohibition for the conviction; and

* * * * *

PART 741—REQUIREMENTS OF INSURANCE

■ 4. The authority citation for part 741 continues to read as follows:

Authority: 12 U.S.C. 1757, 1766(a), 1781–1790, and 1790d; 31 U.S.C. 3717.

■ 5. In § 741.3, revise the second sentence of paragraph (c) as follows:

§ 741.3 Criteria.

(c) *Fitness of management.* * * * No person shall serve as a director, officer, committee member, or employee of an insured credit union who has been convicted of a crime covered under section 205(d) of the Federal Credit Union Act (12 U.S.C. 1785(d)), except with the written consent of the Board.

* * * * *

PART 746—APPEALS PROCEDURES

■ 6. The authority citation for part 746 continues to read as follows:

Authority: 12 U.S.C. 1766, 1787, and 1789.

§ 746.201 [Amended]

■ 7. In § 746.201, in paragraph (c), add ''752.11(b),'' between ''745.201(c),'' and ''subpart J to part 747 of this chapter,''.

PART 748—SECURITY PROGRAM, SUSPICIOUS TRANSACTIONS, CATASTROPHIC ACTS, CYBER INCIDENTS, AND BANK SECRECY ACT COMPLIANCE

■ 8. The authority citation for part 748 continues to read as follows:

Authority: 12 U.S.C. 1766(a), 1786(b)(1), 1786(q), 1789(a)(11); 15 U.S.C. 6801–6809; 31 U.S.C. 5311 and 5318.

■ 9. Revise footnote 7 in appendix B to part 748 to read as follows:

Appendix B to Part 748—Guidance on Response Programs for Unauthorized Access to Member Information and Member Notice

[7] Credit unions must also conduct background checks of employees to ensure that the credit union does not violate 12 U.S.C. 1785(d), which prohibits a credit union from hiring an individual convicted of certain criminal offenses or who is subject to a prohibition order under 12 U.S.C. 1786(g).

* * * * *

■ 10. Add part 752 to read as follows:

PART 752—CONSENT TO SERVICE OF PERSONS CONVICTED OF, OR WHO HAVE PROGRAM ENTRIES FOR, CERTAIN CRIMINAL OFFENSES

Sec.
752.1 What is section 205(d) of the FCU Act?
752.2 Who is covered by section 205(d)?
752.3 What offenses are covered under section 205(d)?
752.4 What constitutes a conviction under section 205(d)?
752.5 What constitutes a pretrial diversion or similar program under section 205(d)?
752.6 What are the types of consent applications that can be filed?
752.7 When must a consent application be filed?
752.8 *De minimis* offenses.
752.9 How to file a consent application.
752.10 How a consent application is evaluated.
752.11 What will the NCUA do if the consent application is denied?

Authority: 12 U.S.C. 1785(d).

§ 752.1 What is section 205(d) of the Federal Credit Union Act?

(a) This subpart covers consent applications under section 205(d) of the Federal Credit Union Act (FCU Act), 12 U.S.C. 1785(d). The NCUA refers to such applications as ''consent applications.'' Under section 205(d), any person who has been convicted of any criminal offense involving dishonesty or breach of trust, or has agreed to enter into a pretrial diversion or similar program (program entry) in connection with a prosecution for such offense (collectively, covered offenses), may not become, or continue as, an institution-affiliated party (IAP) of an insured credit union; or otherwise participate, directly or indirectly, in the conduct of the affairs of any insured credit union without the prior written consent of the NCUA. Section 205(d) imposes a ten-year ban against the Board granting consent for a person convicted of certain crimes enumerated in Title 18 of the United States Code. In order for the Board to grant consent during the ten-year period, the Board must file a

motion with, and obtain the approval of, the sentencing court.

(b) In addition, the law prohibits an insured credit union from permitting such a person to engage in any conduct or to continue any relationship prohibited by section 205(d). Insured credit unions must therefore make a reasonable, documented, inquiry to verify an applicant's history to ensure that a person who has a conviction or program entry covered by the provisions of section 205(d) is not hired or permitted to participate in its affairs without the written consent of the NCUA issued under this subpart. Insured credit unions may extend a conditional offer of employment contingent on the completion of a background check satisfactory to the credit union to determine if the applicant is prohibited under section 205(d), but the applicant may not work for, be employed by, or otherwise participate in the affairs of the insured credit union until the credit union has determined that the applicant is not prohibited under section 205(d).

(c) If there is a conviction or program entry covered by the prohibitions of section 205(d), a consent application under this subpart must be filed seeking the NCUA's consent to become, or to continue as, an IAP; or to otherwise participate, directly or indirectly, in the affairs of the insured credit union. The consent application must be filed, and consented to, prior to serving in any of the foregoing capacities unless such consent application is not required under the subsequent provisions of this subpart. The purpose of a consent application is to provide the applicant an opportunity to demonstrate that, notwithstanding the prohibition, a person is fit to participate in the conduct of the affairs of an insured credit union without posing a risk to its safety and soundness or impairing public confidence in that credit union. The burden is upon the applicant to establish that the consent application warrants approval.

§ 752.2 Who is covered by section 205(d)?

(a)(1) Persons covered by section 205(d) include IAPs, as defined by 12 U.S.C. 1786(r), and others who are participants in the conduct of the affairs of an insured credit union. Therefore, all directors, officers, and employees of an insured credit union who fall within the scope of section 205(d), including *de facto* employees, as determined by the NCUA based upon generally applicable standards of employment law, will also be subject to section 205(d).

(2) Whether other persons who are not IAPs are covered depends upon their degree of influence or control over the management or affairs of an insured credit union. Those who exercise major policymaking functions of an insured credit union are deemed participants in the affairs of that institution and covered by section 205(d). Similarly, directors and officers of subsidiaries or joint ventures of an insured credit union will be covered if they participate in the affairs of the insured credit union or are in a position to influence or control the management or affairs of the insured credit union. Typically, an independent contractor does not have a relationship with the insured credit union other than the activity for which the credit union has contracted. However, an independent contractor who influences or controls the management or affairs of the insured credit union would be covered by section 205(d).

(b) The term *person,* for purposes of section 205(d), means an individual and does not include a corporation, firm, or other business entity.

§ 752.3 Which offenses qualify as "Covered Offenses" under section 205(d)?

(a) *General definitions.* The conviction or program entry must be for a criminal offense involving dishonesty or breach of trust.

(1) The term *criminal offense involving dishonesty*—

(i) Means an offense under which an individual, directly or indirectly—

(A) Cheats or defrauds; or

(B) Wrongfully takes property belonging to another in violation of a criminal statute;

(ii) Includes an offense that federal, state, or local law defines as dishonest, or

for which dishonesty is an element of the offense; and

(iii) Does not include—

(A) A misdemeanor criminal offense committed more than 1 year before the date on which an individual files a consent application, excluding any period of incarceration; or

(B) An offense involving the possession of controlled substances. At a minimum, this exclusion applies to criminal offenses involving the simple possession of a controlled substance and possession with intent to distribute a controlled substance. This exclusion may also apply to other drug-related offenses depending on the statutory elements of the offenses or from court determinations that the statutory provisions of the offenses involve dishonesty or breach of trust as noted in paragraph (b) of this section. Potential applicants may contact their appropriate NCUA Regional Office or the Office of National Examinations and Supervision, if applicable, if they have questions about whether their offenses are covered under section 205(d).

(iv) The term *offense committed* in paragraph (a)(1)(iii)(A) means the last date of the underlying misconduct. In instances with multiple offenses, *offense committed* means the last date of any of the underlying offenses.

(2) The term *breach of trust* means a wrongful act, use, misappropriation, or omission with respect to any property or fund that has been committed to a person in a fiduciary or official capacity, or the misuse of one's official or fiduciary position to engage in a wrongful act, use, misappropriation, or omission.

(b) *Dishonesty or breach of trust.* Whether a crime involves dishonesty or breach of trust will be determined from the statutory elements of the offense itself or from court determinations that the statutory provisions of the offense involve dishonesty or breach of trust.

(c) *Certain older offenses excluded.* — (1) *General.* Section 205(d) does not apply to an offense if—

(i) it has been 7 years or more since the offense occurred; or

(ii) the individual was incarcerated with respect to the offense, and it has been 5 years or more since the individual was released from incarceration.

(iii) The NCUA interprets the term "offense occurred" to mean the last date of the underlying misconduct. In instances with multiple covered offenses, "offense occurred" means the last date of any of the underlying offenses.

(2) *Offenses committed by individuals 21 years of age or younger.* For individuals who committed an offense when they were 21 years of age or younger, section 205(d) shall not apply to the offense if it has been more than 30 months since the sentencing occurred. The NCUA interprets "sentencing occurred" to mean the date on which a court imposed the sentence, not the date on which all conditions of sentencing were completed.

(3) *Limitation.* This paragraph (c) shall not apply to an offense described under 12 U.S.C. 1785(d)(2).

(d) *Designated lesser offenses excluded.* Section 205(d) does not apply to the following offenses, if 1 or more years has passed since the applicable conviction or program entry: using fake identification; shoplifting; trespassing; fare evasion; and driving with an expired license or tag.

(e) *Foreign convictions.* The NCUA considers individuals who are convicted of or enter into a pretrial diversion program for a criminal offense involving

dishonesty or breach of trust in foreign jurisdictions to be subject to section 205(d), unless the offense is otherwise excluded by this subpart.

§ 752.4 What constitutes a conviction under section 205(d)?

(a) *Convictions requiring a consent application.* There must be a conviction of record. Section 205(d) does not cover arrests or pending cases not brought to trial, unless the person has a program entry as set out in § 752.5. Section 205(d) does not cover acquittals or any conviction that has been reversed on appeal, unless the reversal was for the purpose of re-sentencing. A conviction with regard to which an appeal is pending requires a consent application. A conviction for which a pardon has been granted will require a consent application.

(b) *Convictions not requiring a* consent *application.* When an individual is charged with a covered offense and, in the absence of a program entry as set out in § 752.5, is subsequently convicted of an offense that is not a covered offense, the conviction is not subject to section 205(d).

(c) *Expungement, dismissal, and sealing.* A conviction shall not be considered a conviction of record and shall not require a consent application if—

(1) there is an order of expungement, sealing, or dismissal that has been issued in regard to the conviction in connection with such offense, or if a conviction has been otherwise expunged, sealed, or dismissed by operation of law; and

(2) it is intended by the language in the order itself, or in the legislative provisions under which the order was issued, or in other legislative provisions, that the conviction shall be destroyed or sealed from the individual's state, tribal, or federal record, even if exceptions allow the conviction to be considered for certain character and fitness evaluation purposes.

(d) *Youthful offenders.* An adjudication by a court against a person as a ''youthful offender'' (or similar term) under any youth-offender law applicable to minors as defined by state law, or any judgment as a ''juvenile delinquent'' by any court having jurisdiction over minors as defined by state law, does not require a consent application. Such an adjudication does not constitute a matter covered under section 205(d) and is not a conviction or program entry for determining the applicability of § 752.8.

§ 752.5 What constitutes a pretrial diversion or similar program under section 205(d)?

(a) The term ''pretrial diversion or similar program'' (program entry) means a program characterized by a suspension or eventual dismissal or reversal of charges or criminal prosecution upon agreement by the accused to restitution, drug or alcohol rehabilitation, anger management, or community service. Whether the outcome of a case constitutes a program entry is determined by relevant Federal, State, or local law, and, if not so designated under applicable law, then the determination of whether a disposition is a program entry will be made by the Board on a case-by-case basis.

(b) When a covered offense either is reduced by a program entry to an offense that would otherwise not be covered by section 205(d) or is dismissed upon successful completion of a program entry, the covered offense remains a covered offense for purposes of section 205(d). The covered offense will require a consent application unless it is *de minimis* as provided by § 752.8 of this subpart.

(c) Expungements, dismissals, or sealings of program entries will be treated the same as those for convictions.

§ 752.6 What are the types of consent applications that can be filed?

(a) The NCUA will accept consent applications from—

(1) an individual; or

(2) an insured credit union applying on behalf of an individual.

(b) An individual or an insured credit union may file consent applications at separate times. Under either approach, the consent application(s) must be filed with the appropriate NCUA Regional Office, or the Office of National Examinations and Supervision, as required by this subpart.

§ 752.7 When may a consent application be filed?

(a) Except for situations in which no consent application is required under section 205(d) and this subpart, a consent application must be filed when there is a conviction by a court of competent jurisdiction for a covered offense by any adult or minor treated as an adult, or when such person has a program entry regarding that offense. Before a consent application may be filed, all of the sentencing requirements associated with a conviction, or conditions imposed by the program entry, including but not limited to, imprisonment, fines, condition of rehabilitation, and probation requirements, must be completed, and the case must be considered final by the procedures of the applicable jurisdiction.

(b) The NCUA's consent application forms as well as additional information concerning section 205(d) can be accessed at the NCUA's Regional Offices or the Office of National Examinations and Supervision, if applicable, or on the NCUA's website.

§ 752.8 *De minimis* offenses

(a) *In general.* Approval is automatically granted, and a consent application will not be required where all of the following *de minimis* criteria are met.

(1) The individual has been convicted of, or has program entries for, no more than 2 covered offenses, including those subject to paragraph (b) of this section; and for each covered offense, all of the sentencing requirements associated with the conviction, or conditions imposed by the program entry, have been completed (the sentence- or program-completion requirement does not apply under paragraph (b)(2) of this section);

(2) For each covered offense, the individual could have been sentenced to a term of confinement in a correctional facility of 3 years or less and/or a fine of $2,500 or less, and the individual actually served 3 days or less of jail time for each covered offense.

(i) Jail time is calculated based on the time an individual spent incarcerated as a punishment or a sanction—not as pretrial detention—and does not include probation or parole where an individual was restricted to a particular jurisdiction or was required to report occasionally to an individual or a specific location. Jail time includes confinement to a psychiatric treatment center in lieu of a jail, prison, or house of correction on mental-competency grounds. The definition is not intended to include either of the following:

(ii) Persons who are restricted to a substance-abuse treatment program facility for part or all of the day; and

(iii) Persons who are ordered to attend outpatient psychiatric treatment.

(3) If there are 2 convictions or program entries for a covered offense, each conviction or program entry was entered at least 3 years prior to the date a consent application would otherwise be required, except as provided in paragraph (b)(1) of this section; and

(4) Each covered offense was not committed against an insured depository institution or insured credit union.

(b) *Other types of offenses for which the de minimis exception applies and no consent application is required*—(1)

Age of person at time of covered offense. If there are 2 convictions or program entries for a covered offense, and the actions that resulted in both convictions or program entries all occurred when the individual was 21 years of age or younger, then the *de minimis* criteria in paragraph (a)(3) of this section shall be met if the convictions or program entries were entered at least 18 months prior to the date a consent application would otherwise be required.

(2) *Convictions or program entries for insufficient funds checks.* Convictions or program entries of record based on the writing of ''bad'' or insufficient funds check(s) shall be considered *de minimis* offenses under this provision if the following conditions apply:

(i) The aggregate total face value of all ''bad'' or insufficient funds check(s) cited across all the conviction(s) or program entry(ies) for ''bad'' or insufficient funds checks is $2,000 or less;

(ii) No insured depository institution or insured credit union was a payee on any of the ''bad'' or insufficient funds checks that were the basis of the conviction(s) or program entry(ies); and

(iii) The individual has no more than 1 other *de minimis* offense under this section.

(3) *Convictions or program entries for small-dollar, simple theft.* Convictions or program entries based on the simple theft of goods, services, or currency (or other monetary instrument) shall be considered *de minimis* offenses under this provision if the following conditions apply:

(i) The value of the currency, goods, or services taken is $1,000 or less;

(ii) The theft was not committed against an insured depository institution or insured credit union;

(iii) The individual has no more than 1 other *de minimis* offense under this section; and

(iv) If there are 2 *de minimis* offenses under this section, each conviction or program entry was entered at least 3 years prior to the date a consent application would otherwise be required, or at least 18 months prior to the date a consent application would otherwise be required if the actions that resulted in the conviction or program entry all occurred when the individual was 21 years of age or younger.

(v) Simple theft excludes burglary, forgery, robbery, identity theft, and fraud.

(c) *Fidelity bond coverage and disclosure to institutions.* Any person who meets the criteria under this section shall be covered by a fidelity bond to the same extent as others in similar positions, and shall disclose the presence of the conviction(s) or program entry(ies) to all insured credit unions in the affairs of which he or she intends to participate.

(d) *Non-qualifying convictions or program entries.* No conviction or program entry for a violation of the Title 18 sections set out in 12 U.S.C. 1785(d)(2) can qualify under any of the *de minimis* exceptions set out in this section.

§ 752.9 How to file a consent application.

Forms and instructions should be obtained from the NCUA's website (*www.ncua.gov*), and the consent application(s) must be filed with the appropriate NCUA Regional Director. A consent application may be filed by an individual and by an insured credit union on behalf of an individual. The appropriate Regional Office for a credit union-sponsored application is the office covering the state where the insured credit union's home office is located, or the Office of National Examinations and Supervision. The appropriate Regional Office for an individual consent application is the office covering the state where the person resides. States covered by each NCUA Regional Office are listed in section 790.2 of this chapter.

§ 752.10 How a consent application is evaluated.

(a) *Criminal history records.* In reviewing a consent application, the NCUA will—

(1) primarily rely on the criminal history record of the Federal Bureau of Investigation; and

(2) provide such record to the applicant to review for accuracy.

(b) *Certified copies.* The NCUA will not require an applicant to provide certified copies of criminal history records unless the NCUA determines that there is a clear and compelling justification to require additional information to verify the accuracy of the criminal history record of the Federal Bureau of Investigation.

(c) *Factors for determination.* The ultimate determinations in assessing a consent application are whether the person has demonstrated their fitness to participate in the conduct of the affairs of an insured credit union, and whether the affiliation, or participation by the person in the conduct of the affairs of the credit union may constitute a threat to the safety and soundness of the credit union or the interests of its members or threaten to impair public confidence in the credit union.

(d) *Individualized assessment.* When evaluating consent applications, the NCUA will conduct an individualized assessment that will consider:

(1) Whether the conviction or program entry is subject to section 205(d) and the specific nature and circumstances of the offense;

(2) Whether the participation directly or indirectly by the person in any manner in the conduct of the affairs of the insured credit union constitutes a threat to the safety and soundness of the credit union or the interests of its members or threatens to impair public confidence in the credit union;

(3) Evidence of rehabilitation including the applicant's age at the time of the conviction or program entry, the time that has elapsed since the conviction or program entry, the relationship of the individual's offense to the responsibilities of the applicable position;

(4) The individual's employment history, letters of recommendation, certificates documenting participation in substance-abuse programs, successful participating in job preparation and educational programs, and other relevant evidence;

(5) The ability of management of the insured credit union to supervise and control the person's activities;

(6) The applicability of the insured credit union's fidelity bond coverage to the person; and

(7) For state-chartered, federally insured credit unions, the opinion or position of the state regulator; and

(8) Any additional factors in the specific case that appear relevant to the consent application.

(e) *Underlying merits not at issue.* The question of whether a person, who was convicted of a crime or who agreed to a program entry, was guilty of that crime shall not be at issue in a proceeding under this subpart or under 12 CFR part 746, subpart B.

(f) *Application of factors to 10-year ban exception.* The foregoing factors will also be applied by the NCUA to determine whether the interests of justice are served in seeking an exception in the appropriate court when a consent application is made to terminate the 10-year ban prior to its expiration date under 12 U.S.C. 1785(d)(2)(A) for certain Federal offenses.

(g) *Fidelity bond requirements not affected.* All approvals and orders will be subject to the condition that the person be covered by a fidelity bond to the same extent as others in similar positions. If the NCUA has approved a consent application filed by an individual and has issued a consent order, the individual must disclose the presence of the conviction(s) or program

entry(ies) to all insured credit unions in the affairs of which they wish to participate.

(h) *Sponsored consent applications.* When deemed appropriate by the NCUA, credit union-sponsored consent applications are to allow the individual to work for the same employer (without restrictions on the location) and across positions, except that the prior consent of the NCUA (which may require a new consent application) will be required for any proposed significant changes in the individual's security-related duties or responsibilities, such as promotion to an officer or other positions that the employer determines will require higher security screening credentials.

(i) *Subsequent consent applications.* In situations in which an approval has been granted for a person to participate in the affairs of a particular insured credit union and the person subsequently seeks to participate at another insured credit union, another consent application must be submitted and approved by the NCUA prior to the person participating in the affairs of the other insured credit union.

§ 752.11 What will the NCUA do if the consent application is denied?

(a) The NCUA will inform the applicant in writing that the consent application has been denied and summarize or cite the relevant considerations specified in § 752.10 of this subpart.

(b) The denial will also notify the applicant of the right to request reconsideration from the Regional Office or the Office of National Examinations and Supervision, or to file an appeal with the Board, and shall include a description of applicable filing deadlines and time frames for agency responses. The Regional Office or the Office of National Examinations and Supervision and the Board will apply the review process contained in 12 CFR part 746, subpart B, to any request for reconsideration or appeal. The request for review must include a statement of the underlying facts that form the basis of the request for reconsideration or appeal, a statement of the basis for the denial to which the applicant objects and the alleged error in such denial, and any other support, materials, or evidence relied upon by the applicant that were not previously provided.

[FR Doc. 2023–23509 Filed 11–6–23; 8:45 am]

BILLING CODE 7535–01–P

CONSUMER PRODUCT SAFETY COMMISSION

16 CFR Part 1408

[Docket No. CPSC–2019–0020]

Safety Standard for Residential Gas Furnaces and Boilers; Correction

AGENCY: Consumer Product Safety Commission.

ACTION: Proposed rule; correction.

SUMMARY: On October 25, 2023, the Commission published a notice of proposed rulemaking (NPR) to address dangerous levels of carbon monoxide production and leakage from residential gas furnaces and boilers. That document contained a typographical error in the preamble. This document corrects that error.

DATES: November 7, 2023.

FOR FURTHER INFORMATION CONTACT: Ronald A. Jordan, Directorate for Engineering Sciences, Mechanical Engineering, Consumer Product Safety Commission, National Product Testing and Evaluation Center, 5 Research Place, Rockville, MD 20850; telephone: 301–987–2219; *rjordan@cpsc.gov.*

SUPPLEMENTARY INFORMATION: The Commission is correcting a typographical error in the preamble of the NPR, *Safety Standard for Residential Gas Furnaces and Boilers,* 16 CFR part 1408, which appeared in the **Federal Register** on October 25, 2023. 88 FR 73272. This document corrects a typographical error in section XV of the preamble, entitled Paperwork Reduction Act. On page 73289, first column, second paragraph, the first sentence erroneously states ''4,374 hours (833 hours + 833 + 208 hours + 2,500 hours)''. This notice corrects that error by revising that language to correctly read ''3,541 hours (833 hours + 208 hours + 2,500 hours)''. The estimated time burden thus is lower than stated in the NPR. The estimated financial burden in the same sentence is unchanged.

Alberta E. Mills,

Secretary, Consumer Product Safety Commission.

[FR Doc. 2023–24538 Filed 11–6–23; 8:45 am]

BILLING CODE 6355–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1, 31, and 301

[REG–122793–19]

RIN 1545–BP71

Gross Proceeds and Basis Reporting by Brokers and Determination of Amount Realized and Basis for Digital Asset Transactions

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notification of rescheduling of public hearing on a proposed rulemaking.

SUMMARY: This document reschedules and changes to telephonic-only the public hearing originally scheduled for November 7, 2023, for a notice of proposed rulemaking (REG–122793–19) that was published in the **Federal Register** on Tuesday, August 29, 2023. The rescheduled hearing will be held on November 13, 2023, at 10 a.m. ET by telephone only. The proposed regulations relate to information reporting by brokers, the determination of amount realized and basis, and backup withholding, for certain digital asset sales and exchanges.

DATES: The previously scheduled public hearing for the notice of proposed rulemaking published on August 29, 2023 (88 FR 59576), has been rescheduled to a telephonic-only hearing on November 13, 2023, at 10 a.m. ET.

ADDRESSES: Commenters are strongly encouraged to submit public comments electronically. Submit electronic submissions via the Federal eRulemaking Portal at *www.regulations.gov* (indicate IRS and REG–122793–19) by following the online instructions for submitting comments. Once submitted to the Federal eRulemaking Portal, comments cannot be edited or withdrawn. The Department of the Treasury and the IRS will publish any comments submitted electronically or on paper to the public docket. Send paper submissions to CC:PA:01:PR (REG–122793–19), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:01:PR (REG–122793–19), Courier's Desk, Internal Revenue Service, 1111 Constitution Ave. NW, Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Concerning submissions of comments

and requests to participate in the telephonic public hearing, email *publichearings@irs.gov* (preferred) or call (202) 317–6901 (not a toll-free number).

SUPPLEMENTARY INFORMATION: A notice of proposed rulemaking and request for comments that appeared in the **Federal Register** on Tuesday, August 29, 2023 (88 FR 59576), announced that written or electronic comments must be received by October 30, 2023. In a notification published on October 24, 2023 (88 FR 73300), the due date to receive written comments was extended to Monday, November 13, 2023.

The public hearing previously scheduled for November 7, 2023, at 10 a.m. ET, has been rescheduled for November 13, 2023, at 10 a.m. ET, and will be conducted by telephone only.

Persons who wished to present oral comments at the public hearing were required to submit written or electronic comments and an outline of the topics to be discussed as well as the time to be devoted to each topic, not to exceed ten minutes in total. Requests, with the outline of the topics to be discussed, were required to be made by email to *publichearings@irs.gov* by October 30, 2023. This due date for requests to testify has not been extended. Persons who made timely requests to testify will receive the telephone number and access code for the rescheduled public hearing.

Individuals who have already sent an email to *publichearings@irs.gov* to request to attend the hearing by telephone or in person do not need to make a second request to attend the rescheduled hearing being held by telephone only. The IRS will provide those individuals with a telephone number and access code for the rescheduled hearing by email.

Additional individuals who want to attend the rescheduled telephonic public hearing without testifying must send an email to *publichearings@irs.gov* to receive the telephone number and access code for the public hearing. The subject line of the email must contain the regulation number ''REG–122793–19'' and the words ''ATTEND Hearing Telephonically''. For example, the subject line may say: ''Request to ATTEND Hearing Telephonically for REG–122793–19.'' These new requests to attend the public hearing must be received by 5 p.m. ET on November 9, 2023. All individuals who timely request to attend the public hearing will receive the telephone number and access code.

Adrienne Griffin,

Branch Chief (Procedure & Administration).

[FR Doc. 2023–24608 Filed 11–3–23; 11:15 am]

BILLING CODE 4830–01–P

Notices

Federal Register

Vol. 88, No. 214

Tuesday, November 7, 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.

AGENCY FOR INTERNATIONAL DEVELOPMENT

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; USAID Workforce Commuter Survey

AGENCY: Agency for International Development (USAID).

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, USAID is proposing a new information collection.

DATES: All comments should be submitted within 60 calendar days from the date of this publication.

ADDRESSES: Comments submitted in response to this notice should be submitted to *mbureauclimatechangewg@usaid.gov.*

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Greg Shanahan, *mbureauclimatechangewg@usaid.gov,* 202–921–5107.

SUPPLEMENTARY INFORMATION: USAID, in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps USAID assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand USAID's information collection requirements and provide USAID the data it requested in the format it prefers. USAID is soliciting comments on the proposed information collection request (ICR) that USAID describes below. USAID is especially interested in public comment addressing the following issues: (1) how USAID might enhance the quality, utility, and clarity of the information it is planning to collect; and (2) how USAID might minimize the burden for the members of USAID's workforce who respond to the commuter survey, including by using information technology. Written comments USAID receives in response to this notice will be public records.

Title of Collection: USAID Workforce Commuter Survey.

OMB Control Number: XXXX. Type of Review: A new information collection.

Respondents/Affected Public: USAID's workforce, including contractor staff.

Total Estimated Number of Annual Responses: 6,500.

Total Estimated Number of Annual Burden Hours: 1,083.33 (6,500 * 10 mins = 65,000 mins/60 mins = 1,083.33 hours).

Abstract: USAID's workforce commuter survey enables USAID to estimate the greenhouse gas (GHG) emissions associated with its workforce's commuting and to gather data on its workforce's commuting habits. USAID will use these data to inform its GHG emissions inventory, measure progress against its GHG emissions reduction targets, and inform and improve its commuter benefits program and reporting.

Dated: September 29, 2023.

Ruth Buckley,

Deputy Assistant Administrator for Management, Bureau for Management USAID.

[FR Doc. 2023–24554 Filed 11–6–23; 8:45 am]

BILLING CODE 6116–01–P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments are requested regarding: whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology Comments regarding these information collections are best assured of having their full effect if received by December 7, 2023. Written comments and recommendations for the proposed information collection should be submitted within 30 days of the publication of this notice on the following website *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Agricultural Marketing Service

Title: National Science Laboratories.

OMB Control Number: 0581–NEW.

Summary of Collection: Under the Agricultural Marketing Act of 1946, as amended (7 U.S.C. 1621–1627), the Agricultural Marketing Service (AMS) administers programs that create domestic and international marketing opportunities for U.S. producers of food, fiber, and specialty crops. AMS also provides the agricultural industry with valuable services to ensure the quality and availability of wholesome food for consumers across the country and around the world.

AMS' Science & Technology Program (S&T) provides scientific, certification and analytical services to the agricultural community to improve the quality, wholesomeness and marketing of agricultural products domestically and internationally. S&T provides support to USDA Agencies, Federal and State agencies, and private sector food and agricultural industries. S&T is organized into four divisions:

Laboratory Approval & Testing Division (LATD); Monitoring Programs Division (MPD); the Plant Variety Protection Office (PVPO); and the Seed Regulatory and Testing Division (SRTD). AMS' S&T, LATD provides analytical lab testing and approval services to facilitate domestic and international marketing of food and agricultural commodities. AMS, LATD's National Science Laboratories (NSL) provides objective, timely, and cost-effective analytical testing services to facilitate marketing of food and agricultural products. Regulations implementing AMS' NSL appear at 7 CFR part 91.

Pursuant to this authority, AMS' National Science Laboratories (NSL) is a fee-for-service lab network (7 CFR parts 91) utilized by both industry and government. Through laboratories located in Gastonia, NC, and Blakely, GA, NSL provides chemical, microbiological, and bio-molecular analyses on food and agricultural commodities. NSL provides testing service for AMS commodity programs, other USDA agencies, Federal and State agencies, US Military, research institutions, and private sector food and agricultural industries.

Need and Use of the Information: The National Science Laboratories (NSL) collects, voluntarily from the applicant, customer/business information and specific information about the sample(s) being submitted to perform chemical, microbiological, and bio-molecular analyses on food and agricultural commodities, provide an analytical report/certificate, and collect payment for services. The customer/business information requested is used by the Administrative Officer to identify the applicant in the billing system, to set up an account in the billing system and contact the party responsible for payment of the fee for services. The Sample information documentation requested, to be provided with sample(s), is used by NSL staff to uniquely identify sample, sample conditions, and requested analytical test(s). This is a ''fee for service'' program with voluntary participation. All costs are recovered. Only information essential to provide service is requested.

Description of Respondents: Business or other for-profit.

Number of Respondents: 490.

Frequency of Responses: Reporting: Annually.

Total Burden Hours: 2613.

Levi S. Harrell,

Departmental Information Collection Clearance Officer.

[FR Doc. 2023–24557 Filed 11–6–23; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments regarding this information collection received by December 7, 2023 will be considered. Written comments and recommendations for the proposed information collection should be submitted within 30 days of the publication of this notice on the following website *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

National Appeals Division

Title: National Appeals Division Customer Service Survey.

OMB Control Number: 0503–0007.

Summary of Collection: The Secretary of Agriculture established the National Appeals Division (NAD) on October 20, 1994, by Secretary's Memorandum 1010–1, pursuant to the Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994 (Pub. L. 103–354, section 271, dated October 13, 1994). The Act consolidated the appellate functions and staffs of several USDA agencies. The intent is to provide for independent hearing and review determinations that resulted from Agency adverse decisions. Administrative Judges conduct evidentiary hearing on adverse decisions or, when the appellant requests they review the Agency's record of the adverse decision without a hearing. NAD maintains a database to track appeal requests, the database contains only information necessary to process the appeal request, such as the name, address, filing data, and final results of the appeal. NAD will collect information using a survey.

Need and Use of the Information: NAD wants to gather current data to measure the appellant's perception of the quality of how easy the determination was to read; how intently the Administrative Judge listened to the appellant; and how courteous the Administrative Judge was during the appeal process. NAD will also use the information gathered from its surveys to tailor and prioritize training. Failure to collect this information will not impede NAD's ability to conduct administrative appeals; however, it will impair NAD's ability to develop and improve Customer Service Standards.

Description of Respondents: Individuals or households.

Number of Responsdents: 2,400.

Frequency of Responses: Reporting: Annually.

Total Burden Hours: 329.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2023–24525 Filed 11–6–23; 8:45 am]

BILLING CODE 3410–WY–P

DEPARTMENT OF AGRICULTURE

Food Safety and Inspection Service

[Docket No. FSIS–2023–0025]

Notice of Request for Renewal of an Approved Information Collection: Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery

AGENCY: Food Safety and Inspection Service (FSIS), U.S. Department of Agriculture (USDA).

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 and the Office of Management and Budget (OMB) regulations, FSIS is announcing its intention to request renewal of the approved information collection regarding the qualitative customer and stakeholder feedback on service delivery by FSIS. There are no changes to the existing information collection. The approval for this information collection will expire on March 31, 2024.

DATES: Submit comments on or before January 8, 2024.

ADDRESSES: FSIS invites interested persons to submit comments on this **Federal Register** notice. Comments may be submitted by one of the following methods:

- *Federal eRulemaking Portal:* This website provides commenters the ability to type short comments directly into the comment field on the web page or to attach a file for lengthier comments. Go to *https://www.regulations.gov.* Follow the on-line instructions at that site for submitting comments.
- *Mail:* Send to Docket Clerk, U.S. Department of Agriculture, Food Safety and Inspection Service, 1400 Independence Avenue SW, Mailstop 3758, Washington, DC 20250–3700.
- *Hand- or courier-delivered submittals:* Deliver to 1400 Independence Avenue SW, Jamie L. Whitten Building, Room 350–E, Washington, DC 20250–3700.

Instructions: All items submitted by mail or electronic mail must include the Agency name and docket number FSIS–2023–0025. Comments received in response to this docket will be made available for public inspection and posted without change, including any personal information, to *https://www.regulations.gov.*

Docket: For access to background documents or comments received, call 202–720–5046 to schedule a time to visit the FSIS Docket Room at 1400 Independence Avenue SW, Washington, DC 20250–3700.

FOR FURTHER INFORMATION CONTACT: Gina Kouba, Office of Policy and Program Development, Food Safety and Inspection Service, USDA, 1400 Independence Avenue SW, Mailstop 3758, South Building, Washington, DC 20250–3700; 202–720–5046.

SUPPLEMENTARY INFORMATION:

Title: Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery.

OMB Number: 0583–0151.

Expiration Date: March 31, 2024.

Type of Request: Request for renewal of an approved information collection.

Abstract: FSIS has been delegated the authority to exercise the functions of the Secretary (7 CFR 2.18 and 2.53), as specified in the Federal Meat Inspection Act (FMIA) (21 U.S.C. 601, *et seq.*), the Poultry Products Inspection Act (PPIA) (21 U.S.C. 451, *et seq.*), and the Egg Products Inspection Act (EPIA) (21 U.S.C. 1031, *et seq.*). These statutes mandate that FSIS protect the public by verifying that meat, poultry, and egg products are safe, wholesome, and properly labeled.

FSIS is requesting renewal of the approved information collection regarding the qualitative customer and stakeholder feedback on service delivery by FSIS. There are no changes to the existing information collection. The approval for this information collection will expire on March 31, 2024.

The proposed information collection activity provides a means for FSIS to garner qualitative customer and stakeholder feedback in an efficient, timely manner, in accordance with the Agency's commitment to improving service delivery.

By ''qualitative feedback,'' FSIS means information that provides useful insights on perceptions and opinions, but not a statistical survey that yields quantitative results that can be generalized to the population studied. Qualitative feedback provides insights into customer or stakeholder perceptions, experiences, and expectations; provides an early warning of issues with the Agency's customer service; and focuses attention on matters with respect to which communication or changes in operations might improve delivery of products or services. This collection will allow for ongoing, collaborative, and actionable communications between the Agency and its customers and stakeholders. It will also allow the feedback to contribute directly to the improvement of program management.

The solicitation of qualitative feedback will target topics such as: Timeliness, appropriateness, accuracy of information, courtesy, efficiency of service delivery, and resolution of issues with service delivery. Responses will be assessed to plan and inform efforts to improve or maintain the quality of service offered to the public. If this information is not collected, vital feedback from customers and stakeholders on the Agency's services will be unavailable.

FSIS will only submit a collection for approval under this generic clearance if it meets the following conditions:

The collection is voluntary;

The collection is low-burden for respondents (based on considerations of total burden hours, total number of respondents, or burden-hours per respondent) and is low-cost for both the respondents and the Federal Government;

The collection is non-controversial and does not raise issues of concern to other Federal agencies;

The collection is targeted to the solicitation of opinions from respondents who have had experience with the program, or who may have experience with the program in the near future;

Personally identifiable information (PII) is collected only to the extent necessary and is not retained; as a general matter, this information collection will not result in any new system of records containing privacy information and will not involve questions of a sensitive nature, such as sexual behavior and attitudes, religious beliefs, or other matters that are commonly considered private;

Information gathered is intended to be used only internally for general service improvement and program management purposes and is not intended for release outside of FSIS (if released, FSIS will indicate the qualitative nature of the information);

Information gathered will not be used for the purpose of substantially informing policy decisions; and

Information gathered will yield qualitative information; the collection will not be designed or expected to yield statistically reliable results or used as though the results are generalizable to the population of study.

FSIS has made the following estimates based upon an information collection assessment:

Estimate of Burden: The public reporting burden for this collection of information is estimated to average .5 hours per response.

Respondents: Individuals and households; businesses and organizations; State, local, or Tribal government.

Estimated Annual Number of Respondents: 4,000.

Estimated Annual Number of Responses per Respondent: 1.

Estimated Annual Number of Responses: 4,000.

Estimated Total Annual Burden on Respondents: 2,000 hours.

Copies of this information collection assessment can be obtained from Gina Kouba, Office of Policy and Program Development, Food Safety and Inspection Service, USDA, 1400 Independence SW, Mailstop 3758, South Building, Washington, DC 20250; (202) 720–5627.

All responses to this notice will be summarized and included in the request for OMB approval. All comments will

also become a matter of public record. Copies of this information collection assessment can be obtained from Gina Kouba, Office of Policy and Program Development, Food Safety and Inspection Service, USDA, 1400 Independence Avenue SW, Mailstop 3758, South Building, Washington, DC 20250–3700; 202–720–5046.

Comments are invited on: (a) whether the proposed collection of information is necessary for the proper performance of FSIS' functions, including whether the information will have practical utility; (b) the accuracy of FSIS' estimate of the burden of the proposed collection of information, including the validity of the method and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques, or other forms of information technology. Comments may be sent to both FSIS, at the addresses provided above, and the Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Washington, DC 20253.

Additional Public Notification

Public awareness of all segments of rulemaking and policy development is important. Consequently, FSIS will announce this **Federal Register** publication on-line through the FSIS web page located at: *https://www.fsis.usda.gov/federal-register.*

FSIS will also announce and provide a link to this **Federal Register** publication through the FSIS *Constituent Update,* which is used to provide information regarding FSIS policies, procedures, regulations, **Federal Register** notices, FSIS public meetings, and other types of information that could affect or would be of interest to our constituents and stakeholders. The *Constituent Update* is available on the FSIS web page. Through the web page, FSIS can provide information to a much broader, more diverse audience. In addition, FSIS offers an email subscription service which provides automatic and customized access to selected food safety news and information. This service is available at: *https://www.fsis.usda.gov/subscribe.* Options range from recalls to export information, regulations, directives, and notices. Customers can add or delete subscriptions themselves and have the option to password protect their accounts.

USDA Non-Discrimination Statement

In accordance with Federal civil rights law and USDA civil rights regulations and policies, USDA, its Mission Areas, agencies, staff offices, employees, and institutions participating in or administering USDA programs are prohibited from discriminating based on race, color, national origin, religion, sex, gender identity (including gender expression), sexual orientation, disability, age, marital status, family/parental status, income derived from a public assistance program, political beliefs, or reprisal or retaliation for prior civil rights activity, in any program or activity conducted or funded by USDA (not all bases apply to all programs). Remedies and complaint filing deadlines vary by program or incident.

Program information may be made available in languages other than English. Persons with disabilities who require alternative means of communication to obtain program information (*e.g.,* Braille, large print, audiotape, American Sign Language) should contact the responsible Mission Area, agency, or staff office; the USDA TARGET Center at (202) 720–2600 (voice and TTY); or the Federal Relay Service at (800) 877–8339.

To file a program discrimination complaint, a complainant should complete a Form AD–3027, *USDA Program Discrimination Complaint Form,* which can be obtained online at *https://www.usda.gov/forms/electronic-forms,* from any USDA office, by calling (866) 632–9992, or by writing a letter addressed to USDA. The letter must contain the complainant's name, address, telephone number, and a written description of the alleged discriminatory action in sufficient detail to inform the Assistant Secretary for Civil Rights (ASCR) about the nature and date of an alleged civil rights violation. The completed AD–3027 form or letter must be submitted to USDA by:

(1) *Mail:* U.S. Department of Agriculture, Office of the Assistant Secretary for Civil Rights, 1400 Independence Avenue SW, Washington, DC 20250–9410;

(2) *Fax:* (833) 256–1665 or (202) 690–7442; or

(3) *Email: program.intake@usda.gov.*

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Paul Kiecker,

Administrator.

[FR Doc. 2023–24546 Filed 11–6–23; 8:45 am]

BILLING CODE 3410–DM–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–469–820]

Common Alloy Aluminum Sheet From Spain: Final Results of Antidumping Duty Administrative Review; 2020–2022

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) determines that common alloy aluminum sheet (aluminum sheet) from Spain was sold in the United States at less than normal value during the period of review (POR), October 15, 2020, through March 31, 2022.

DATES: Applicable November 7, 2023.

FOR FURTHER INFORMATION CONTACT: Colin Thrasher, AD/CVD Operations, Office V, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–3004.

SUPPLEMENTARY INFORMATION:

Background

On May 5, 2023, Commerce published the *Preliminary Results* covering one producer/exporter, Compania Valenciana de Aluminio Baux, S.L.U./Bancolor Baux, S.L.U. (collectively, Baux).[1] We invited interested parties to comment on the *Preliminary Results.* On August 10, 2023, Commerce extended the time period for issuing the final results of this review until November 1, 2023.[2] For a complete description of the events that occurred since the *Preliminary Results, see* the Issues and Decision Memorandum.[3]

[1] *See Common Alloy Aluminum Sheet from Spain: Preliminary Results of Antidumping Duty Administrative Review; 2020–2022,* 88 FR 29090 (May 5, 2023) (*Preliminary Results*) and accompanying Preliminary Decision Memorandum. Commerce previously determined that Baux is a single entity comprised of the following two producers/exporters of subject merchandise: Compania Valenciana de Aluminio Baux, S.L.U. and Bancolor Baux S.L.U. (Bancolor). *See Common Alloy Aluminum Sheet from Spain: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Extension of Provisional Measures,* 85 FR 65367 (October 15, 2020), and accompanying Preliminary Decision Memorandum, unchanged in *Common Alloy Aluminum Sheet from Spain: Final Affirmative Determination of Sales at Less Than Fair Value,* 86 FR 13298 (March 8, 2021) (*Final Determination*), and accompanying Issues and Decision Memorandum.

[2] *See* Memorandum, ''Extension of Deadline for Final Results of Antidumping Duty Administrative Review, 2020–2022,'' dated August 10, 2023.

[3] *See* Memorandum, ''Issues and Decision Memorandum for the Final Results of the

Commerce conducted this administrative review in accordance with section 751 of the Tariff Act of 1930, as amended (the Act).

Scope of the Order [4]

The products covered by this *Order* are common alloy aluminum sheet from Spain. For a full description of the scope, *see* the Issues and Decision Memorandum.

Analysis of Comments Received

All issues raised in the case and rebuttal briefs are addressed in the Issues and Decision Memorandum. A list of the issues that parties raised and to which we responded in the Issues and Decision Memorandum is attached to this notice as an appendix. The Issues and Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Issues and Decision Memorandum can be accessed directly at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

Changes Since the Preliminary Results

Based on a review of the record and comments received from interested parties, we have recalculated the weighted-average dumping margin for Baux. We have used updated sales databases and made certain additional changes as a result of verification in determining Baux's dumping margin. For a more detailed discussion of these changes, *see* the Issues and Decision Memorandum.

Final Results of Review

Commerce determines that the following estimated weighted-average dumping margin exists for the period October 15, 2020, through March 31, 2022:

Exporter/producer	Weighted-average dumping margin (percent)
Compania Valenciana de Aluminio Baux, S.L.U./ Bancolor Baux, S.L.U	10.38

Disclosure

Commerce intends to disclose to interested parties the calculations performed in connection with the final results within five days of any public announcement or, if there is no public announcement, within five days of the date of publication of the notice of final determination in the **Federal Register**, in accordance with 19 CFR 351.224(b).

Assessment Rate

Pursuant to section 751(a)(2)(A) of the Act, and 19 CFR 351.212(b)(1), Commerce shall determine, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries covered by this review.

Because Baux's weighted-average dumping margin is not zero or *de minimis* (*i.e.,* less than 0.5 percent), Commerce has calculated importer-specific antidumping duty assessment rates. We calculated importer-specific *ad valorem* assessment rates based on the ratio of the total amount of dumping calculated for the examined sales to the total entered value of the sales. Where an importer-specific assessment rate is zero or *de minimis,* we will instruct CBP to liquidate the appropriate entries without regard to antidumping duties.

For entries of subject merchandise during the POR produced by Baux for which it did not know its merchandise was destined for the United States, we will instruct CBP to liquidate unreviewed entries at the all-others rate established in the original less-than-fair value (LTFV) investigation of 3.80 percent if there is no rate for the intermediate company(ies) involved in the transaction.[5]

We intend to instruct CBP to take into account the ''provisional measures deposit cap,'' in accordance with 19 CFR 351.212(d).

Commerce intends to issue assessment instructions to CBP no earlier than 35 days after the date of publication of the final results of this review in the **Federal Register**. If a timely summons is filed at the U.S. Court of International Trade, the assessment instructions will direct CBP not to liquidate relevant entries until the time for parties to file a request for a statutory injunction has expired (*i.e.,* within 90 days of publication).

Cash Deposit Requirements

The following cash deposit requirements will be effective for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of this administrative review, as provided by section 751(a)(2)(C) of the Act: (1) the cash deposit rate for Baux will be the rate established in the final results of this administrative review; (2) for merchandise exported by producers or exporters not covered in this administrative review but covered in a prior segment of the proceeding, the cash deposit rate will continue to be the company-specific rate published for the most recently completed segment of this proceeding; (3) if the exporter is not a firm covered in this review, a prior review, or the LTFV investigation, but the producer is, the cash deposit rate will be the rate established for the most recently completed segment of this proceeding for the producer of the subject merchandise; and (4) the cash deposit rate for all other manufacturers or exporters will continue to be 3.80 percent, the all-others rate established in the LTFV investigation.[6] These cash deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this POR. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping duties has occurred and the subsequent assessment of double antidumping duties.

Administrative Protective Order

This notice also serves as a final reminder to parties subject to administrative protective order (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3), which continues to govern business proprietary information in this segment of the proceeding. Timely written

Administrative Review of the Antidumping Duty Order: Common Alloy Aluminum Sheet from Spain; 2020–2022,'' dated concurrently with and hereby adopted by this notice (Issues and Decision Memorandum).

[4] *See Common Alloy Aluminum Sheet from Bahrain, Brazil, Croatia, Egypt, Germany, India, Indonesia, Italy, Oman, Romania, Serbia, Slovenia, South Africa, Spain, Taiwan and the Republic of Turkey: Antidumping Duty Orders,* 86 FR 22139 (April 27, 2021) (*Order*).

[5] For a full discussion of this practice, *see Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954 (May 6, 2003); *see also Final Determination.*

[6] *See Final Determination.*

notification of the return/destruction of APO materials, or conversion to judicial protective order, is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

Notification to Interested Parties

We are issuing and publishing this notice in accordance with sections 751(a)(1) and 777(i)(1) of the Act, and 19 CFR 351.221(b)(5) and 19 CFR 351.213(h)(1).

Dated: November 1, 2023.

Lisa W. Wang,

Assistant Secretary for Enforcement and Compliance.

Appendix

List of Topics Discussed in the Issues and Decision Memorandum

I. Summary
II. Background
III. Scope of the *Order*
IV. Changes Since the *Preliminary Results*
V. Discussion of the Issues
  Comment 1: Whether Commerce Should Grant Baux a Level of Trade Adjustment
  Comment 2: Whether Commerce Should Use Baux's Updated Databases
VI. Recommendation

[FR Doc. 2023–24598 Filed 11–6–23; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–533–895]

Common Alloy Aluminum Sheet From India: Final Results of Antidumping Duty Administrative Review; 2020–2022

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) determines that common alloy aluminum sheet (aluminum sheet) from India was not sold in the United States at less than normal value during the period of review (POR), October 15, 2020, through March 31, 2022.

DATES: Applicable November 7, 2023.

FOR FURTHER INFORMATION CONTACT: Rachel Jennings, AD/CVD Operations, Office V, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington DC 20230; telephone: (202) 482–1110.

SUPPLEMENTARY INFORMATION:

Background

On May 5, 2023, Commerce published the *Preliminary Results* of this administrative review and invited parties to comment on the *Preliminary Results.*[1] This administrative review covers two producers/exporters of aluminum sheet from India.[2] Commerce selected one respondent for individual examination, Hindalco Industries Limited (Hindalco).[3] On August 16, 2023, Commerce extended the time period for issuing the final results of this review until November 1, 2023.[4] For a complete description of the events that occurred since the *Preliminary Results, see* the Issues and Decision Memorandum.[5]

Commerce conducted this administrative review in accordance with section 751 of the Tariff Act of 1930, as amended (the Act).

Scope of the Order[6]

The products covered by this *Order* are common alloy aluminum sheet from India. For a full description of the scope, *see* the Issues and Decision Memorandum.

Analysis of Comments Received

All issues raised in the case and rebuttal briefs are addressed in the Issues and Decision Memorandum. A list of the issues that parties raised and to which we responded in the Issues and Decision Memorandum is attached to this notice as an appendix to this notice. The Issues and Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Issues and Decision Memorandum can be accessed directly at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

Changes Since the Preliminary Results

Based on a review of the record and comments received from interested parties, we made certain changes to the margin calculation for these final results. However, those adjustments did not result in any changes to the estimated weighted-average dumping margin for Hindalco. For a more detailed discussion of these changes, *see* the Issues and Decision Memorandum.

Rate for Non-Examined Companies

The Act and Commerce's regulations do not address the establishment of a rate to be applied to companies not selected for examination when Commerce limits its examination in an administrative review pursuant to section 777A(c)(2) of the Act. Generally, Commerce looks to section 735(c)(5) of the Act, which provides instructions for calculating the all-others rate in a market economy investigation, for guidance when calculating the rate for companies which were not selected for individual examination in an administrative review. Under section 735(c)(5)(A) of the Act, the all-others rate is normally ''an amount equal to the weighted average of the estimated weighted-average dumping margins established for exporters and producers individually investigated, excluding any zero and *de minimis* margins, and any margins determined entirely {on the basis of facts available}.''

Where the dumping margin for individually examined respondents are all zero, *de minimis,* or based entirely on facts available, section 735(c)(5)(B) of the Act provides that Commerce may use ''any reasonable method to establish the estimated all-others rate for exporters and producers not individually investigated, including averaging the estimated weighted average dumping margins determined for the exporters and producers individually investigated.''

In this review, we calculated a weighted-average dumping margin for Hindalco that is zero and we did not calculate any margins which are not zero, *de minimis,* determined entirely on the basis of facts available. Therefore, consistent with section 735(c)(5)(B) of the Act, we are applying to Virgo Aluminum Limited, the company not selected for individual examination in this review, a margin of zero percent.

Final Results of Review

Commerce determines that the following estimated weighted-average dumping margins exist for the period October 15, 2020, through March 31, 2022:

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[1] *See Common Alloy Aluminum Sheet from India: Preliminary Results of Antidumping Duty Administrative Review; 2020–2022,* 88 FR 29082 (May 5, 2023) (*Preliminary Results*), and accompanying Preliminary Decision Memorandum.

[2] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 87 FR 35165 (June 9, 2022).

[3] *See* Memorandum, ''Respondent Selection,'' dated July 1, 2022.

[4] *See* Memorandum, ''Extension of Deadline for Final Results of Antidumping Duty Administrative Review, 2020–2022,'' dated August 16, 2023.

[5] *See* Memorandum, ''Issues and Decision Memorandum for the Final Results of the Administrative Review of the Antidumping Duty Order: Common Alloy Aluminum Sheet from India; 2020–2022,'' dated concurrently with and hereby adopted by this notice (Issues and Decision Memorandum).

[6] *See Common Alloy Aluminum Sheet from Bahrain, Brazil, Croatia, Egypt, Germany, India, Indonesia, Italy, Oman, Romania, Serbia, Slovenia, South Africa, Spain, Taiwan and the Republic of Turkey: Antidumping Duty Orders,* 86 FR 22139 (April 27, 2021) (*Order*).

Exporter/producer	Weighted-average dumping margin (percent)
Hindalco Industries Limited ..	0.00
Virgo Aluminum Limited	0.00

Disclosure

Commerce intends to disclose to interested parties the calculations performed in connection with the final results within five days of any public announcement or, if there is no public announcement, within five days of the date of publication of the notice of final determination in the **Federal Register**, in accordance with 19 CFR 351.224(b).

Assessment Rates

Pursuant to section 751(a)(2)(A) of the Act, and 19 CFR 351.212(b)(1), Commerce shall determine, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries covered by this review. Where the respondent's weighted-average dumping margin is either zero or *de minimis* (*i.e.,* less than 0.5 percent), we will instruct CBP to liquidate the appropriate entries without regard to antidumping duties. Accordingly, because Hindalco's weighted-average dumping margin is zero percent, we will instruct CBP to liquidate the appropriate entries without regard to antidumping duties. For entries of subject merchandise during the POR produced by Hindalco for which it did not know its merchandise was destined for the United States, we will instruct CBP to liquidate unreviewed entries at the all-others rate if there is no rate for the intermediate company(ies) involved in the transaction.[7] For the company which was not selected for individual review, Virgo Aluminum Limited, we will assign an assessment rate based on the methodology described in the ''Rates for Non-Examined Companies'' section, above.

We intend to instruct CBP to take into account the ''provisional measures deposit cap,'' in accordance with 19 CFR 351.212(d). Commerce intends to issue assessment instructions to CBP no earlier than 35 days after the date of publication of the final results of this review in the **Federal Register**. If a timely summons is filed at the U.S. Court of International Trade, the assessment instructions will direct CBP not to liquidate relevant entries until the time for parties to file a request for a statutory injunction has expired (*i.e.,* within 90 days of publication).

Cash Deposit Requirements

The following cash deposit requirements will be effective for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of this administrative review, as provided by section 751(a)(2)(C) of the Act: (1) the cash deposit rate for Hindalco and Virgo Aluminum Limited will be the rates established in the final results of this administrative review; (2) for merchandise exported by producers or exporters not covered in this administrative review but covered in a prior segment of the proceeding, the cash deposit rate will continue to be the company-specific rate published for the most recently completed segment of this proceeding; (3) if the exporter is not a firm covered in this review, a prior review, or the original less-than-fair-value (LTFV) investigation, but the producer is, the cash deposit rate will be the rate established for the most recently completed segment of this proceeding for the producer of the subject merchandise; and (4) the cash deposit rate for all other manufacturers or exporters will continue to be 44.64 percent, the all-others rate established in the LTFV investigation.[8] These cash deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping and/or countervailing duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping and/or countervailing duties occurred and the subsequent assessment of double antidumping duties, and/or an increase in the amount of antidumping duties by the amount of the countervailing duties.

Administrative Protective Order

This notice also serves as a final reminder to parties subject to administrative protective order (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3), which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return/destruction of APO materials, or conversion to judicial protective order, is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

Notification to Interested Parties

We are issuing and publishing this notice in accordance with sections 751(a)(1) and 777(i)(1) of the Act, and 19 CFR 351.221(b)(5) and 19 CFR 351.213(h)(1).

Dated: November 1, 2023.

Lisa W. Wang,

Assistant Secretary for Enforcement and Compliance.

Appendix

List of Topics Discussed in the Issues and Decision Memorandum

I. Summary
II. Background
III. Scope of the *Order*
IV. Changes Since the *Preliminary Results*
V. Discussion of the Issues
- Comment 1: Whether Hindalco Properly Reported U.S. Gross Unit Price
- Comment 2: Whether Hindalco Withheld Information About its Home Market Resales
- Comment 3: Whether Hindalco Withheld Information About its Deemed Export Sales
- Comment 4: Whether the Application of Total Adverse Facts Available to Hindalco is Warranted
- Comment 5: Whether Hindalco Properly Reported Home Market Freight Expenses
- Comment 6: Whether Hindalco's Early Payment Discounts and/or Quantity Discounts Should be Used in Calculating Normal Value
- Comment 7: Whether Commerce Should Revise its Major Input Analysis
- Comment 8: Whether Commerce Should Apply the Transactions Disregarded Rule to Other Affiliated Party Purchases
- Comment 9: Whether Commerce Should Grant Hindalco's Reported Cost of Production Offsets
- Comment 10: Whether Hindalco Misclassified Certain Products in its Cost Database
- Comment 11: Whether Hindalco's Underreported its General and Administrative Expenses

VI. Recommendation

[FR Doc. 2023–24597 Filed 11–6–23; 8:45 am]

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[7] For a full discussion of this practice, *see Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954 (May 6, 2003).

[8] *See Common Alloy Aluminum Sheet from India: Final Affirmative Determination of Sales at Less Than Fair Value,* 86 FR 13282 (March 8, 2021).

DEPARTMENT OF COMMERCE

International Trade Administration

[C–714–001]

Phosphate Fertilizers From the Kingdom of Morocco: Final Results of Countervailing Duty Administrative Review; 2020–2021

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) determines that OCP S.A. (OCP), a producer/exporter of phosphate fertilizers from the Kingdom of Morocco (Morocco), received countervailable subsidies during the period of review (POR), November 30, 2020, through December 31, 2021.

DATES: Applicable November 7, 2023.

FOR FURTHER INFORMATION CONTACT: Jaron Moore or Robert Palmer, AD/CVD Operations, Office VIII, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–3640 or (202) 482–9068, respectively.

SUPPLEMENTARY INFORMATION:

Background

Commerce published the preliminary results of this administrative review on May 5, 2023.[1] On August 23, 2023, Commerce extended the deadline for the final results of this review to no later than November 1, 2023.[2] For a description of the events that occurred since the *Preliminary Results, see* the Issues and Decision Memorandum.[3] We conducted this review in accordance with section 751 of the Tariff Act of 1930, as amended (the Act).

Scope of the Order

The products covered by this order are phosphate fertilizers. For a complete description of the scope of this order, *see* the Issues and Decision Memorandum.

Analysis of Comments Received

All issues raised in interested parties' case briefs are addressed in the Issues and Decision Memorandum accompanying this notice. A list of the issues raised by parties, and to which Commerce responded in the Issues and Decision Memorandum, is provided in the appendix to this notice. The Issues and Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Issues and Decision Memorandum can be accessed directly at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

Verification

As provided in section 782(i) of the Act, in September 2023, Commerce conducted an on-site verification of the subsidy information reported by OCP and the Government of Morocco. We used standard on-site verification procedures, including an examination of relevant accounting records and original source documents provided by the respondent.

Changes Since the Preliminary Results

Based on a review of the record and comments received from interested parties regarding the *Preliminary Results,* and for the reasons explained in the Issues and Decision Memorandum, we made certain revisions to the subsidy calculations for OCP. These changes are explained in the Issues and Decision Memorandum.

Final Results of Administrative Review

In accordance with 19 CFR 351.221(b)(4)(i), we calculated an individual net countervailable subsidy rate for OCP. Commerce determines that, during the POR, the net countervailable subsidy rate for the company under review is as follows:

Company	Subsidy rate (percent *ad valorem*)
OCP S.A.[4]	2.12

Disclosure

Commerce intends to disclose the calculations performed for these final results of review within five days of the date of publication of this notice in the **Federal Register**, in accordance with 19 CFR 351.224(b).

Assessment Rate

Pursuant to section 751(a)(2)(C) of the Act and 19 CFR 351.212(b)(2), Commerce has determined, and U.S. Customs and Border Protection (CBP) shall assess, countervailing duties on all appropriate entries of subject merchandise in accordance with the final results of this review, for the above-listed company at the applicable *ad valorem* assessment rate. We intend to issue assessment instructions to CBP no earlier than 35 days after the date of publication of the final results of this review in the **Federal Register**. If a timely summons is filed with the U.S. Court of International Trade, the assessment instructions will direct CBP not to liquidate relevant entries until the time for parties to file a request for a statutory injunction has expired (*i.e.,* within 90 days of publication).

Cash Deposit Rates

In accordance with section 751(a)(1) of the Act, Commerce intends to instruct CBP to collect cash deposits of estimated countervailing duties in the amount shown for OCP on shipments of the subject merchandise entered, or withdrawn from warehouse for consumption on or after the date of publication of the final results of this administrative review. The cash deposit requirement, effective upon the publication of the final results of this review, shall remain in effect until further notice.

Administrative Protective Order

This notice also serves as a final reminder to parties subject to an administrative protective order (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a sanctionable violation.

Notification to Interested Parties

These final results are issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act, and 19 CFR 351.221(b)(5).

[1] *See Phosphate Fertilizers from the Kingdom of Morocco: Preliminary Results of Countervailing Duty Administrative Review; 2020–2021,* 88 FR 29089 (May 5, 2023) (*Preliminary Results*), and accompanying Preliminary Decision Memorandum.

[2] *See* Memorandum, ''Extension of Deadline for Final Results of Countervailing Duty Administrative Review,'' dated August 23, 2023.

[3] *See* Memorandum, ''Issues and Decision Memorandum for the Final Results of the Countervailing Duty Administrative Review of Phosphate Fertilizers from the Kingdom of Morocco; 2020–2021,'' dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

[4] Commerce has found the following companies to be cross-owned with OCP S.A.: Jorf Fertilizers Company I; Jorf Fertilizers Company II; Jorf Fertilizers Company III; Jorf Fertilizers Company IV; and Jorf Fertilizers Company V.

Dated: November 1, 2023.

Lisa W. Wang,

Assistant Secretary for Enforcement and Compliance.

Appendix

List of Topics Discussed in the Issues and Decision Memorandum

I. Summary
II. Background
III. Scope of the *Order*
IV. Use of Facts Otherwise Available and Adverse Inferences
V. Subsidies Valuation
VI. Analysis of Programs
VII. Discussion of the Issues
General
Comment 1: Whether to Accept OCP's Payroll Tax Refund as a Minor Correction
Comment 2: Whether Commerce's ''Other Assistance'' Question Is Contrary to Law
Comment 3: Whether Commerce Can Seek Information About the Provision of Rail Service for Less Than Adequate Remuneration (LTAR) and Direct Loans
Comment 4: Whether Maroc Phosphore Is a Reporting Entity
Provision of Mining Rights for LTAR
Comment 5: Whether Commerce Should Revise the Phosphate Rock Benchmark
Comment 6: Whether to Include or Exclude Headquarters (HQ), Support, and Debt Costs in the Costs of Producing Phosphate Rock
Comment 7: The Cost of Production (COP) Profit Rate
Comment 8: Whether Commerce Should Apply Adverse Facts Available (AFA) and Disregard OCP's Reported Costs of Production for Phosphate Rock
Comment 9: Whether Commerce Should Adjust the Phosphate Rock Benchmark for Freight
Reductions in Tax Fines and Penalties
Comment 10: Whether the Reductions in Tax Fines and Penalties Is Specific
Provision of Port Services for LTAR
Comment 11: Whether Agence Nationale des Ports' (ANP) Provision of Port Services and Infrastructure to OCP Constitutes a Financial Contribution
Comment 12: Whether ANP's Provision of Port Services Is *De Facto* Specific
Comment 13: Whether ANP's Provision of Port Services Confers a Benefit Customs Duty Exemption for Capital Goods, Machinery, and Equipment
Comment 14: Whether to Correct a Ministerial Error in the Benefit Calculation for the Customs Duty Exemptions for Capital Goods, Machinery, and Equipment Program
VIII. Recommendation

[FR Doc. 2023–24581 Filed 11–6–23; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[A–201–830]

Carbon and Certain Alloy Steel Wire Rod From Mexico: Preliminary Results of Antidumping Duty Administrative Review; 2021–2022

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) preliminarily determines that sales of carbon and certain alloy steel wire rod (wire rod) from Mexico were made at less than normal value during the period of review (POR), October 1, 2021, through September 30, 2022. We invite interested parties to comment on these preliminary results.

DATES: Applicable November 7, 2023.

FOR FURTHER INFORMATION CONTACT: Laurel LaCivita or Matthew Palmer, AD/CVD Operations, Office III, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–4243 or (202) 482–1678, respectively.

SUPPLEMENTARY INFORMATION:

Background

On October 29, 2002, Commerce published the antidumping duty order on wire rod from Mexico in the **Federal Register**.[1] On October 3, 2022, we published in the **Federal Register** a notice of opportunity to request an administrative review of the *Order*.[2] On December 5, 2022, pursuant to section 751(a)(1) of the Act, Commerce initiated an administrative review of the *Order*[3] on wire rod from Mexico covering the following five exporters/producers: ArcelorMittal Mexico S.A. de C.V. (AMM); Deacero S.A.P.I. de C.V. (Deacero); Grupo Villacero S.A. de C.V. (Villacero); Talleres y Aceros S.A. de C.V. (Talleres y Aceros); and Ternium Mexico S.A. de C.V. (Ternium). On June 14, 2023, Commerce extended the deadline for the preliminary results to October 31, 2023.[4]

For a complete description of the events that followed the initiation of this review, *see* the Preliminary Decision Memorandum.[5] A list of topics discussed in the Preliminary Decision Memorandum is attached as an appendix to this notice. The Preliminary Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

Scope of the Order

The merchandise subject to the *Order* is wire rod, in coils, of approximately round cross section, 5.00 mm or more, but less than 19.00 mm, in solid cross-sectional diameter. The subject merchandise is classifiable in the Harmonized Tariff Schedule of the United States (HTSUS) primarily under the subheadings: 7213.91.3000, 7213.91.3010, 7213.91.3011, 7213.91.3015, 7213.91.3020, 7213.91.3090, 7213.91.3091, 7213.91.3092, 7213.91.3093, 7213.91.4500, 7213.91.4510, 7213.91.4590, 7213.91.6000, 7213.91.6010, 7213.91.6090, 7213.99.0030, 7213.99.0031, 7213.99.0038, 7213.99.0090, 7227.20.0000, 7227.20.0010, 7227.20.0020, 7227.20.0030, 7227.20.0080, 7227.20.0090, 7227.20.0095, 7227.90.6010, 7227.90.6020, 7227.90.6030, 7227.90.6035, 7227.90.6050, 7227.90.6051, 7227.90.6053, 7227.90.6058, 7227.90.6059, 7227.90.6080, and 7227.90.6085. The HTSUS subheadings are provided for convenience and customs purposes only; the written product description remains dispositive.

A full description of the scope of the *Order* is contained in the Preliminary Decision Memorandum.

[1] *See Notice of Antidumping Duty Orders: Carbon and Certain Alloy Steel Wire Rod from Brazil, Indonesia, Mexico, Moldova, Trinidad and Tobago, and Ukraine,* 67 FR 65945 (October 29, 2002) (*Order*).

[2] *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review and Join Annual Inquiry Service List,* 87 FR 59775 (October 3, 2022).

[3] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 87 FR 74404, 74406 (December 5, 2022).

[4] *See* Memorandum, ''Extension of Deadline for Preliminary Results of Antidumping Duty Administrative Review,'' dated June 14, 2023.

[5] *See* Memorandum, ''Decision Memorandum for the Preliminary Results of the Administrative Review of the Antidumping Duty Order on Carbon and Certain Alloy Steel Wire Rod from Mexico; 2021–2022,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

Methodology

Commerce is conducting this review in accordance with section 751(a)(1)(B) of the Tariff Act of 1930, as amended (the Act). Export price and constructed export price were calculated in accordance with section 772 of the Act. Normal value was calculated in accordance with section 773 of the Act. For a full description of the methodology underlying our conclusions, *see* the Preliminary Decision Memorandum.

Rate for Non-Selected Companies

For the rate for companies not selected for individual examination in an administrative review, generally, Commerce looks to section 735(c)(5) of the Act, which provides instructions for calculating the all-others rate in a less-than-fair-value (LTFV) investigation. Under section 735(c)(5)(A) of the Act, the all-others rate is normally ''an amount equal to the weighted average of the estimated weighted-average dumping margins established for exporters and producers individually investigated, excluding any zero or *de minimis* margins, and any margins determined entirely {on the basis of facts available}.'' Accordingly, Commerce's practice in administrative reviews has been to average the weighted-average dumping margins for the companies selected for individual examination in the administrative review, excluding rates that are zero, *de minimis,* or based entirely on facts available.[6] For these preliminary results, we calculated a zero percent weighted-average dumping margin for AMM and a weighted-average dumping margin for Deacero that is above *de minimis* and not based entirely on facts available. Therefore, consistent with our practice, we have assigned the companies not selected for individual examination (*i.e.,* Villacero, Talleres y Aceros, and Ternium) the weighted-average dumping margin calculated for Deacero.

Preliminary Results of Review

As a result of this review, we preliminarily determine the following weighted-average dumping margins exist for the POR:

Producer/exporter	Weighted-average dumping margin (percent)
ArcelorMittal Mexico S.A. de C.V	0.00
Deacero S.A.P.I. de C.V./ Deacero USA, Inc	0.70
Grupo Villacero S.A. de C.V	0.70
Talleres y Aceros S.A. de C.V	0.70
Ternium Mexico S.A. de C.V	0.70

Disclosure and Public Comment

Commerce will disclose to parties to this proceeding the calculations performed in reaching the preliminary results within five days of the date of publication of these preliminary results.[7]

Case briefs may be submitted to the Assistant Secretary for Enforcement and Compliance. Interested parties will be notified of the timeline for the submission of such case briefs and written comments at a later date. Rebuttal briefs, limited to issues raised in the case briefs, may be filed no later than five days after the date for filing case briefs.[8] Parties who submit case briefs or rebuttal briefs in this proceeding are requested to submit with the argument: (1) a statement of the issue, (2) a summary of the argument, and (3) a table of authorities.[9] All briefs must be filed electronically using ACCESS. An electronically filed document must be received successfully in its entirety by Commerce's electronic records system, ACCESS. Note that Commerce has amended certain of its requirements pertaining to the service of documents in 19 CFR 351.303(f).[10]

Interested parties who wish to request a hearing must submit a written request to the Assistant Secretary for Enforcement and Compliance, U.S. Department of Commerce, using Enforcement and Compliance's ACCESS system within 30 days of publication of this notice.[11] Requests should contain the party's name, address, and telephone number, the number of participants, and a list of the issues to be discussed. If a request for a hearing is made, we will inform parties of the scheduled date for the hearing at a time and location to be determined.[12] Parties should confirm by telephone the date, time, and location of the hearing.

Unless the deadline is extended pursuant to section 751(a)(3)(A) of the Act and 19 CFR 351.213(h)(2), Commerce will issue the final results of this administrative review, including the results of our analysis of the issues raised by the parties in their case briefs, not later than 120 days after the date of publication of this notice, pursuant to section 751(a)(3)(A) of the Act.

Verification

On March 15, 2023, Commercial Metals Company (CMC) and Nucor Corporation (Nucor), domestic interested parties, requested that Commerce conduct verification of the information submitted in AMM and Deacero's responses.[13] Accordingly, as provided in section 782(i)(3) of the Act, Commerce intends to verify Deacero's information that will be relied upon in determining the final results of review.

Assessment Rates

Upon issuance of the final results, Commerce shall determine, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries covered by this review. For any individually examined respondents whose weighted-average dumping margin is above *de minimis* (*i.e.,* 0.50 percent), we will calculate importer-specific *ad valorem* antidumping duty assessment rates based on the ratio of the total amount of dumping calculated for the importer's examined sales to the total entered value of those same sales in accordance with 19 CFR 351.212(b)(1).[14] If the respondent has not reported entered values, we will calculate a per-unit assessment rate for each importer by dividing the total amount of dumping calculated for the examined sales made to that importer by the total quantity associated with those sales. We will instruct CBP to assess antidumping duties on all appropriate entries covered by this review when the importer-specific assessment rate calculated in the final results of this review is above *de minimis* (*i.e.,* 0.50 percent). Where either the respondent's weighted-average dumping margin is zero or *de minimis,* or an importer-specific assessment rate is zero or *de minimis,* we will instruct CBP to liquidate the

[6] *See, e.g., Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews and Rescission of Reviews in Part,* 73 FR 52823, 52824 (September 11, 2008), and accompanying Issues and Decision Memorandum at Comment 16.

[7] *See* 19 CFR 351.224(b).

[8] *See* 19 CFR 351.309(d).

[9] *See* 19 CFR 351.309(c)(2) and (d)(2).

[10] *See Administrative Protective Order, Service, and Other Procedures in Antidumping and Countervailing Duty Proceedings; Final Rule,* 88 FR 67069 (September 29, 2023).

[11] *See* 19 CFR 351.310(c).

[12] *See* 19 CFR 351.310.

[13] *See* CMC/Nucor's Letter, ''Request for Verification,'' dated March 15, 2023.

[14] In these preliminary results, Commerce applied the assessment rate calculation method adopted in *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Proceedings; Final Modification,* 77 FR 8101 (February 14, 2012).

appropriate entries without regard to antidumping duties.

In accordance with Commerce's ''automatic assessment'' practice, for entries of subject merchandise during the POR produced by each respondent which did not know that its merchandise was destined for the United States, we will instruct CBP to liquidate entries not reviewed at the all-others rate of 20.11 percent [15] if there is no rate for the intermediate company(ies) involved in the transaction.

For the companies which were not selected for individual review (*i.e.,* Villacero, Talleres y Aceros, and Ternium), we will instruct CBP to assess antidumping duties at an *ad valorem* rate equal to the weighted-average dumping margin determined for the non-examined companies in the final results of this review. The final results of this review shall be the basis for the assessment of antidumping duties on entries of merchandise covered by the final results of this review and for future deposits of estimated duties, where applicable.[16]

Commerce intends to issue assessment instructions to CBP no earlier than 41 days after the date of publication of the final results of this review in the **Federal Register**, in accordance with 19 CFR 356.8(a).

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of the notice of final results of administrative review for all shipments of wire rod from Mexico entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results, as provided by section 751(a)(2) of the Act: (1) the cash deposit rate for the firms listed above will be equal to the dumping margins established in the final results of this review, except if the ultimate rates are *de minimis* within the meaning of 19 CFR 351.106(c)(1), in which case the cash deposit rates will be zero; (2) for merchandise exported by producers or exporters not covered in this administrative review but covered in a prior segment of the proceeding, the cash deposit rate will continue to be the company-specific rate published for the most recently completed segment of this proceeding in which the producer or exporter participated; (3) if the exporter is not a firm covered in this review, a prior review, or the original less-than-fair-value investigation but the producer is, then the cash deposit rate will be the rate established for the most recently completed segment of the proceeding for the producer of the merchandise; and (4) the cash deposit rate for all other producers or exporters will continue to be 20.11 percent, the all-others rate established in the antidumping duty investigation.[17] These cash deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice also serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

Notification to Interested Parties

We are issuing and publishing these results in accordance with sections 751(a)(1) and 777(i)(1) of the Act, 19 CFR 351.213(h)(2), and 19 CFR 351.221(b)(4).

Dated: October 31, 2023.

Lisa W. Wang,

Assistant Secretary for Enforcement and Compliance.

Appendix

List of Topics Discussed in the Preliminary Decision Memorandum

I. Summary
II. Background
III. Scope of the *Order*
IV. Whether Application of Facts Available and Use of Adverse Inference Is Appropriate
V. Rate for Respondents Not Selected for Individual Examination
VI. Discussion of Methodology
VII. Currency Conversion
VIII. Recommendation

[FR Doc. 2023–24583 Filed 11–6–23; 8:45 am]

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[15] *See Order,* 67 FR at 65947.

[16] *See* section 751(a)(2)(C) of the Act.

[17] *See Order,* 67 FR at 65947.

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–106]

Wooden Cabinet and Vanities and Components Thereof From the People's Republic of China: Final Results and Final Determination of No Shipments of the Antidumping Duty Administrative Review; 2021–2022

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) determines that Fujian Dushi Wooden Industry Co., Ltd. (Dushi) and The Ancientree Cabinet Co., Ltd. (Ancientree) made sales of wooden cabinets and vanities and components thereof (cabinets) at prices below normal value and eight companies had no shipments of subject merchandise during the period of review (POR) April 1, 2021, through March 31, 2022.

DATES: Applicable November 7, 2023.

FOR FURTHER INFORMATION CONTACT: Jacob Keller, AD/CVD Operations, Office I, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–4849.

SUPPLEMENTARY INFORMATION:

Background

On May 5, 2023, Commerce published in the **Federal Register** the *Preliminary Results* of the antidumping duty administrative review and invited interested parties to comment.[1] For a complete description of the events that occurred since Commerce published the *Preliminary Results, see* the Issues and Decision Memorandum.[2] On August 14, 2023, we extended the deadline for these final results to November 1, 2023.[3] Commerce conducted this review in accordance with section 751(a) of the Tariff Act of 1930, as amended (the Act).

[1] *See Wooden Cabinets and Vanities and Components Thereof from the People's Republic of China: Preliminary Results, Preliminary Determination of No Shipments, and Partial Recission of the Antidumping Duty Administrative Review; 2021–2022,* 88 FR 29086 (May 5, 2023) (*Preliminary Results*), and accompanying Preliminary Decision Memorandum.

[2] *See* Memorandum, ''Issues and Decision Memorandum for the Final Results of the Antidumping Duty Administrative Review of Wooden Cabinets and Vanities and Components Thereof from the People's Republic of China; 2021–2022,'' dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

[3] *See* Memorandum, ''Extension of Deadline for Final Results of Antidumping Duty Administrative Review,'' dated August 14, 2023.

Scope of the Order [4]

The products covered by this *Order* are wooden cabinets and vanities that are for permanent installation (including floor mounted, wall mounted, ceiling hung or by attachment of plumbing), and wooden components thereof. For full description of the scope of the *Order, see* the Issues and Decision Memorandum.

Analysis of Comments Received

All issues raised in the parties' briefs are addressed in the Issues and Decision Memorandum. A list of the issues addressed is included as Appendix I to this notice. The Issues and Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Issues and Decision Memorandum can be accessed directly at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

Changes from the Preliminary Results

Based on our analysis of the comments received, Commerce made certain revisions to the calculations of the preliminary weighted-average dumping margins assigned to Ancientree and Dushi, and the non-examined separate rate respondents. Commerce is also assigning separate rates to Suzhou Siemo Wood Import & Export Co., Ltd. (Siemo) and Jiangsu Weisen Houseware Co., Ltd. (Jiangsu Weisen). Regarding Siemo, we are accepting its separate rate certification because it has a suspended entry of subject merchandise that entered the United States during the POR. Regarding Jiangsu Weisen, we find that the entries associated with Weisen Housewares Co., Ltd. (Weisen) are entries of subject merchandise applicable to Jiangsu Weisen. Further, based on information on the record, we are now considering Weisen to be the same entity as Jiangsu Weisen. As a result, we are assigning Jiangsu Weisen a separate rate and no longer consider Weisen to be part of the China-wide entity. The Issues and Decision Memorandum contains a more detailed discussion of these revisions.

Final Determination of No Shipments

In the *Preliminary Results,* Commerce determined that certain companies did not have shipments of subject merchandise during the POR.[5] As we received no information to contradict our preliminary determination with respect to those companies, we continue to find that they made no shipments of subject merchandise to the United States during the POR. Additionally, we find that Siemo had shipments of subject merchandise during the POR and, therefore, are granting Siemo a separate rate in this administrative review.[6] Accordingly, we will issue appropriate instructions that are consistent with our ''automatic assessment'' clarification for the no shipment companies listed in Appendix II.[7]

Rates for Non-Examined Separate Rate Respondents

Commerce determines that 25 companies, not individually examined, are eligible for separate rates in this administrative review.[8] The Act and Commerce's regulations do not address the establishment of a separate rate to be applied to companies not selected for individual examination when Commerce limits its examination in an administrative review pursuant to section 777A(c)(2) of the Act. Generally, Commerce looks to section 735(c)(5) of the Act, which provides instructions for calculating the all-others rate in an investigation, for guidance when calculating the rate for separate rate respondents which Commerce did not examine individually in an administrative review. Section 735(c)(5)(A) of the Act states that the all-others rate should be calculated by averaging the weighted-average dumping margins calculated for individually-examined respondents, excluding dumping margins that are zero, *de minimis,* or based entirely on facts available. Accordingly, in the final results of review, we are assigning to the non-selected separate rate respondents an estimated weighted-average dumping margin based on the average of Ancientree's and Dushi's rates weighted by their publicly available ranged U.S. sales values.[9]

China-Wide Entity

Commerce considers all other companies, listed in Appendix II of this notice, for which a review was requested, and which did not demonstrate separate rate eligibility, to be part of the China-wide entity.

Final Results of Administrative Review

Commerce determines that the following weighted-average dumping margin exists for the administrative review covering the period April 1, 2021, through March 31, 2022:

Exporter	Weighted-average dumping margin (percent)
Fujian Dushi Wooden Industry Co., Ltd	43.40
The Ancientree Cabinet Co., Ltd	8.26
Non-Selected Companies Under Review Receiving a Separate Rate [10]	12.03

Disclosure

Pursuant to 19 CFR 351.224(b), within five days of the publication of this notice in the **Federal Register**, we will disclose to the parties to this proceeding, the calculations that we performed for these final results of review.

Assessment Rates

Pursuant to section 751(a)(2)(C) of the Act and 19 CFR 351.212(b), Commerce intends to determine, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries of subject merchandise in accordance with these final results of review. Pursuant to 19 CFR 351.212(b)(1), for Ancientree and Dushi, because we do not have entered values for all U.S. sales to a particular importer (or customer), Commerce calculated importer-specific per-unit assessment rates by dividing the total amount of dumping for reviewed sales of subject merchandise to that importer by the total quantity sold to that importer. Where an importer-specific per-unit assessment rate is zero or *de minimis* (*i.e.,* less than 0.5 percent), Commerce will instruct CBP to liquidate appropriate entries without regard to antidumping duties.[11]

For all non-selected separate rate applicants subject to this review, we will instruct CBP to liquidate all entries of subject merchandise that entered the United States during the POR at the weighted-average of the rates calculated

[4] *See Wooden Cabinets and Vanities and Components Thereof from the People's Republic of China: Antidumping Duty Order,* 85 FR 22126 (April 21, 2020) (*Order*).

[5] *See Preliminary Results,* 88 FR at 29087.

[6] *See* Issues and Decision Memorandum at Comment 8.

[7] *See Non-Market Economy Antidumping Proceedings: Assessment of Antidumping Duties,* 76 FR 65694 (October 24, 2011) (*Assessment Notice*).

[8] *See* Appendix II.

[9] As explained in the Issues and Decision Memorandum, because there are only two relevant weighted-average dumping margins for these preliminary results, using a weighted average of these two rates risks disclosure of business proprietary information (BPI) data.

[10] *See* Appendix II.

[11] *See* 19 CFR 351.106(c)(2).

for Ancientree and Dushi, as listed above. For entries of subject merchandise during the POR produced by Ancientree and Dushi for which they did not know their merchandise was destined for the United States, we intend to instruct CBP to liquidate such entries at the China-wide rate if there is no rate for the intermediate company or companies involved in the transaction.

Consistent with Commerce's assessment practice in non-market economy cases, for the companies which Commerce determined had no shipments of the subject merchandise, any suspended entries made under those exporters' case numbers (*i.e.,* at the exporters' rates) will be liquidated at the China-wide rate.[12]

Commerce intends to issue assessment instructions to CBP no earlier than 35 days after the date of publication of the final results of review in the **Federal Register**. If a timely summons is filed at the U.S. Court of International Trade, the assessment instructions will direct CBP not to liquidate relevant entries until the time for parties to file a request for a statutory injunction has expired (*i.e.,* within 90 days of publication).

Cash Deposit Requirements

The following cash deposit requirements will be effective for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of this administrative review, as provided by section 751(a)(2)(C) of the Act: (1) the cash deposit rate for the companies subject to this review will be the rate established in these final results of the review; (2) for previously investigated or reviewed Chinese and non-Chinese exporters not listed above that have separate rates, the cash deposit rate will continue to be the exporter-specific rate published for the most recently completed segment of this proceeding in which they were reviewed; (3) for all Chinese exporters of subject merchandise that have not been found to be entitled to a separate rate, the cash deposit rate will be equal to the weighted-average dumping margin for the China-wide entity (*i.e.,* 251.64 percent); and (4) for all non-Chinese exporters of subject merchandise which have not received their own separate rate, the cash deposit rate will be the rate applicable to the Chinese exporter(s) that supplied that non-Chinese exporter.[13] These cash deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice also serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping and/or countervailing duties prior to liquidation of the relevant entries during this POR Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping and/or countervailing duties occurred and the subsequent assessment of double antidumping duties, and/or an increase in the amount of antidumping duties by the amount of countervailing duties.

Administrative Protective Order

This notice also serves as a final reminder to parties subject to an administrative protective order (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3), which continues to govern BPI in this segment of the proceeding. Timely written notification of the return or destruction of APO materials, or conversion to judicial protective order, is hereby requested. Failure to comply with the regulations and terms of an APO is a sanctionable violation.

Notification to Interested Parties

We are issuing and publishing these final results of review in accordance with sections 751(a)(l), 751(a)(2)(B), and 777(i) of the Act.

Dated: November 1, 2023.

Lisa W. Wang,

Assistant Secretary for Enforcement and Compliance.

Appendix I

List of Topics Discussed in the Issues and Decision Memorandum

I. Summary
II. Background
III. Scope of the *Order*
IV. Changes from the *Preliminary Results*
V. Discussion of the Issues
- Comment 1: Whether Commerce Should Apply Total Adverse Facts Available (AFA) to Ancientree
- Comment 2: Whether Commerce Should Select Malayasia as the Primary Surrogate Country (SC)
- Comment 3: Whether Commerce Should Revise the Respondents' *Sigma* Freight Calculations
- Comment 4: Whether Commerce Should Revise Certain Surrogate Values (SV)
- Comment 5: Whether Commerce Should Exclude Russian Non-Market Economy (NME) Imports into Bulgaria
- Comment 6: Whether Commerce Should Revise the Respondents' Wood Density Values
- Comment 7: Whether Commerce Should Assign Jiangsu Wisen Houseware Co., Ltd. (Jinagsu Wiesen) and Weisen Houseware Co., Ltd. (Weisen), a Separate Rate
- Comment 8: Whether Commerce Should Accept Suzhou Siemo Wood Import & Export Co., Ltd.'s (Siemo) No Shipment Certification
- Comment 9: Whether Commerce Should Clarify its No Shipment Policy

VI. Recommendation

Appendix II

No Shipment Companies

1. Dalian Hualing Wood Co., Ltd.
2. Dalian Meisen Woodworking Co., Ltd.
3. Guangzhou Nuolande Import and Export Co., Ltd.
4. Hangzhou Hoca Kitchen & Bath Products Co., Ltd.
5. Linyi Kaipu Furniture Co., Ltd.
6. Senke Manufacturing Company
7. Shandong Longsen Woods Co., Ltd.
8. Shouguang Fushi Wood Co., Ltd.

Non-Selected Companies Under Review Receiving a Separate Rate

1. Anhui Xinyuanda Cupboard Co., Ltd.
2. Dongguan Ri Sheng Home Furnishing Articles Co., Ltd.
3. Goldenhome Living Co., Ltd.
4. Jiang Su Rongxin Wood Industry Co., Ltd. (Formerly known as Jiang Su Rongxin Cabinets Ltd.)
5. Jiangsu Sunwell Cabinetry Co., Ltd.
6. Jiangsu Weisen Houseware Co., Ltd; Weisen Houseware Co., Ltd.
7. KM Cabinetry Co., Ltd.
8. Kunshan Baiyulan Furniture Co., Ltd.
9. Morewood Cabinetry Co., Ltd.
10. Nantong Aershin Cabinets Co., Ltd.
11. Quanzhou Ample Furnishings Co., Ltd.
12. Qufu Xinyu Furniture Co., Ltd.
13. Shanghai Beautystar Cabinetry Co., Ltd.
14. Shanghai Zifeng International Trading Co., Ltd.
15. Sheen Lead International Trading (Shanghai) Co., Ltd.
16. Suzhou Siemo Wood Import & Export Co., Ltd.
17. Taishan Oversea Trading Co., Ltd.
18. Taizhou Overseas Int'l Ltd.
19. Tech Forest Cabinetry Co., Ltd.
20. Weifang Fuxing Wood Co., Ltd.
21. Xiamen Adler Cabinetry Co., Ltd.
22. Yichun Dongmeng Wood Co., Ltd.
23. Yixing Pengjia Technology Co., Ltd. (Formerly known as Yixing Pengjia Cabinetry Co., Ltd.)
24. Zhangzhou OCA Furniture Co., Ltd.
25. Zhoushan For-strong Wood Co., Ltd.

Companies Considered To Be Part of the China-Wide Entity

1. Deqing Meisheng Import and Export Co., Ltd.
2. Fujian Senyi Kitchen Cabinet Co., Ltd.
3. Fuzhou Hauster Kitchen Cabinet Manufacturing Co., Ltd.
4. Fuzhou Pyrashine Trading Co., Ltd.
5. Jiang Su Rongxin Import and Export Co., Ltd.

[12] For a full discussion of this practice, *see Assessment Notice.*

[13] *See Order,* 85 FR at 22126.

6. Linshu Meibang Furniture Co., Ltd.
7. Shanghai Zifeng Industries Development Co., Ltd.
8. Shenzhen Pengchengzhirong Trade Co., Ltd.
9. Weihai Jarlin Cabinetry Manufacture Co., Ltd.
10. Xiamen Got Cheer Co., Ltd.
11. Yindu Kitchen Equipment Co., Ltd.
12. Zaozhuang New Sharp Import & Export Trading Co., Ltd.
13. ZBOM Cabinets Co., Ltd.
14. Zhongshan KM Cabinetry Co., Ltd.

[FR Doc. 2023–24602 Filed 11–6–23; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[C–570–107]

Wooden Cabinets and Vanities and Components Thereof From the People's Republic of China: Final Results and Partial Recission of Countervailing Duty Administrative Review; 2021

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) determines that countervailable subsidies were provided to certain producers and exporters of wooden cabinets and vanities and components thereof (wooden cabinets) from the People's Republic of China (China) during the period of review (POR) January 1, 2021, through December 31, 2021. Commerce is also rescinding the review with respect to five companies.

DATES: Applicable November 7, 2023.

FOR FURTHER INFORMATION CONTACT: Michael Romani or Richard Roberts, AD/CVD Operations, Office I, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC, 20230; telephone: (202) 482–0198 or (202) 482–3464, respectively.

SUPPLEMENTARY INFORMATION:

Background

Commerce published the *Preliminary Results* of this administrative review in the **Federal Register** on May 5, 2023, and invited interested parties to comment.[1] For a complete description of the events that occurred subsequent to the *Preliminary Results, see* the Issues and Decision Memorandum.[2]

Scope of the Order [3]

The products covered by the scope of the *Order* are wooden cabinets from China. A full description of the scope of the *Order* is contained in the Issues and Decision Memorandum.

Analysis of Comments Received

All issues raised by the interested parties in their case and rebuttal briefs are addressed in the Issues and Decision Memorandum. A list of topics discussed in the Issues and Decision Memorandum is provided in the appendix to this notice. The Issues and Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Issues and Decision Memorandum can be accessed directly at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

Changes Since the Preliminary Results

Based on our analysis of comments from interested parties and the evidence on the record, we revised the calculation of the net countervailable subsidy rates for Fujian Dushi Wooden Industry Co. (Dushi) and Jiangsu Sunwell Cabinetry Co., Ltd. (Sunwell). For a discussion of the issues, *see* the Issues and Decision Memorandum.

Methodology

Commerce conducted this administrative review in accordance with section 751(a)(1)(A) of the Tariff Act of 1930, as amended (the Act). For each of the subsidy programs found to be countervailable, we find that there is a subsidy, *i.e.,* a government-provided financial contribution that gives rise to a benefit to the recipient, and that the subsidy is specific.[4] For a complete description of the methodology underlying all of Commerce's conclusions, including our reliance, in part, on facts otherwise available, including adverse facts available, pursuant to sections 776(a) and (b) of the Act, *see* the Issues and Decision Memorandum.

Partial Rescission of Review

Commerce's practice is to rescind an administrative review of a countervailing duty order, pursuant to 19 CFR 351.213(d)(3), when there are no reviewable entries of subject merchandise during the POR for which liquidation is suspended.[5] Normally, upon completion of an administrative review, the suspended entries are liquidated at the countervailing duty assessment rate calculated for the review period.[6] Therefore, for an administrative review of a company to be conducted, there must be a reviewable, suspended entry that Commerce can instruct U.S. Customs and Border Protection (CBP) to liquidate at the calculated countervailing duty assessment rate calculated for the review period.[7]

We find five companies subject to this review: (1) Shouguang Fushi Wood Co., Ltd..; (2) Taizhou Overseas Int'l Ltd.; (3) Yixing Pengjia Technology Co., Ltd.; (4) Zaozhuang New Sharp Import & Export Trading Co., Ltd..; and (5) Zhoushan For-strong Wood Co., Ltd. did not have reviewable entries of subject merchandise for which liquidation is suspended. Because there is no evidence on the record that these five companies had entries, exports, or sales of subject merchandise during the POR, we are rescinding this review with respect to these five companies consistent with 19 CFR 351.213(d)(3).

Companies Not Selected for Individual Review

The statute and Commerce's regulations do not address the establishment of a rate to be applied to companies not selected for individual examination when Commerce limits its examination in an administrative review pursuant to section 777A(e)(2) of the Act. However, Commerce normally determines the rates for non-selected companies in reviews in a manner that is consistent with section 705(c)(5) of the Act, which provides the basis for calculating the all-others rate in an

[1] *See Wooden Cabinets and Vanities and Components Thereof from the People's Republic of China: Preliminary Results of Countervailing Duty Administrative Review, Rescission of Administrative Review in Part, and Intent To Rescind in Part; 2021,* 88 FR 29084 (May 5, 2023) (*Preliminary Results*), and accompanying Preliminary Decision Memorandum.

[2] *See* Memorandum, ''Issues and Decision Memorandum for the Final Results of the Countervailing Duty Administrative Review of Wooden Cabinets and Vanities and Components Thereof from the People's Republic of China; 2021,'' dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

[3] *See Certain Corrosion Inhibitors from the People's Republic of China: Antidumping Duty and Countervailing Duty Orders,* 86 FR 14869 (March 19, 2021) (*Order*).

[4] *See* sections 771(5)(B) and (D) of the Act regarding financial contribution; section 771(5)(E) of the Act regarding benefit; and section 771(5A) of the Act regarding specificity.

[5] *See, e.g., Lightweight Thermal Paper from the People's Republic of China: Notice of Rescission of Countervailing Duty Administrative Review; 2015,* 82 FR 14349 (March 20, 2017); and *Circular Welded Carbon Quality Steel Pipe from the People's Republic of China: Rescission of Countervailing Duty Administrative Review; 2017,* 84 FR 14650 (April 11, 2019).

[6] *See* 19 CFR 351.212(b)(2).

[7] *See* 19 CFR 351.213(d)(3).

investigation. Section 705(c)(5)(A)(i) of the Act instructs Commerce, as a general rule, to calculate the all-others rate equal to the weighted average of the countervailable subsidy rates established for exporters and producers individually investigated, excluding any zero or *de minimis* countervailable subsidy rates, and any rates determined entirely on the basis of facts available.

There are eight companies for which a review was requested and not rescinded, and which were not selected as mandatory respondents or found to be cross-owned with a mandatory respondent. In this review, the rates for Dushi and Sunwell were above *de minimis* and not based entirely on facts available. Therefore, we are applying to the non-selected companies the average of the net subsidy rates calculated for Dushi and Sunwell, which we calculated using publicly-ranged sales data submitted by Dushi and Sunwell.[8]

This is the same methodology Commerce applied in the *Preliminary Results* for determining a rate for companies not selected for individual examination. However, due to changes in the subsidy rate calculations for Dushi and Sunwell, we revised the non-selected rate accordingly. Consequently, for the eight non-selected companies for which a review was requested and not rescinded, we are applying an *ad valorem* subsidy rate of 13.63 percent for 2021.

Final Results of Review

We determine the following net countervailable subsidy rates exist for the period January 1, 2021, through December 31, 2021:

Company	Subsidy rate—2021 (percent ad valorem)
Fujian Dushi Wooden Industry Co	16.13
Jiangsu Sunwell Cabinetry Co., Ltd[9]	7.54
Review-Specific Average Rate Applicable to the Following Companies[10]	
KM Cabinetry Co, Ltd	13.63
Nantong Aershin Cabinet Co., Ltd	13.63
Shanghai Zifeng International Trading Co., Ltd[11]	13.63
Sheen Lead International Trading (Shanghai) Co., Ltd[12]	13.63
Taishan Oversea Trading Company Ltd	13.63
Weifang Fuxing Wood Co., Ltd	13.63
Xiamen Adler Cabinetry Co., Ltd	13.63
Yixing Pengjia Cabinetry Co., Ltd	13.63

Disclosure

Commerce intends to disclose calculations and analysis performed for the final results of review within five days after the date of publication of this notice in the **Federal Register** in accordance with 19 CFR 351.224(b).

Assessment Requirements

In accordance with section 751(a)(2)(C) of the Act and 19 CFR 351.212(b)(2), Commerce has determined, and CBP shall assess, countervailing duties on all appropriate entries covered by this review, for the above-listed companies at the applicable *ad valorem* assessment rates listed for the corresponding time periods (*i.e.,* January 1, 2021, to December 31, 2021). Commerce intends to issue assessment instructions to CBP no earlier than 35 days after publication of the final results of this review in the **Federal Register**. If a timely summons is filed at the U.S. Court of International Trade, the assessment instructions will direct CBP not to liquidate relevant entries until the time for parties to file a request for a statutory injunction has expired (*i.e.,* within 90 days of publication).

Cash Deposit Requirements

In accordance with section 751(a)(1) of the Act, Commerce also intends to instruct CBP to collect cash deposits of estimated countervailing duties in the amounts shown above for the above-listed companies with regard to shipments of subject merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of these final results of review. For all non-reviewed firms, we will instruct CBP to continue to collect cash deposits of estimated countervailing duties at the all-others rate or the most recent company-specific rate applicable to the company, as appropriate. These cash deposit requirements, effective upon publication of these final results, shall remain in effect until further notice.

Administrative Protective Order

This notice also serves as a final reminder to parties subject to an administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3), which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return or destruction of APO materials or conversion to judicial protective order, is hereby requested. Failure to comply with the regulations and terms of an APO is a sanctionable violation.

Notification to Interested Parties

The final results are issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act, 19 CFR 351.213(d)(3), and 19 CFR 351.221(b)(5).

Dated: November 1, 2023.

Lisa W. Wang,

Assistant Secretary for Enforcement and Compliance.

Appendix

List of Topics Discussed in the Issues and Decision Memorandum

I. Summary
II. Background
III. Scope of the *Order*
IV. Partial Rescission of Administrative Review
V. Non-Selected Rate
VI. Subsidies Valuation
VII. Interest Rate Benchmarks, Input, Electricity, and Land Benchmarks
VIII. Use of Facts Otherwise Available and Application of Adverse Inferences
IX. Analysis of Programs
X. Discussion of the Issues
Comment 1: Whether Commerce Should Rescind the Review for Sheen Lead International Trading (Shanghai) Co., Ltd. (Sheen Lead) or Shanghai Zifeng International Trading Co., Ltd. (Shanghai Zifeng)
Comment 2: Whether Commerce Should Apply Adverse Facts Available (AFA) to the Export Buyer's Credit (EBC) Program

[8] With two respondents under examination, Commerce normally calculates: (A) a weighted-average of the estimated subsidy rates calculated for the examined respondents; (B) a simple average of the estimated subsidy rates calculated for the examined respondents; and (C) a weighted average of the estimated subsidy rates calculated for the examined respondents using each company's publicly-ranged U.S. sale quantities for the merchandise under consideration. Commerce then compares (B) and (C) to (A) and selects the rate closest to (A) as the most appropriate rate for all other producers and exporters. *See, e.g., Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews, Final Results of Changed-Circumstances Review, and Revocation of an Order in Part,* 75 FR 53661, 53663 (September 1, 2010).

[9] Commerce finds the following companies to be cross-owned with Sunwell: Shanghai Beautystar Cabinetry Co., Ltd.

[10] This rate is based on the rate for the respondent that was selected for individual review, excluding rates that are zero, *de minimis,* or based entirely on facts available. *See* section 735(c)(5)(A) of the Act.

[11] *See* Issues and Decision Memorandum at Comment 1.

[12] *Id.*

Comment 3: Whether Commerce Should Include Petitioner's Density Benchmark Data to Measure the Adequacy of Remuneration for the Provision of Sawn Wood and Fiberboard
Comment 4: Whether Commerce Should Apply AFA to the Provision of Electricity for Less Than Adequate Remuneration (LTAR)
Comment 5: Whether Commerce Should Continue to Countervail the Provision of Certain Inputs for LTAR Based on AFA
Comment 6: Whether Commerce Should Use a Free-On-Board (FOB) Sales Denominator
Comment 7: Whether Commerce Should Change Benchmarks Used to Measure the Benefit for Certain Policy Loans Received by Fujian Dushi Wooden Industry Company (Dushi)
Comment 8: Whether Commerce Should Calculate All Benefits under the Provision of Electricity for LTAR
Comment 9: Whether Commerce Should Adjust Certain Sales Denominators to Conduct the 0.5% Test for ''Other Subsidies'' Received by Dushi
Comment 10: Whether Commerce Should Correct Errors in the Calculations Used to Measure the Adequacy of Remuneration from the Provision of Certain Inputs
Comment 11: Whether Commerce Should Adjust the Calculation of Benchmark Interest Applied to Jiangsu Sunwell Cabinetry Co., Ltd.'s (Sunwell) Loans
Comment 12: Whether Commerce Should Adjust the Benefit Calculation for the Provision of Electricity for LTAR Program for Sunwell
XI. Recommendation

[FR Doc. 2023–24582 Filed 11–6–23; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–053]

Certain Aluminum Foil From People's Republic of China: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2021–2022

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) determines that certain companies under review sold certain aluminum foil (aluminum foil) from the People's Republic of China (China) at less than normal value during the period of review (POR) April 1, 2021, through March 31, 2022.

DATES: Applicable November 7, 2023.

FOR FURTHER INFORMATION CONTACT: Michael J. Heaney, AD/CVD Operations, Office VI, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–4475.

SUPPLEMENTARY INFORMATION:

Background

On May 5, 2023, Commerce published the *Preliminary Results* and invited interested parties to comment.[1] On August 28, 2023, we extended the deadline for these final results until November 1, 2023.[2] For a full summary of the events that occurred since Commerce published the *Preliminary Results, see* the Issues and Decision Memorandum.[3] Commerce conducted this review in accordance with section 751(a) of the Tariff Act of 1930, as amended (the Act).

Scope of the Order [4]

The merchandise covered by the *Order* is certain aluminum foil from China. For a complete description of the scope of the *Order, see* the Issues and Decision Memorandum.

Analysis of Comments Received

All issues raised in the case and rebuttal briefs are addressed in the Issues and Decision Memorandum and are listed in the appendix to this notice.[5] The Issues and Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Issues and Decision Memorandum can be found at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

Changes From the Preliminary Results

Based on our analysis of the comments received from interested parties, we made certain changes to the margin calculations for Jiangsu Dingsheng New Materials Joint-Stock Co., Ltd.; Dingsheng Aluminium Industries (Hong Kong) Trading Co., Limited (Dingsheng Aluminium Industries (Hong Kong) Trading Co., Ltd.); Hangzhou Dingsheng Import & Export Co., Ltd. (Hangzhou Dingsheng Import and Export Co., Ltd.); Hangzhou Five Star Aluminium Co., Ltd.; Hangzhou Teemful Aluminium Co., Ltd.; Inner Mongolia Liansheng New Energy Material Co., Ltd.; and Inner Mongolia Xinxing New Energy Material Co., Ltd. (collectively, Dingsheng).[6] For a discussion of these changes, *see* the Issues and Decision Memorandum.

Final Determination of No Shipments

In the *Preliminary Results,* we preliminarily determined that Shanghai Shenyan Packaging Materials Joint-Stock Co., Ltd. (Shanghai Shenyan) had no shipments of subject merchandise during the POR. We received no information to contradict this determination.[7] Therefore, we continue to find that Shanghai Shenyan had no shipments of subject merchandise during the POR and will issue appropriate liquidation instructions that are consistent with our ''automatic assessment'' clarification for these final results.[8]

Separate Rates

In the *Preliminary Results,* we determined that the Dingsheng single entity [9] was eligible for a separate rate,

[1] *See Certain Aluminum Foil from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review, Partial Rescission of Antidumping Administrative Review, and Preliminary Determination of No Shipments; 2021–2022,* 88 FR 29092 (May 5, 2023) (*Preliminary Results*) and accompanying Preliminary Decision Memorandum (PDM).

[2] *See* Memorandum, ''Extension of Deadline for Final Results of 2021–2022 Antidumping Duty Administrative Review,'' dated August 28, 2023.

[3] *See* Memorandum, ''Issues and Decision Memorandum for the Final Results of the 2021–2022 Antidumping Duty Administrative Review of Certain Aluminum Foil from the People's Republic of China;'' dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

[4] *See Certain Aluminum Foil from the People's Republic of China: Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order,* 83 FR 17362 (April 19, 2018) (*Order*).

[5] *See* appendix.

[6] In the *Preliminary Results* we inadvertently omitted identifying Jiangsu Dingsheng New Materials Joint-Stock Co., Ltd. as part of the Dingsheng entity, which we have corrected for these final results. *See Preliminary Results,* 88 FR at 29092–93.

[7] *Id.,* 88 FR at 29093.

[8] *See Non-Market Economy Antidumping Proceedings: Assessment of Antidumping Duties,* 76 FR 65694 (October 24, 2011) (*Assessment Practice Refinement*).

[9] Consistent with a prior segment of this proceeding, we have continued to find that Jiangsu Dingsheng New Materials Joint-Stock Co., Ltd.; Dingsheng Aluminium Industries (Hong Kong) Trading Co., Limited (Dingsheng Aluminium Industries (Hong Kong) Trading Co., Ltd.); Hangzhou Dingsheng Import&Export Co., Ltd. (Hangzhou Dingsheng Import and Export Co., Ltd.); Hangzhou Five Star Aluminium Co., Ltd.; Hangzhou Teemful Aluminium Co., Ltd.; Inner Mongolia Liansheng New Energy Material Co.; and Inner Mongolia Xinxing New Energy Material Co., Ltd. are affiliated entities, pursuant to sections 771(33)(E), (F), and (G) of the Act, and that they should be treated as a single entity pursuant to 19 CFR 351.401(f)(1)–(2). *See Antidumping Duty Investigation of Certain Aluminum Foil from the People's Republic of China: Affirmative Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination and Accompanying Preliminary Decision Memorandum,* 82 FR 50858 (November 2, 2017), and accompanying PDM at 16–18, unchanged in *Certain Aluminum Foil from the People's Republic of*

and that Shanghai Huafon Aluminum Corporation (Shanghai Huafon) is ineligible for a separate rate because it did not file a response to our antidumping duty questionnaire.[10] No interested parties submitted comments on Commerce's preliminary separate-rate determinations. For these final results, we continue to determine that the Dingsheng single entity is eligible for a separate rate, and that Shanghai Huafon is ineligible for a separate rate.

The China-Wide Entity

In accordance with Commerce's policy, the China-wide entity will not be under review unless a party specifically requests, or Commerce self-initiates, a review of the China-wide entity.[11] Because no party requested a review of the China-wide entity, and Commerce did not self-initiate a review of the entity, the China-wide entity is not under review, and the weighted-average dumping margin for the China-wide entity (*i.e.,* 105.80 percent) is not subject to change.[12] Because Shanghai Huafon did not demonstrate its eligibility for a separate rate, we determine Shanghai Huafon to be part of the China-wide entity.

Final Results of Administrative Review

We determine that the following estimated weighted-average dumping margins exist for the period April 1, 2021, through March 31, 2022:

Exporter	Weighted-average dumping margin (percent)
Jiangsu Dingsheng New Materials Joint-Stock Co., Ltd.; Dingsheng Aluminium Industries (Hong Kong) Trading Co., Limited (Dingsheng Aluminium Industries (Hong Kong) Trading Co., Ltd.)/Hangzhou Dingsheng Import & Export Co., Ltd. (Hangzhou Dingsheng Import and Export Co., Ltd.)/Hangzhou Five Star Aluminium Co., Ltd./Hangzhou Teemful Aluminium Co., Ltd./Inner Mongolia Liansheng New Energy Material Co., Ltd./Inner Mongolia Xinxing New Energy Material Co., Ltd	32.81

Disclosure

Pursuant to 19 CFR 351.224(b), we intend to disclose to parties in this proceeding the calculations performed for Dingsheng within five days of the publication of this notice in the **Federal Register**.

Assessment Rates

Commerce has determined, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries in this review, in accordance with section 751(a)(2)(C) of the Act and 19 CFR 351.212(b). We intend to issue assessment instructions to CBP no earlier than 35 days after the date of publication of these final results in the **Federal Register**. If a timely summons is filed at the U.S. Court of International Trade, the assessment instructions will direct CBP not to liquidate relevant entries until the time for parties to file a request for a statutory injunction has expired (*i.e.,* within 90 days of publication).

Where Dingsheng reported reliable entered values, we calculated importer- (or customer-) specific *ad valorem* rates by aggregating the dumping margins calculated for all U.S. sales to each importer (or customer) and dividing this amount by the total entered value of the sales to each importer (or customer).[13] Where Commerce calculated a weighted-average dumping margin by dividing the total amount of dumping for reviewed sales to that party by the total sales quantity associated with those transactions, Commerce will direct CBP to assess importer- (or customer-) specific assessment rates based on the resulting per-unit rates.[14] Where an importer- (or customer-) specific *ad valorem* or per-unit rate is greater than *de minimis* (*i.e.,* 0.50 percent), Commerce will instruct CBP to collect the appropriate duties at the time of liquidation.[15] Where an importer- (or customer-) specific *ad valorem* or per-unit rate is zero or *de minimis,* Commerce will instruct CBP to liquidate appropriate entries without regard to antidumping duties.[16]

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of the final results of this review for shipments of the subject merchandise from China entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided by section 751(a)(2)(C) of the Act: (1) for subject merchandise exported by the companies listed above that have separate rates, the cash deposit rate will be the rate established in these final results of review for each exporter as listed above; (2) for previously investigated or reviewed Chinese and non-Chinese exporters not listed above that received a separate rate in a prior segment of this proceeding, the cash deposit rate will continue to be the existing exporter-specific rate; (3) for all Chinese exporters of subject merchandise that have not been found to be entitled to a separate rate, the cash deposit rate will be that for the China-wide entity; and (4) for all non-Chinese exporters of subject merchandise which have not received their own rate, the cash deposit rate will be the rate applicable to the Chinese exporter that supplied that non-Chinese exporter. These deposit requirements, when imposed, shall remain in effect until further notice.

Reimbursement of Duties

This notice also serves as the final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during the POR. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

Notification to Importers

This notice serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping and/or countervailing duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping and/or countervailing

China: Final Determination of Sales at Less Than Fair Value, 83 FR 9282 (March 5, 2018).

[10] *See Preliminary Results,* 88 FR at 29093; *see also Preliminary Results* PDM at 6–9.

[11] *See Antidumping Proceedings: Announcement of Change in Department Practice for Respondent Selection in Antidumping Duty Proceedings and Conditional Review of the Nonmarket Economy Entity in NME Antidumping Duty Proceedings,* 78 FR 65963, 65969–70 (November 4, 2013).

[12] *See Order,* 84 FR at 2814.

[13] *See* 19 CFR 351.212(b)(1).

[14] *Id.*

[15] *Id.*

[16] *See* 19 CFR 351.106(c)(2).

duties occurred and the subsequent assessment of double antidumping duties, and/or an increase in the amount of antidumping duties by the amount of the countervailing duties.

Administrative Protective Order

This notice also serves as a reminder to parties subject to an administrative protective order (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305, which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return or destruction of APO materials, or conversion to judicial protective order, is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

Notification to Interested Parties

These final results of review are issued and published in accordance with sections 751(a) and 777(i)(1) of the Act, and 19 CFR 351.221(b)(5).

Dated: November 1, 2023.

Lisa W. Wang,

Assistant Secretary for Enforcement and Compliance.

Appendix

List of Topics Discussed in the Issues and Decision Memorandum

I. Summary
II. Background
III. Scope of the *Order*
IV. Changes to the *Preliminary Results*
V. Discussion of the Issues
  Comment 1: Selection of Surrogate Country
  Comment 2: Surrogate Financial Ratios
  Comment 3: Double Remedies Adjustment
  Comment 4: Differential Pricing
VI. Recommendation

[FR Doc. 2023–24599 Filed 11–6–23; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

Open Meeting of the Internet of Things Advisory Board

AGENCY: National Institute of Standards and Technology (NIST).

ACTION: Notice of open meeting.

SUMMARY: The Internet of Things (IoT) Advisory Board will meet Tuesday, December 12 and Wednesday, December 13, 2023 from 11 a.m. until 5 p.m., eastern time. Both sessions will be open to the public.

DATES: The Internet of Things (IoT) Advisory Board will meet Tuesday, December 12 and Wednesday, December 13, 2023 from 11 a.m. until 5 p.m., eastern time.

ADDRESSES: The meeting will be virtual via Webex webcast hosted by the National Cybersecurity Center of Excellence (NCCoE) at NIST. Please note registration instructions under the **SUPPLEMENTARY INFORMATION** section of this notice.

FOR FURTHER INFORMATION CONTACT: Barbara Cuthill, Information Technology Laboratory, National Institute of Standards and Technology, Telephone: (301) 975–3273, Email address: *barbara.cuthill@nist.gov.*

SUPPLEMENTARY INFORMATION: Pursuant to the Federal Advisory Committee Act, as amended, 5 U.S.C.1001 *et seq.,* notice is hereby given that the IoT Advisory Board will hold open meetings on Tuesday, December 12 and Wednesday, December 13, 2023 from 11 a.m. until 5 p.m., eastern time. Both sessions will be open to the public. The IoT Advisory Board is authorized by section 9204(b)(5) of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 (Pub. L. 116–283) and advises the IoT Federal Working Group convened by the Secretary of Commerce pursuant to section 9204(b)(1) of the Act on matters related to the Federal Working Group's activities. Details regarding the IoT Advisory Board's activities are available at *https://www.nist.gov/itl/applied-cybersecurity/nist-cybersecurity-iot-program/internet-things-advisory-board.*

The agenda for the December meeting is expected to focus on finalizing the organization of the recommendations to be included in the IoT Advisory Board's report for the IoT Federal Working Group as well as continued refinement of that report and filling gaps in those recommendations.

The recommendations and discussions are expected to focus on the specific focus areas for the report cited in the legislation and the charter:

- Smart traffic and transit technologies
- Augmented logistics and supply chains
- Sustainable infrastructure
- Precision agriculture
- Environmental monitoring
- Public safety
- Health care

In addition, the IoT Advisory Board may discuss other elements that the legislation called for in the report:

- whether adequate spectrum is available to support the growing Internet of Things and what legal or regulatory barriers may exist to providing any spectrum needed in the future;
- policies, programs, or multi-stakeholder activities that—
  - promote or are related to the privacy of individuals who use or are affected by the Internet of Things;
  - may enhance the security of the Internet of Things, including the security of critical infrastructure;
  - may protect users of the Internet of Things; and
  - may encourage coordination among Federal agencies with jurisdiction over the Internet of Things

Note that agenda items may change without notice. The final agendas will be posted on the IoT Advisory Board web page: *https://www.nist.gov/itl/applied-cybersecurity/nist-cybersecurity-iot-program/internet-things-advisory-board.*

Public Participation: Written comments and requests to present comments orally to the IoT Advisory Board from the public are invited and may be submitted electronically by email to Barbara Cuthill at the contact information indicated in the **FOR FURTHER INFORMATION CONTACT** section of this notice by 5 p.m. on the Tuesday, December 5, 2023 to allow distribution of written comments to IoT Advisory Board members prior to the meeting.

Each IoT Advisory Board meeting agenda will include a period, not to exceed sixty minutes, for oral presentation of comments from the public. Oral presentation of comments from the public during this sixty-minute period will be accommodated on a first-come, first-served basis and limited to five minutes per person for oral presentation if requested by the commenter.

Members of the public who wish to expand upon their submitted comments, those who had wished to present comments orally but could not be accommodated on the agenda, and those who were unable to attend the meeting via webinar, are invited to submit written statements. In addition, written statements are invited and may be submitted to the IoT Advisory Board at any time. All written statements should be directed to the IoT Advisory Board Secretariat, Information Technology Laboratory by email to: *Barbara.Cuthill@nist.gov.*

Admittance Instructions: Participants planning to attend via webinar must register via the instructions found on the IoT Advisory Board's web page at *https://www.nist.gov/itl/applied-cybersecurity/nist-cybersecurity-iot-program/internet-things-advisory-board.*

Alicia Chambers,

NIST Executive Secretariat.

[FR Doc. 2023–24588 Filed 11–6–23; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

Board of Overseers of the Malcolm Baldrige National Quality Award; Meeting

AGENCY: National Institute of Standards and Technology, Department of Commerce

ACTION: Notice of open meeting.

SUMMARY: The Board of Overseers of the Malcolm Baldrige National Quality Award (Board) will meet in open session on Wednesday, December 6, 2023. The purpose of this meeting is to review and discuss the work of the Baldrige Performance Excellence Program to implement improvements to the Malcolm Baldrige National Quality Award (Award), and to provide recommendations to the Director of the National Institute of Standards and Technology (NIST) as the Board deems necessary. Details on the agenda are noted in the **SUPPLEMENTARY INFORMATION** section of this notice.

DATES: The meeting will be held on Wednesday, December 6, 2023, from 11 a.m. Eastern time until 4 p.m. Eastern time. The meeting will be open to the public.

ADDRESSES: The meeting will be held virtually using Microsoft Teams. Please note admittance instructions under the **SUPPLEMENTARY INFORMATION** section of this notice.

FOR FURTHER INFORMATION CONTACT: Robert Fangmeyer, Director, Baldrige Performance Excellence Program, National Institute of Standards and Technology, 100 Bureau Drive, Mail Stop 1020, Gaithersburg, Maryland 20899–1020, telephone number (301) 975–2361, or by email at *robert.fangmeyer@nist.gov.*

SUPPLEMENTARY INFORMATION: Pursuant to the Federal Advisory Committee Act, as amended (FACA), 5 U.S.C. 1001 *et seq.,* notice is hereby given that the Board will meet in open session on Wednesday, December 6, 2023, from 11 a.m. Eastern time until 4 p.m. Eastern time. The Board is currently composed of nine members selected for their preeminence in the field of organizational performance excellence and appointed by the Secretary of Commerce. The Board consists of a balanced representation from U.S. service, manufacturing, small business, nonprofit, education, and health care industries. The Board includes members familiar with the quality, performance improvement operations, and competitiveness issues of manufacturing companies, service companies, small businesses, nonprofits, health care providers, and educational institutions.

The purpose of this meeting is to review and discuss the work of the Baldrige Performance Excellence Program (Program) to implement improvements to the Malcolm Baldrige National Quality Award (Award), and to provide recommendations to the Director of the National Institute of Standards and Technology (NIST) as the Board deems necessary. The agenda will include: Report on Program Accomplishments for 2023, Update on Baldrige Reimagined Implementation, Baldrige Foundation Update, Alliance for Performance Excellence Update, Communities of Excellence Update, and Recommendations for the NIST Director. The agenda may change to accommodate Board business. The final agenda will be posted on the NIST Baldrige Performance Excellence website at *https://www.nist.gov/baldrige/community/overseers.cfm.* The meeting will be open to the public.

Individuals and representatives of organizations who would like to offer comments and suggestions related to the Board's affairs are invited to request a place on the agenda. On December 6, 2023, approximately one-half hour will be reserved in the afternoon for public comments and speaking times will be assigned on a first-come, first-served basis. The amount of time per speaker will be determined by the number of requests received, but is likely to be about 3 minutes each. The exact time for public comments will be included in the final agenda that will be posted on the Baldrige Program website at *https://www.nist.gov/baldrige/community/overseers.cfm.* Questions from the public will not be considered during this period. Speakers who wish to expand upon their oral statements, those who had wished to speak, but could not be accommodated on the agenda, and those who were unable to attend are invited to submit written statements to the Baldrige Performance Excellence Program, NIST, 100 Bureau Drive, Mail Stop 1020, Gaithersburg, Maryland, 20899–1020, via fax at 301–975–4967 or electronically by email to *robyn.verner@nist.gov.*

All participants will be attending via webinar. Please contact Ms. Verner by email at *robyn.verner@nist.gov* for detailed instructions on how to join the webinar. All requests must be received by 12/02/2023.

(Authority: 15 U.S.C. 3711a(d)(2)(B) and the Federal Advisory Committee Act, as amended, 5 U.S.C. 1001 *et seq.*)

Alicia Chambers,

NIST Executive Secretariat.

[FR Doc. 2023–24594 Filed 11–6–23; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD476]

Atlantic Highly Migratory Species; Advisory Panel

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

ACTION: Notice; solicitation of nominations.

SUMMARY: NMFS solicits nominations for the Atlantic Highly Migratory Species (HMS) Advisory Panel (AP). NMFS consults with and considers the comments and views of the HMS AP when preparing and implementing Fishery Management Plans (FMPs) or FMP amendments for Atlantic tunas, swordfish, sharks, and billfish. Nominations are being sought to fill approximately one-third (10) of the seats on the HMS AP for 3-year appointments. Individuals with definable interests in the recreational and commercial fishing and related industries, environmental community, academia, and non-governmental organizations are considered for membership on the HMS AP.

DATES: Nominations must be received on or before December 7, 2023.

ADDRESSES: You may submit nominations and requests for the Advisory Panel Statement of Organization, Practices, and Procedures by email to *HMSAP.Nominations@noaa.gov.* Include in the subject line the following identifier: ''HMS AP Nominations.''

FOR FURTHER INFORMATION CONTACT: Peter Cooper at (301) 427–8503 or via email at *HMSAP.Nominations@noaa.gov.*

SUPPLEMENTARY INFORMATION: Atlantic HMS fisheries (tunas, billfish, swordfish, and sharks) are managed under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act; 16 U.S.C. 1801 *et seq.*) and the Atlantic Tunas Convention Act (16 U.S.C. 971 *et seq.*). The 2006 Consolidated Atlantic HMS FMP and its amendments are implemented by regulations at 50 CFR part 635.

The Magnuson-Stevens Act requires the establishment of an AP for each FMP for HMS, *i.e.,* tunas, swordfish, billfish, and sharks (16 U.S.C. 1854(g)(1)(A)–(B)). Since the inception of the AP in 1998, NMFS has consulted with and considered the comments and views of AP members when preparing and implementing HMS FMPs or FMP amendments. In this notice, NMFS solicits nominations for the HMS AP. Nominations are being sought to fill approximately one-third (10) of the seats on the HMS AP for 3-year appointments. Individuals with definable interests in the recreational and commercial fishing and related industries, environmental community, academia, and non-governmental organizations are considered for membership on the HMS AP as described below.

Procedures and Guidelines

A. Nomination Procedures for Appointments to the AP

Nomination packages should include:

1. The name of the nominee and a description of his/her interest in HMS or HMS fisheries, or in particular species of sharks, swordfish, tunas, or billfish;

2. Contact information, including mailing address, phone, and email of the nominee;

3. A statement of background and/or qualifications;

4. A written commitment that the nominee shall actively participate in good faith, and consistent with ethics obligations, in the meetings and tasks of the HMS AP; and

5. A list of outreach resources that the nominee has at his/her disposal to communicate qualifications for HMS AP membership.

Qualification for membership includes one or more of the following: (1) experience in HMS recreational fisheries; (2) experience in HMS commercial fisheries; (3) experience in fishery-related industries (*e.g.,* marinas, bait and tackle shops); (4) experience in the scientific community working with HMS; and/or (5) representation of a private, non-governmental, regional, national, or international organization that represents marine fisheries, or environmental, governmental, or academic interests regarding HMS.

Tenure for the HMS AP

Member tenure will be for 3 years, with approximately one-third of the members' terms expiring on December 31 of each year. Nominations are sought for terms beginning January 2024 and expiring December 2026.

Members can serve a maximum of three consecutive terms (a total of 9 consecutive years). Afterwards, a member must then sit off the HMS AP for a single year before becoming eligible to apply for a new term.

B. Participants

Nominations for the HMS AP will be accepted to allow representation from commercial and recreational fishing interests, academic/scientific interests, and the environmental/non-governmental organization community, for individuals who are knowledgeable about HMS and/or HMS fisheries. Current representation on the HMS AP, as shown in Table 1, consists of 12 members representing commercial interests, 12 members representing recreational interests, 4 members representing environmental interests, 4 academic representatives, and the ICCAT Advisory Committee Chair. NMFS seeks to fill five commercial, three recreational, one environmental, and one academic sector vacancies for terms starting in 2024.

In filling vacancies, NMFS will seek to maintain the current representation from each of the sectors. NMFS also considers species expertise and representation from the fishing regions (Northeast, Mid-Atlantic, Southeast, Gulf of Mexico, and Caribbean) to ensure the diversity and balance of the HMS AP. Table 1 includes the current representation on the HMS AP by sector, region, and species with terms that are expiring identified in the ''Member Status'' column. It is not meant to indicate that NMFS will only consider persons who have expertise in the species or fishing regions that are listed. Rather, NMFS will aim toward having as diverse and balanced an AP as possible. The intent is to have a group that, as a whole, reflects an appropriate and equitable balance and mix of interests given the responsibilities of the HMS AP.

TABLE 1—CURRENT REPRESENTATION ON THE HMS AP BY SECTOR, REGION, AND SPECIES

Sector	Fishing region	Species	Date appointed	Date term expires	Member status
Academic	SE/Gulf	Sharks	1/1/2022	12/31/2023	Expiring.
Academic	NE/Mid-Atlantic	Tuna/Shark	1/1/2022	12/31/2024	Active.
Academic	SE/Gulf	Sharks	1/1/2022	12/31/2024	Active.
Academic	Northeast	Tunas	1/1/2022	12/31/2024	Active.
Commercial	Gulf of Mexico	Tuna	1/1/2023	12/31/2025	Active.
Commercial	Southeast	Swordfish	1/1/2023	12/31/2025	Active.
Commercial	Mid-Atlantic/SE	Tuna	1/1/2023	12/31/2025	Active.
Commercial	Gulf of Mexico	Sharks	1/1/2021	12/31/2023	Expiring.
Commercial	Northeast	Tuna	1/1/2021	12/31/2023	Expiring.
Commercial	SE/Gulf	Swordfish/Tuna	1/1/2021	12/31/2023	Expiring.
Commercial	Gulf of Mexico	Tuna	1/1/2021	12/31/2023	Expiring.
Commercial	Northeast	Tuna	1/1/2021	12/31/2023	Expiring.
Commercial	NE/SE/GOM	HMS/Tuna	1/1/2022	12/31/2024	Active.
Commercial	Southeast	Sharks	1/1/2022	12/31/2024	Active.
Commercial	Gulf of Mexico	All	1/1/2022	12/31/2024	Active.
Commercial	Northeast	Swordfish/Tuna	1/1/2022	12/31/2024	Active.
Environmental	All	Tuna	1/1/2023	12/31/2025	Active.
Environmental	All	HMS	1/1/2023	12/31/2025	Active.
Environmental	All	Shark	1/1/2021	12/31/2023	Expiring.
Environmental	Caribbean	HMS	1/1/2022	12/31/2024	Active.
Recreational	All	HMS	1/1/2023	12/31/2025	Active.

TABLE 1—CURRENT REPRESENTATION ON THE HMS AP BY SECTOR, REGION, AND SPECIES—Continued

Sector	Fishing region	Species	Date appointed	Date term expires	Member status
Recreational	Northeast	Tuna/Sharks	1/1/2023	12/31/2025	Active.
Recreational	All	HMS	1/1/2023	12/31/2025	Active.
Recreational	Northeast	Tuna	1/1/2023	12/31/2025	Active.
Recreational	Gulf of Mexico	HMS	1/1/2023	12/31/2025	Active.
Recreational	All	Billfish	1/1/2021	12/31/2023	Expiring.
Recreational	Mid-Atlantic	Shark	1/1/2021	12/31/2023	Expiring.
Recreational	Southeast/Mid Atlantic.	Billfish	1/1/2021	12/31/2023	Expiring.
Recreational	Northeast	Tuna/Shark	1/1/2022	12/31/2024	Active.
Recreational	NE/SE/GOM	All	1/1/2022	12/31/2024	Active.
Recreational	Mid-Atlantic	HMS	1/1/2022	12/31/2024	Active.
Recreational	Southeast	HMS/Billfish	1/1/2022	12/31/2024	Active.

Note: Terms that are expiring or associated with current members stepping down are marked as ''Expiring''.

Five additional members on the HMS AP include one member representing each of the following Councils: New England Fishery Management Council, the Mid-Atlantic Fishery Management Council, the South Atlantic Fishery Management Council, the Gulf of Mexico Fishery Management Council, and the Caribbean Fishery Management Council. The HMS AP also includes 22 ex-officio participants: 20 representatives of the coastal states and 2 representatives of the interstate commissions (the Atlantic States Marine Fisheries Commission and the Gulf States Marine Fisheries Commission).

NMFS will provide the necessary administrative support, including technical assistance, for the HMS AP. However, NMFS will not compensate participants with monetary support of any kind. Depending on availability of funds, members may be reimbursed for travel costs related to the HMS AP meetings.

C. Meeting Schedule

Meetings of the HMS AP will be held as frequently as necessary but are routinely held twice each year. In recent years, meetings have been held once in the spring, and once in the fall. The meetings may be held in conjunction with public hearings.

Dated: November 1, 2023.

Jennifer M. Wallace,

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

[FR Doc. 2023–24537 Filed 11–6–23; 8:45 am]

BILLING CODE 3510–22–P

COMMODITY FUTURES TRADING COMMISSION

Market Risk Advisory Committee

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice of meeting.

SUMMARY: The Commodity Futures Trading Commission (CFTC) announces that on December 11, 2023, from 9:30 a.m. to 12:30 p.m. (eastern standard time), the Market Risk Advisory Committee (MRAC or Committee) will hold an in-person public meeting at the CFTC's Washington, DC headquarters, with options for the public to attend virtually. At this meeting, the MRAC will discuss current topics and developments in the areas of central counterparty risk and governance, market structure, climate-related risk, and innovative and emerging technologies affecting the derivatives and related financial markets.

DATES: The meeting will be held on December 11, 2023, from 9:30 a.m. to 12:30 p.m. (eastern standard time). Please note that the meeting may end early if the MRAC has completed its business. Members of the public who wish to submit written statements in connection with the meeting should submit them by December 18, 2023.

ADDRESSES: The meeting will take place in the Conference Center at the CFTC's headquarters, Three Lafayette Centre, 1155 21st Street NW, Washington, DC 20581. You may submit public comments, identified by ''Market Risk Advisory Committee,'' through the CFTC website at *https://comments.cftc.gov.* Follow the instructions for submitting comments through the Comments Online process on the website. If you are unable to submit comments online, contact Tamika Bent, Designated Federal Officer, via the contact information listed below to discuss alternate means of submitting your comments. Any statements submitted in connection with the committee meeting will be made available to the public, including publication on the CFTC website, *https://www.cftc.gov.*

FOR FURTHER INFORMATION CONTACT: Tamika Bent, MRAC Designated Federal Officer, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW, Washington, DC 20581; (646) 746–3930 or *tbent@cftc.gov.*

SUPPLEMENTARY INFORMATION: The meeting will be open to the public with seating on a first-come, first-served basis. Members of the public may also listen to the meeting by telephone by calling a domestic or international toll or toll-free number to connect to a live, listen-only audio feed. Call-in participants should be prepared to provide their first name, last name, and affiliation.

Domestic Toll-Free Number: 833 435 1820 U.S., 833 568 8864 U.S.
Domestic Toll Number: +1 669 254 5252 U.S. (San Jose), +1 646 828 7666 U.S. (New York), +1 646 964 1167 U.S. (U.S. Spanish Line), +1 415 449 4000 U.S. (U.S. Spanish Line), +1 551 285 1373 U.S. (New Jersey), +1 669 216 1590 U.S. (San Jose)
International numbers available: *https://cftc-gov.zoomgov.com/u/acCnfESxJU*
International Toll- and Toll-Free Numbers: Will be posted on the CFTC's website, *https://www.cftc.gov,* on the page for the meeting, under Related Links
Call-In/Webinar ID: 161 828 9052
Pass Code/Pin Code: 086794

Members of the public may also view a live webcast of the meeting via the *http://www.cftc.gov* website. The meeting agenda may change to accommodate other Committee priorities. For agenda updates, please visit: *https://www.cftc.gov/About/AdvisoryCommittees/MRAC.*

After the meeting, a transcript of the meeting will be published through a link on the CFTC's website, *https://www.cftc.gov.* Persons requiring special accommodations to attend the meeting because of a disability should notify the contact person above.

(Authority: 5 U.S.C. 1009(a)(2).)

Dated: November 2, 2023.

Robert Sidman,

Deputy Secretary of the Commission.

[FR Doc. 2023–24565 Filed 11–6–23; 8:45 am]

BILLING CODE 6351–01–P

CONSUMER PRODUCT SAFETY COMMISSION

Public Availability of Consumer Product Safety Commission FY 2021 Service Contract Inventory, FY 2020 Service Contract Inventory Analysis, and Plan for FY 2021 Inventory Analysis

AGENCY: Consumer Product Safety Commission.

ACTION: Notice.

SUMMARY: The Consumer Product Safety Commission (CPSC), in accordance with Division C of the Consolidated Appropriations Act, 2010, is announcing the availability of CPSC's service contract inventory for fiscal year (FY) 2021, CPSC's FY 2020 service contract inventory analysis, and the plan for analyzing CPSC's FY 2021 service contract inventory.

FOR FURTHER INFORMATION CONTACT: Eddie Ahmad, Director, Procurement Services, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814. Telephone: 301–504–7884; email: *aahmad@cpsc.gov.*

SUPPLEMENTARY INFORMATION: Section 743(a) of the Consolidated Appropriations Act, 2010 (Consolidated Appropriations Act), 31 U.S.C. 501 note, titled ''Service Contract Inventory Requirement,'' requires agencies to submit to the Office of Management and Budget (OMB), an annual inventory of service contracts awarded or extended through the exercise of an option on or after April 1, 2010. The contents of the inventory must include:

(A) A description of the services purchased by the agency and the role the services played in achieving agency objectives, regardless of whether such a purchase was made through a contract or task order.

(B) The organizational component of the agency that is administering the contract, and the component whose requirements are being met through contractor performance of the service.

(C) The total dollar amount obligated for services under the contract and the funding source for the contract.

(D) The total dollar amount invoiced for services under the contract.

(E) The contract type and date of award.

(F) The name of the contractor and place of performance.

(G) The number and work location of contractor and subcontractor employees, expressed as full-time equivalents for direct labor, compensated under the contract.

(H) Whether the contract is a personal services contract.

(I) Whether the contract was awarded on a noncompetitive basis, regardless of date of award.

Section 743(c) of the Consolidated Appropriations Act, 31 U.S.C. 501 note, requires agencies to ''publish in the **Federal Register** a notice that the inventory is available to the public.'' OMB also requires that agencies submit an analysis of the previous year's inventory and a plan for how the agency will analyze the current year's inventory.

Consequently, through this notice, we are announcing that the CPSC's service contract inventory for FY 2021 is available to the public.[1] The inventory provides information on service contract actions that the CPSC made in Fiscal Year (FY) 2021 per the Federal Acquisition Regulation (FAR) requirements in FAR part 4.1703. The information is organized by function to show how contracted resources are distributed throughout the CPSC. OMB posted a consolidated government-wide Service Contract Inventory for FY 2021 at *https://www.acquisition.gov/service-contract-inventory.* You can access the CPSC's inventories by limiting the ''Contracting Agency Name'' field on each spreadsheet to ''Consumer Product Safety Commission.''

Additionally, CPSC's Division of Procurement Services has posted CPSC's FY 2020 service contract inventory analysis and the plan for analyzing the FY 2021 inventory on CPSC's website at the following link: *https://www.cpsc.gov/Agency-Reports/Service-Contract-Inventory.*

Alberta Mills,

Secretary, Consumer Product Safety Commission.

[FR Doc. 2023–24570 Filed 11–6–23; 8:45 am]

BILLING CODE 6355–01–P

[1] On October 31, 2023, the Commission voted (4–0) to publish this notice.

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD–2023–OS–0107; Req No. OS–2024–00035–FR]

Privacy Act of 1974; System of Records

AGENCY: Office of the Secretary of Defense (OSD), Department of Defense (DoD).

ACTION: Notice of a modified system of records.

SUMMARY: In accordance with the Privacy Act of 1974, the Office of the Secretary of Defense is modifying a system of records titled, ''Joint Advertising, Market Research & Studies (JAMRS) Survey Database,'' DHRA 05. The records within this system are used to compile names of individuals aged 16 through maximum recruiting age to create a mailing frame from which to conduct surveys. These surveys are conducted multiple times per year and designed so that appropriate levels of precision are achieved for inferences to be made at various geographic levels. The system also maintains the ability to remove the names of individuals who are current/former members of, or are enlisting in, the Armed Forces, and individuals who have asked to be removed from consideration as a participant in any future survey. The DHRA 05 system of records notice (SORN) is being updated to add two new DoD Standard routine uses (Routine Uses I and J) which authorize disclosures to allow for coordination with the Office of Inspector General and other disclosures mandated by Federal statute or treaty. The DoD is also modifying various other sections within the SORN to improve clarity or update information that has changed.

DATES: This system of records is effective upon publication; however, comments on the Routine Uses will be accepted on or before December 7, 2023. The Routine Uses are effective at the close of the comment period.

ADDRESSES: You may submit comments, identified by docket number and title, by either of the following methods:

* *Federal Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

* *Mail:* Department of Defense, Office of the Assistant to the Secretary of Defense for Privacy, Civil Liberties, and Transparency, Regulatory Directorate, 4800 Mark Center Drive, Attn: Mailbox 24, Suite 08D09, Alexandria, VA 22350–1700.

Instructions: All submissions received must include the agency name and

docket number for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT:

Samuel M. Peterson, DHRA Component Privacy Officer, 400 Gigling Rd., Rm. DODC–MB 7028, Seaside, CA 93955, *dodhra.mc-alex.dhra-hq.mbx.privacy@mail.mil* or 831–220–7330.

SUPPLEMENTARY INFORMATION:

I. Background

This system of records covers information maintained in the Joint Advertising, Market Research & Studies (JAMRS) Survey Database, which DoD uses for surveying efforts in support of military recruiting. JAMRS maintains and regularly updates a list of recruitment-aged individuals which is used by DoD to draw samples for surveys within the database. The objective of such surveys is to understand the perceptions, beliefs, and attitudes of recruitment-aged Americans as they relate to joining the Military through surveys. Subject to public comment, the OSD is updating this SORN to add two new DoD Standard routine uses (Routine Uses I and J) which authorize disclosures to allow for coordination with an Office of Inspector General and other disclosures mandated by Federal statute or treaty. In addition to updating the routine use section, the other modifications are to the following sections: (1) System Location to update the address, (2) Authority for Maintenance of the System to update citation(s); (3) Purpose of the System to improve clarity; (4) Categories of Records to provide clarity; (5) Records Source Categories to add additional sources; (6) Policies and Practices for Storage of Records to account for the use of Government-validated Cloud Computing environments; (7) Policies and Practices For Retrieval of Records for clarity; (8) Administrative, Technical, and Physical Safeguards to update the description of safeguards protecting these records; (9) to the Record Access, Notification, and Contesting Record Procedures, to reflect the updated guidance for accessing records and to update the appropriate citation for contesting records. Furthermore, this notice includes non-substantive changes to simplify the formatting and text of the previously published notice.

DoD SORNs have been published in the **Federal Register** and are available from the address in **FOR FURTHER INFORMATION CONTACT** or at the Privacy, Civil Liberties, and Freedom of Information Directorate website at *https://dpcld.defense.gov/privacy.*

II. Privacy Act

Under the Privacy Act, a ''system of records'' is a group of records under the control of an agency from which information is retrieved by the name of an individual or by some identifying number, symbol, or other identifying particular assigned to the individual. In the Privacy Act, an individual is defined as a U.S. citizen or lawful permanent resident.

In accordance with 5 U.S.C. 552a(r) and Office of Management and Budget (OMB) Circular No. A–108, the Office of the Assistant to the Secretary of Defense for Privacy, Civil Liberties, and Transparency has provided a report of this system of records to the OMB and to Congress.

Dated: November 2, 2023.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

SYSTEM NAME AND NUMBER:

Joint Advertising, Market Research & Studies Survey Database (JAMRS), DHRA 05.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

Department of Defense (Department or DoD), located at 1000 Defense Pentagon, Washington, DC 20301–1000, and other Department installations, offices, or mission locations. Information may also be stored within a government-certified cloud, implemented and overseen by the Department's Chief Information Officer (CIO), 6000 Defense Pentagon, Washington, DC 20301–6000.

SYSTEM MANAGER(S):

Program Manager, Defense Personnel Analytics Center, Office of People Analytics, Joint Advertising, Market Research & Studies (JAMRS), Suite 06J25, 4800 Mark Center Drive, Alexandria, VA 22350–4000; email: *info@jamrs.org.*

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

10 U.S.C. 503(a), Enlistments: Recruiting campaigns; 10 U.S.C. 136, Under Secretary of Defense for Personnel and Readiness; 10 U.S.C. 4001, Research and development projects; 10 U.S.C. 7013, Secretary of the Army; 10 U.S.C. 8013, Secretary of the Navy; 10 U.S.C. 9013, Secretary of the Air Force; and 14 U.S.C. 350, Coast Guard.

PURPOSE(S) OF THE SYSTEM:

To compile names, demographic information, and contact information of individuals aged 16 through maximum recruiting age to create a mailing frame from which to conduct surveys. Survey respondents are randomly selected from the mailing frame data for the administration of mail-based surveys within the survey sampling administrative database. These surveys cover numerous topics related to interest and knowledge of military service and are conducted multiple times per year. Each survey is designed so that appropriate levels of precision are achieved for inferences to be made at various geographic levels. The system also provides JAMRS with the ability to remove the names of individuals who are current/former members of, or are enlisting in, the Armed Forces, and individuals who have asked to be removed from consideration as a participant in any future JAMRS surveys.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

A. Individuals aged 16 through maximum recruiting age; Selective Service System registrants; individuals who have taken the Armed Services Vocational Aptitude Battery (ASVAB) test; current military personnel who are on Active Duty or in the Reserves; prior service individuals who still have remaining Military Service Obligation (commonly known as the Individual Ready Reserve or IRR); individuals who are in the process of enlisting or enrolled in ROTC (commonly known as the Military Entrance Program Command (MEPCOM) applicant file).

B. Individuals who have asked to be removed from consideration as a participant in any future JAMRS survey. Opt-Out Information: Individuals who are 15½ years old or older, or parents or legal guardians acting on behalf of individuals who are between the ages of 15½ and 18 years old, seeking to have their name or the name of their child or ward, as well as other identifying data, removed from this system of records (or removed in the future when such information is obtained), should address written Opt-Out requests to Joint Advertising, Marketing Research & Studies (JAMRS), ATTN: Survey Project Officer, Suite 06J25, 4800 Mark Center Drive, Alexandria, VA 22350–4000. Such requests must contain the full name, date of birth, and current address of the individual. Opt-Out requests will

be honored until the individual is no longer eligible for recruitment. However, because Opt-Out screening is based, in part, on the current address of the individual, any change in address will require the submission of a new opt-out request with the new address.

CATEGORIES OF RECORDS IN THE SYSTEM:

Name, gender, mailing address, date of birth, ethnicity, Armed Services Vocational Aptitude Battery (ASVAB) test results, and information source code.

Note 1: For individuals who have submitted an opt-out request to JAMRS, the system maintains the individuals' information in suppression files. The suppression files ensure those individuals are not contacted.

Note 2: Individuals' survey responses are not maintained in this system of records. DoD de-identifies JAMRS survey responses and does not maintain an association between the results and the individual's record in this system of records.

RECORD SOURCE CATEGORIES:

Records and information stored in this system of records are obtained from: Individuals (or their parents/guardians), including those who have submitted an opt-out request; State Department of Motor Vehicle offices; commercial information brokers/vendors (to obtain high-school and college directory information); the Selective Service System; the Defense Manpower Data Center; the United States Military Entrance Processing Command (for individuals who have taken the ASVAB test); and the Direct Marketing Association (for the National Do-Not Mail List).

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act of 1974, as amended, all or a portion of the records or information contained herein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

A. To contractors, grantees, experts, consultants, students, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for the Federal Government when necessary to accomplish an agency function related to this system of records.

B. To the appropriate Federal, State, local, territorial, tribal, foreign, or international law enforcement authority or other appropriate entity where a record, either alone or in conjunction with other information, indicates a violation or potential violation of law, whether criminal, civil, or regulatory in nature.

C. To any component of the Department of Justice for the purpose of representing the DoD, or its components, officers, employees, or members in pending or potential litigation to which the record is pertinent.

D. In an appropriate proceeding before a court, grand jury, or administrative or adjudicative body or official, when the DoD or other Agency representing the DoD determines that the records are relevant and necessary to the proceeding; or in an appropriate proceeding before an administrative or adjudicative body when the adjudicator determines the records to be relevant to the proceeding.

E. To the National Archives and Records Administration for the purpose of records management inspections conducted under the authority of 44 U.S.C. 2904 and 2906.

F. To a Member of Congress or staff acting upon the Member's behalf when the Member or staff requests the information on behalf of, and at the request of, the individual who is the subject of the record.

G. To appropriate agencies, entities, and persons when (1) the DoD suspects or confirms a breach of the system of records; (2) the DoD determines as a result of the suspected or confirmed breach there is a risk of harm to individuals, the DoD (including its information systems, programs, and operations), the Federal Government, or national security; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with the DoD's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm.

H. To another Federal agency or Federal entity, when the DoD determines that information from this system of records is reasonably necessary to assist the recipient agency or entity in (1) responding to a suspected or confirmed breach or (2) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, programs and operations), the Federal Government, or national security, resulting from a suspected or confirmed breach.

I. To another Federal, State or local agency for the purpose of comparing to the agency's system of records or to non-Federal records, in coordination with an Office of Inspector General in conducting an audit, investigation, inspection, evaluation, or some other review as authorized by the Inspector General Act.

J. To such recipients and under such circumstances and procedures as are mandated by Federal statute or treaty.

K. To the Department of Homeland Security to support the development of advertising and market research targeted at prospective United States Coast Guard recruits.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Records may be stored electronically in secure facilities behind a locked door. Electronic records may be stored locally on digital media; in agency-owned cloud environments; or in vendor Cloud Service Offerings certified under the Federal Risk and Authorization Management Program (FedRAMP).

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Records are retrieved by name, address, and date of birth.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

System records are destroyed/deleted 1 year after the JAMRS survey contact list has been created. Contact information of individuals who wish to be removed (Opt-Out suppression files) is retained for ten (10) years from the date the information is added.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

Access to information in the database is highly restricted and limited to those that require the records in the performance of their official duties. Personnel with access to the database have completed background security checks and have been provided Common Access Cards. The database complies with DoD cloud computing policy and procedural guidance as published. The database utilizes a layered approach of overlapping controls, monitoring, and authentication to ensure overall security of the data, network, and system resources. The use of information security continuous monitoring support the maintenance of ongoing awareness of information security, vulnerabilities, and threats to support organizational risk management decisions. Sophisticated physical security, perimeter security (firewall, intrusion prevention), access control, authentication, encryption, data transfer, and monitoring solutions prevent unauthorized access from internal and external sources. The following administrative controls are also applied to restrict access to those who require the data in the performance

of their official duties: periodic security audits; regular monitoring of users' security practices; methods to ensure only authorized personnel have access to personally identifiable information; encryption of backups containing sensitive data; and backup's secured offsite.

RECORD ACCESS PROCEDURES:

Individuals seeking access to their records should follow the procedures in 32 CFR part 310. Parents and guardians of minor children must follow the procedures in 32 CFR 310.3(d) to obtain access to records of the child. These procedures require the parent or legal guardian to establish: (1) The identity of the individual who is the subject of the record; (2) the parent/guardian's own identity; (3) that the requester is the parent or guardian of that individual, which may be proven by providing a copy of the individual's birth certificate showing parentage or a court order establishing the guardianship; and (4) that the parent or guardian is acting on behalf of the individual in making the request. Individuals should address written inquiries to the Office of the Secretary of Defense/Joint Staff, Freedom of Information Act Requester Service Center, Office of Freedom of Information, 1155 Defense Pentagon, Washington, DC 20301–1155. Signed, written requests should contain the name and number of this system of records notice along with the name, date of birth, current address, and email address of the individual. In addition, the requester must provide either a notarized statement or an unsworn declaration made in accordance with 28 U.S.C. 1746, in the appropriate format:

If executed outside the United States: ''I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date). (Signature).''

If executed within the United States, its territories, possessions, or commonwealths: ''I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature).''

CONTESTING RECORD PROCEDURES:

The DoD rules for accessing records, contesting contents, and appealing initial Component determinations are contained in 32 CFR part 310, or may be obtained from the system manager.

NOTIFICATION PROCEDURES:

Individuals seeking to determine whether information about themselves is contained in this system of records should follow the instructions for Record Access Procedures above.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

October 25, 2018, 83 FR 53856. December 22, 2011, 76 FR 795661.

[FR Doc. 2023–24612 Filed 11–6–23; 8:45 am]

BILLING CODE 6001–FR–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2023–SCC–0150]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Charter Online Management and Performance System (COMPS) CMO Grant Profile

AGENCY: Office of Elementary and Secondary Education (OESE), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act (PRA) of 1995, the Department is proposing a new information collection request (ICR).

DATES: Interested persons are invited to submit comments on or before December 7, 2023.

ADDRESSES: Written comments and recommendations for proposed information collection requests should be submitted within 30 days of publication of this notice. Click on this link *www.reginfo.gov/public/do/PRAMain* to access the site. Find this information collection request (ICR) by selecting ''Department of Education'' under ''Currently Under Review,'' then check the ''Only Show ICR for Public Comment'' checkbox. *Reginfo.gov* provides two links to view documents related to this information collection request. Information collection forms and instructions may be found by clicking on the ''View Information Collection (IC) List'' link. Supporting statements and other supporting documentation may be found by clicking on the ''View Supporting Statement and Other Documents'' link.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Stephanie Jones, (202) 453–7498.

SUPPLEMENTARY INFORMATION: The Department is especially interested in public comment addressing the following issues: (1) is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Charter Online Management and Performance System (COMPS).

CMO Grant Profile.

OMB Control Number: 1810–NEW.

Type of Review: New ICR.

Respondents/Affected Public: State, Local, and Tribal Governments.

Total Estimated Number of Annual Responses: 45.

Total Estimated Number of Annual Burden Hours: 360.

Abstract: This request is for a new OMB approval to collect the Grant Profile data from Charter School Programs (CSP) Replication and Expansion of High-Quality Charter Schools (CMO) grantees. The Charter School Programs (CSP) was originally authorized under title V, part B, subpart 1, sections 5201 through 5211 of the Elementary and Secondary Education Act (ESEA) of 1965, as amended by the No Child Left Behind (NCLB) Act of 2001. For fiscal year 2017 and thereafter, ESEA has been amended by the Every Student Succeeds Act (ESSA), (20USC 7221–7221i), which reserves funds to improve education by supporting innovation in public education and to: (2) provide financial assistance for the planning, program design, and initial implementation of charter schools; (3) increase the number of high-quality charter schools available to students across the United States; (4) evaluate the impact of charter schools on student achievement, families, and communities, and share best practices between charter schools and other public schools; (5) encourage States to provide support to charter schools for facilities financing in an amount more nearly commensurate to the amount States typically provide for traditional public schools; (6) expand opportunities for children with disabilities, English learners, and other traditionally underserved students to attend charter schools and meet the challenging State academic standards; (7) support efforts to strengthen the charter school authorizing process to improve performance management, including transparency, oversight and monitoring (including financial audits), and evaluation of such schools; and (8) support quality, accountability, and

transparency in the operational performance of all authorized public chartering agencies, including State educational agencies, local educational agencies, and other authorizing entities.

The U.S. Department of Education (ED) is requesting authorization to collect data from CSP grantees within the CMO program through a new online platform. In 2022, ED began development of a new data collection system, the Charter Online Management and Performance System (COMPS), designed specifically to reduce the burden of reporting for users and increase validity of the overall data. This new collection consists of questions responsive to the actions established in the program's final rule published in the **Federal Register** on July 6, 2022, as well as the CMO program Notice Inviting Applications (NIA). This collection request is a consolidation of all previously established program data collection efforts and provides a more comprehensive representation of grantee performance.

Dated: November 1, 2023.

Kun Mullan,

PRA Coordinator, Strategic Collections and Clearance, Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.

[FR Doc. 2023–24535 Filed 11–6–23; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2023–SCC–0131]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; eZ-Audit: Electronic Submission of 90/10 Revenue Attestations for Proprietary Institutions

AGENCY: Federal Student Aid (FSA), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act (PRA) of 1995, the Department is proposing a new information collection request (ICR).

DATES: Interested persons are invited to submit comments on or before December 7, 2023.

ADDRESSES: Written comments and recommendations for proposed information collection requests should be submitted within 30 days of publication of this notice. Click on this link *www.reginfo.gov/public/do/PRAMain* to access the site. Find this information collection request (ICR) by selecting ''Department of Education'' under ''Currently Under Review,'' then check the ''Only Show ICR for Public Comment'' checkbox. *Reginfo.gov* provides two links to view documents related to this information collection request. Information collection forms and instructions may be found by clicking on the ''View Information Collection (IC) List'' link. Supporting statements and other supporting documentation may be found by clicking on the ''View Supporting Statement and Other Documents'' link.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Beth Grebeldinger, 202–377–4018.

SUPPLEMENTARY INFORMATION: The Department is especially interested in public comment addressing the following issues: (1) is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: eZ-Audit: Electronic Submission of 90/10 Revenue Attestations for Proprietary Institutions.

OMB Control Number: 1845–NEW.

Type of Review: A new ICR.

Respondents/Affected Public: Private Sector.

Total Estimated Number of Annual Responses: 157,500.

Total Estimated Number of Annual Burden Hours: 2,042.

Abstract: This is a new information collection request for the eZ-Audit—Electronic Submission of 90/10 Revenue Attestation for Proprietary Institutions. The request includes updates to the collection for domestic and foreign proprietary/for-profit schools' 90/10 Revenue Attestation, and updates to the 90/10 Revenue Attestation calculation and reporting requirements per The American Rescue Plan of 2021 (ARP) which amended the Higher Education Act (HEA) of 1965 and the update in regulatory requirements made to 34 CFR 668.28.

Dated: November 1, 2023.

Kun Mullan,

PRA Coordinator, Strategic Collections and Clearance, Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.

[FR Doc. 2023–24533 Filed 11–6–23; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Bonneville Power Administration

[BPA File No.: TC–25]

Proposed Modifications to Open Access Transmission Tariff; Public Hearing and Opportunities for Public Review and Comment

AGENCY: Bonneville Power Administration (Bonneville), Department of Energy (DOE).

ACTION: Notice of public hearing and opportunity to review and comment.

SUMMARY: Bonneville is initiating a proceeding pursuant to Bonneville's open access transmission tariff (Tariff) and the Federal Power Act to modify the non-rate terms and conditions for transmission and interconnection services in the Tariff. The proposed modifications to Bonneville's Tariff implement a first-ready, first-served cluster study process for all new large generator interconnection requests and establish the transition process available for pending requests received in Bonneville's queue as of 15 days after publication of this notice. The proposed modifications will be effective on June 30, 2024. Bonneville has designated this proceeding Docket No. TC–25.

DATES: *Prehearing Conference:* The TC–25 tariff proceeding will begin with a prehearing conference, which will be held virtually via WebEx at 10 a.m. on Tuesday, November 14, 2023.

Intervention: Anyone intending to become a party to the TC–25 tariff proceeding must file a petition to intervene on Bonneville's secure website. Petitions to intervene may be filed beginning on the date of publication of this notice and are due no later than 4:30 p.m. on Thursday, November 16, 2023. Part III of this notice, ''Public Participation in TC–25,'' provides details on requesting access to the secure website and filing a petition to intervene.

ADDRESSES: Interested parties may obtain call-in information by accessing Bonneville's TC–25 tariff proceeding web page at *https://www.bpa.gov/goto/tc25* or by contacting the Hearing Clerk at *tc25clerk@gmail.com.*

Participant Comments: Written comments by non-party participants must be received by Wednesday, November 22, 2023, to be considered in the Hearing Officer's recommended decision and the Administrator's Record of Decision (ROD). See Part III of this notice for more information about submitting participant comments.

FOR FURTHER INFORMATION CONTACT: Nicholas Quinata, DKP–7, BPA Communications, Bonneville Power Administration, P.O. Box 3621, Portland, Oregon 97208; by phone toll-free at 1–800–622–4519; or by email to *nyquinata@bpa.gov.*

The Hearing Clerk for this proceeding can be reached via email at *tc25clerk@gmail.com* or via telephone at (503) 479–8506.

Please direct questions regarding Bonneville's secure website to the Hearing Coordinator via email at *cwgriffen@bpa.gov* or, if the question is time-sensitive, via telephone at (503) 230–5107.

Responsible Official: Rebecca Fredrickson, Manager of Transmission Rates, Tariff, Regulatory and Compliance, is the official responsible for the development of Bonneville's open access transmission tariff.

SUPPLEMENTARY INFORMATION:

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Part I. Introduction and Procedural Matters
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Part III. Public Participation in TC–25
Part IV. Summary of Proposed Modifications to Bonneville's Tariff
Part V. Proposed Tariff

Part I—Introduction and Procedural Matters

A. Introduction and Procedural Background

The Bonneville Project Act of 1937, as reaffirmed in the Pacific Northwest Electric Power Planning and Conservation Act, grants the Bonneville Administrator broad authority to enter into contracts upon such terms and conditions and in such manner as the Bonneville Administrator may deem necessary. Bonneville's Tariff provides the generally applicable terms and conditions for transmission and interconnection service across the Federal Columbia River Transmission System (FCRTS). Section 9 of the Tariff provides that the Bonneville Administrator may use the procedures set forth in Section 212(i)(2)(A) of the Federal Power Act to establish and modify non-rate terms and conditions of the Tariff. The Section 212(i)(2)(A) procedures include giving notice in the **Federal Register** and conducting a hearing that adheres to the procedural requirements of paragraphs (1) through (3) of Section 7(i) of the Northwest Power Act, 16 U.S.C. 839e(i) (the same procedures Bonneville uses to set rates). In accordance with these procedures, the Hearing Officer conducts one or more hearings as expeditiously as practicable to develop a full and complete record. Unless the Hearing Officer becomes unavailable to Bonneville, upon conclusion of the hearing, the Hearing Officer shall make a recommended decision to the Bonneville Administrator, and the Bonneville Administrator then makes a separate and final determination to establish or modify the Tariff terms and conditions (discussed further in Part III, Section C of this notice).

Bonneville's Rules of Procedure govern the TC–25 tariff proceedings. The rules are posted on Bonneville's website at *https://www.bpa.gov/energy-and-services/rate-and-tariff-proceedings/rules-of-procedure-revision-process.*

B. Proposed Settlement for Modifications to the Tariff

Starting in June, Bonneville engaged its transmission and interconnection customers and stakeholders in an attempt to reach settlement of the modifications to the Tariff for the TC–25 tariff proceeding. These discussions have resulted in the TC–25 Settlement Agreement, which includes the proposed Tariff modifications Bonneville is proposing to adopt in the TC–25 tariff proceeding. On September 1, 2023, Bonneville posted the TC–25 Settlement Agreement on Bonneville's website and set a deadline of September 15, 2023, for customers and stakeholders to inform Bonneville of any objections to the settlement. Bonneville did not receive any objections by the deadline. A summary of Bonneville's proposed Tariff modifications is provided in Part IV of this notice. A link to the TC–25 Settlement Agreement and proposed Tariff are provided in Part V.

The TC–25 Settlement Agreement calls for Bonneville to file a motion with the Hearing Officer to establish a deadline for parties to either object to the proposed settlement or waive the right to contest the settlement. If no parties object to the settlement by the deadline set by the Hearing Officer, Bonneville's motion would request the Hearing Officer to issue a decision recommending the Bonneville Administrator adopt the TC–25 Settlement Agreement. Bonneville intends to file its motion soon after the TC–25 prehearing conference.

If a party objects to the TC–25 Settlement Agreement, Bonneville will notify all parties and decide how to proceed with respect to the Tariff modifications in the initial proposal.

C. Proposed Procedural Schedule

A proposed schedule for the proceeding is provided below. The proposed schedule assumes there are no objections to the proposed settlement in the TC–25 tariff proceeding. The official schedule will be established by the Hearing Officer and may be amended by the Hearing Officer as needed during the proceeding.

Prehearing Conference—November 14, 2023
BPA Files Initial Proposal—November 14, 2023
Deadline for Petitions to Intervene—November 16, 2023
Deadline for Objections to Settlement Agreement—November 22, 2023
Close of Participant Comments—November 22, 2023
Hearing Officer's Recommended Decision Issued—December 15, 2023
Final ROD—January 26, 2024

D. Ex Parte Communications

Section 1010.5 of the Rules of Procedure prohibits *ex parte* communications. *Ex parte* communications include any oral or written communication (1) relevant to the merits of any issue in the proceeding; (2) that is not on the record; and (3) with respect to which reasonable prior notice has not been given. The *ex parte* rule applies to communications with all Bonneville and DOE employees and contractors, the Hearing Officer, and the Hearing Clerk during the proceeding. Except as provided, any communications with persons covered by the rule regarding the merits of any issue in the proceeding by other Executive Branch agencies, Congress, existing or potential Bonneville customers, nonprofit or public interest groups, or any other non-DOE parties are prohibited. The rule explicitly excludes and does not prohibit communications (1) relating to matters of procedure; (2) otherwise authorized by law or the Rules of Procedure; (3) from or to the Federal Energy Regulatory Commission (Commission); (4) that all litigants agree may be made on an *ex parte* basis; (5) in the ordinary course of business, about information required to be exchanged under contracts, or in information responding to a Freedom of Information Act request; (6) between the Hearing Officer and Hearing Clerk; (7) in meetings for which prior notice has been given; or (8) otherwise specified in Section 1010.5(b) of the Rules of

Procedure. The *ex parte* rule remains in effect until the Bonneville Administrator's Final ROD is issued.

Part II—Scope of the TC–25 Tariff Proceeding

The TC–25 tariff proceeding involves the proposed modifications to Bonneville's Tariff described in Part IV. This section provides guidance to the Hearing Officer regarding the specific issues that are outside the scope of the TC–25 tariff proceeding. In addition to the issues specifically listed below, any other issue that is not a Tariff term or condition issue is outside the scope of this proceeding.

Bonneville may revise the scope of the proceeding to include new issues that arise as a result of circumstances or events occurring outside the proceeding that are substantially related to the Tariff terms and conditions under consideration in the proceeding. *See* Rules of Procedure Section 1010.4(b)(8)(iii), (iv). If Bonneville revises the scope of the proceeding to include new issues, Bonneville will provide public notice on its website, present testimony or other information regarding such issues, and provide a reasonable opportunity to intervene and respond to Bonneville's testimony or other information. *Id.*

A. Business Practices

Bonneville's business practices provide implementation details for the Tariff and are outside the scope of the TC–25 tariff proceeding. Bonneville's decisions regarding the business practices are determined in other forums and follow the procedures in Bonneville's Business Practice Process. If business practices are developed for the proposed terms and conditions in this proceeding, such development will occur outside the terms and conditions proceeding. Pursuant to Section 1010.4(b)(8) of the Rules of Procedure, the Bonneville Administrator directs the Hearing Officer to exclude from the record all argument, testimony, or other evidence that proposes or challenges Bonneville's current and future business practices.

B. Customer-Specific Contracts and Disputes

Contracts and contract disputes between Bonneville and its customers are outside the scope of the TC–25 tariff proceeding. Pursuant to Section 1010.4(b)(8) of the Rules of Procedure, the Bonneville Administrator directs the Hearing Officer to exclude from the record all argument, testimony, or other evidence related to contracts and contract disputes of Bonneville customers.

C. Oversupply Management Protocol

The Oversupply Management Protocol (Tariff Attachment P) includes the Tariff requirements and procedures used to moderate total dissolved gas levels in the Columbia River to protect endangered fish and other aquatic species. Bonneville does not propose to modify the terms of the Oversupply Management Protocol in the TC–25 tariff proceeding. Pursuant to Section 1010.4(b)(8) of the Rules of Procedure, the Bonneville Administrator directs the Hearing Officer to exclude from the record all argument, testimony, or other evidence related to the terms of the Oversupply Management Protocol (Tariff Attachment P), including whether the Oversupply Management Protocol complies with orders of the Commission; whether Bonneville took all actions to avoid using the Oversupply Management Protocol, including the payment of negative prices to generators outside of Bonneville's balancing authority area; and issues concerning the rates for recovering the costs of the Oversupply Management Protocol.

D. Program Cost Estimates

Bonneville's projections of its program costs and spending levels are not determined in terms and conditions proceedings and are outside the scope of the TC–25 tariff proceeding. These projections are determined by Bonneville in other forums, such as the Integrated Program Review public process, with input from stakeholders. Pursuant to Section 1010.4(b)(8) of the Rules of Procedure, the Bonneville Administrator directs the Hearing Officer to exclude from the record all argument, testimony, or other evidence that challenges the appropriateness or reasonableness of the Bonneville Administrator's decisions on costs and spending levels.

E. Rates

Pursuant to Bonneville's statutes, it must set rates to recover costs associated with providing power and transmission services. Bonneville's decisions regarding rates are outside the scope of the TC–25 tariff proceeding. Pursuant to Section 1010.4(b)(8) of the Rules of Procedure, the Bonneville Administrator directs the Hearing Officer to exclude from the record all argument, testimony, or other evidence related to rates, or that challenges the appropriateness or reasonableness of the Bonneville Administrator's decisions on rates or seeks in any way to propose revisions to the rates, including rate schedules, rate schedule provisions, rate designs, rate methodologies, rate forecasts, interest expense and credit, Treasury repayment schedules, non-Federal debt repayment schedules, revenue financing, calculation of depreciation and amortization expense, forecasts of system replacements used in repayment studies, transmission acquisition expenses incurred by Power Services, generation acquisition expenses, minimum required net revenue, increase in, or the use of, financial reserves, and the costs of risk mitigation actions resulting from the expense and revenue uncertainties included in the risk analysis.

Part III—Public Participation in TC–25

A. Distinguishing Between ''Participants'' and ''Parties''

Bonneville distinguishes between ''participants in'' and ''parties to'' the TC–25 tariff proceeding. Separate from the formal hearing process, Bonneville will receive written comments, views, opinions, and information from participants, who may submit comments without being subject to the duties of, or having the privileges of, parties. Participants are not entitled to participate in the prehearing conference; may not cross-examine parties' witnesses, seek discovery, or serve or be served with documents; and are not subject to the same procedural requirements as parties. Bonneville customers that will receive transmission or interconnection service under the terms and conditions of the Tariff, or their affiliated customer groups, may not submit participant comments. Members or employees of organizations that have intervened in the proceeding may submit participant comments as private individuals (that is, not speaking for their organizations), but may not use the comment procedures to address specific issues raised by their intervener organizations.

Written comments by participants will be included in the record and considered by the Hearing Officer and the Bonneville Administrator if they are received by Wednesday, November 22, 2023. Participants should submit comments through Bonneville's website at *www.bpa.gov/comment* or in hard copy to: BPA Public Involvement, DKS–7, Bonneville Power Administration, P.O. Box 3621, Portland, Oregon 97208. All comments should contain the designation ''TC–25'' in the subject line.

B. Interventions

Any entity or person intending to become a party in the TC–25 tariff

proceeding must file a petition to intervene through Bonneville's secure website (*https://ratecase.bpa.gov/*). A first-time user of Bonneville's secure website must create a user account to submit an intervention. Returning users may request access to the TC–25 tariff proceeding through their existing accounts and may submit interventions once their permissions have been updated. The secure website contains a link to the user guide, which provides step-by-step instructions for creating user accounts, generating filing numbers, submitting filings, and uploading interventions. Please contact the Hearing Coordinator via email at *cwgriffen@bpa.gov* or, if the question is time-sensitive, via telephone at (503) 230–5107 with any questions regarding the submission process. A petition to intervene must conform to the format and content requirements set forth in Bonneville's Rules of Procedure Sections 1010.6 and 1010.11 and must be uploaded to the TC–25 tariff proceeding secure website by the deadline established in the procedural schedule.

A petition to intervene must state the name and address of the entity or person requesting party status and the entity or person's interest in the hearing. Bonneville customers and affiliated customer groups will be granted intervention based on petitions filed in conformance with Rules of Procedure. Other petitioners must explain their interests in sufficient detail to permit the Hearing Officer to determine whether the petitioners have a relevant interest in the hearing. The deadline for opposing a timely intervention is two business days after the deadline for filing petitions to intervene. Bonneville or any party may oppose a petition for intervention. All petitions will be ruled on by the Hearing Officer. Late interventions are strongly disfavored. Opposition to an untimely petition to intervene must be filed within two business days after service of the petition.

C. Developing the Record

The hearing record will include, among other things, the transcripts of the hearing, written evidence and arguments entered into the record by Bonneville and the parties, written comments from participants, and other material accepted into the record by the Hearing Officer. Upon conclusion of the hearing, the Hearing Officer will develop a recommended decision for the Bonneville Administrator. The Hearing Officer's recommended decision must be based on the record and include the Hearing Officer's findings and conclusions, including the reasons or bases thereof, on all material issues of fact, law, or discretion raised by the parties in their initial briefs. The Hearing Officer will review and certify the record to the Bonneville Administrator for final decision.

The Bonneville Administrator will make a final determination establishing or modifying Tariff terms and conditions based on the record, the Hearing Officer's recommended decision, and such other materials and information as may have been submitted to or developed by the Bonneville Administrator. The Final ROD will be made available to all parties.

Part IV—Summary of Proposed Modifications to Bonneville's Tariff

In this proceeding, Bonneville proposes to adopt, effective June 30, 2024, modifications to the large generator interconnection procedures (LGIP) in Attachment L to the Tariff and a new Attachment R to the Tariff that would provide for a transition to the modified LGIP. As described above, the specific Tariff modifications at issue are reflected in the TC–25 Settlement Agreement that was developed in discussions with customers and other stakeholders earlier this year.

The LGIP is Bonneville's procedure for interconnecting generating facilities larger than 20 megawatts to the FCRTS. The proposed LGIP would replace the first-come, first-served serial interconnection study process in the current Tariff with a first-ready, first-served cluster study process. Under the proposed first-ready, first-served cluster study process, Bonneville will study a cluster of large generator interconnection requests that meet readiness requirements as opposed to studying each request serially. The proposed modifications to the LGIP include the details necessary to implement the new study process. The proposed modifications also provide for giving customers high-level information early in the interconnection process and allow customers to share costs of identified network upgrades.

The proposed Attachment R includes a process (''Transition Process'') to transition pending interconnection requests received prior to 15 after the publication of this **Federal Register** Notice (''Transition Close Date'') to the first-ready, first-served cluster study process. Under this Transition Process, interconnection requests may apply to continue to be processed in a serial study process or to be included in a Transition Cluster Study. Bonneville will not process any interconnection request submitted after the Transition Close Date until the opening of a new Cluster Request Window, following the requirements in the proposed revisions to the LGIP in Attachment L of Bonneville's Tariff.

Part V—Proposed Tariff

Bonneville's proposed Tariff and the TC–25 Settlement Agreement are part of this notice and available to view and download on Bonneville's website at *https://www.bpa.gov/goto/tc25.*

Signing Authority

This document of the Department of Energy was signed on Tuesday, October 24, 2023, by John L. Hairston, Administrator and Chief Executive Officer of the Bonneville Power Administration, pursuant to delegated authority from the Secretary of Energy. This document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on November 1, 2023.

Treena V. Garrett,

Federal Register Liaison Officer, U.S. Department of Energy.

[FR Doc. 2023–24469 Filed 11–6–23; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

National Nuclear Security Administration Advisory Committee for Nuclear Security

AGENCY: Department of Energy, National Nuclear Security Administration, Office of Defense Programs.

ACTION: Notice of closed meeting.

SUMMARY: This notice announces a closed meeting of the Advisory Committee for Nuclear Security (ACNS). The Federal Advisory Committee Act requires that public notice of meetings be announced in the **Federal Register**. Due to national security considerations, the meeting will be closed to the public and matters to be discussed are exempt from public disclosure under Executive Order 13526, and the Atomic Energy Act of 1954.

DATES: December 5, 2023; 9:00 a.m. to 5:00 p.m.

ADDRESSES: In-Person Meeting.

FOR FURTHER INFORMATION CONTACT: Allyson Koncke-Fernandez, Office of Policy and Strategic Planning (NA–1.1) National Nuclear Security Administration, U.S. Department of Energy, 1000 Independence Ave. SW, Washington, DC 20585, (202) 287–5327, *allyson.koncke-fernandez@nnsa.doe.gov*.

SUPPLEMENTARY INFORMATION:

Background: The ACNS provides advice and recommendations to the Under Secretary Nuclear Security & Administrator, NNSA areas and those of the National Nuclear Security Administration.

Purpose of the Meeting: The Quarterly meeting of the Advisory Committee for Nuclear Security (ACNS) will cover the current status of Committee activities as well as additional charges and is expected to contain discussions of a sensitive nature.

Type of Meeting: In the interest of national security, the meeting will be closed to the public. The Federal Advisory Committee Act, 5 U.S.C. 10, and the Federal Advisory Committee Management Regulation, 41 CFR 102–3.155, incorporate by reference the Government in the Sunshine Act, 5 U.S.C. 552b, which, at 552b(c)(1) and (c)(3) permits closure of meetings where restricted data or other classified matters will be discussed.

Tentative Agenda: Welcome; Headquarters and ACNS Updates; discussion of reports and current actions; discussion of next charges; conclusion.

Public Participation: There will be no public participation in this closed meeting. Those wishing to provide written comments or statements to the Committee are invited to send them to Allyson Koncke-Fernandez at the address listed above.

Minutes: The minutes of the meeting will not be available.

Signed in Washington, DC, on November 1, 2023.

LaTanya Butler,

Deputy Committee Management Officer.

[FR Doc. 2023–24509 Filed 11–6–23; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–1484–031; ER12–2381–017; ER13–1069–020; ER14–1140–007.

Applicants: Inspire Energy Holdings, LLC, MP2 Energy LLC, MP2 Energy NE LLC, Shell Energy North America (US), L.P.

Description: Notice of Change in Status of Shell Energy North America (US), L.P., et. al.

Filed Date: 10/31/23.

Accession Number: 20231031–5330.

Comment Date: 5 p.m. ET 11/21/23.

Docket Numbers: ER10–2126–008.

Applicants: Idaho Power Company.

Description: Notice of Change in Status of Idaho Power Company.

Filed Date: 10/31/23.

Accession Number: 20231031–5314.

Comment Date: 5 p.m. ET 11/21/23.

Docket Numbers: ER10–2354–013.

Applicants: Midway-Sunset Cogeneration Company.

Description: Notice of Non-Material Change in Status of Midway-Sunset Cogeneration Company.

Filed Date: 10/31/23.

Accession Number: 20231031–5337.

Comment Date: 5 p.m. ET 11/21/23.

Docket Numbers: ER12–1470–015; ER10–3026–013; ER16–1833–010.

Applicants: Sempra Gas & Power Marketing, LLC, Termoelectrica U.S., LLC, Energia Sierra Juarez U.S., LLC.

Description: Notice of Change in Status of Energia Sierra Juarez U.S., LLC, et. al.

Filed Date: 10/31/23.

Accession Number: 20231031–5331.

Comment Date: 5 p.m. ET 11/21/23.

Docket Numbers: ER15–1873–018; ER18–471–012; ER23–644–001; ER23–645–001; ER23–646–002; ER23–647–002.

Applicants: Diversion Wind Energy Holdings LLC, Wagon Wheel Wind Project Holdings LLC, Wagon Wheel Wind Project, LLC, Diversion Wind Energy LLC, States Edge Wind I LLC, Buckeye Wind Energy LLC.

Description: Notice of Change in Status of Buckeye Wind Energy LLC, et al.

Filed Date: 10/31/23.

Accession Number: 20231031–5307.

Comment Date: 5 p.m. ET 11/21/23.

Docket Numbers: ER16–1004–002.

Applicants: Roundtop Energy LLC.

Description: Compliance filing: Roundtop Energy Informational Filing to be effective N/A.

Filed Date: 11/1/23.

Accession Number: 20231101–5003.

Comment Date: 5 p.m. ET 11/22/23.

Docket Numbers: ER16–1032–002.

Applicants: Beaver Dam Energy LLC.

Description: Compliance filing: Beaver Dam Energy Informational Filing to be effective N/A.

Filed Date: 11/1/23.

Accession Number: 20231101–5004.

Comment Date: 5 p.m. ET 11/22/23.

Docket Numbers: ER16–1999–002; ER11–4625–008; ER14–608–006; ER16–1644–006; ER16–1998–002; ER16–2000–002; ER16–2001–002; ER16–2002–002; ER16–2003–002; ER16–2006–002; ER19–537–005.

Applicants: MRP San Joaquin Energy, LLC, CalPeak Power—Vaca Dixon LLC, CalPeak Power—Panoche LLC, Midway Peaking, LLC, Malaga Power, LLC, CalPeak Power—Enterprise LLC, CalPeak Power—Border LLC,MRP Generation Holdings, LLC, High Desert Power Project, LLC, Colton Power L.P., CalPeak Power LLC.

Description: Notice of Non-Material Change in Status of CalPeak Power LLC, et. al.

Filed Date: 10/31/23.

Accession Number: 20231031–5341.

Comment Date: 5 p.m. ET 11/21/23.

Docket Numbers: ER17–440–005.

Applicants: Alpaca Energy LLC.

Description: Compliance filing: Alapaca Energy Informational Filing to be effective N/A.

Filed Date: 10/31/23.

Accession Number: 20231031–5272.

Comment Date: 5 p.m. ET 11/21/23.

Docket Numbers: ER17–444–005.

Applicants: Milan Energy LLC.

Description: Compliance filing: Milan Energy Informational Filing to be effective N/A.

*Filed Date:*10/31/23.

Accession Number: 20231031–5278.

Comment Date: 5 p.m. ET 11/21/23.

Docket Numbers: ER17–1742–008; ER13–2490–012; ER17–311–008; ER19–2595–007; ER19–2670–007; ER19–2671–007; ER19–2672–007; ER20–1073–006; ER20–2510–006; ER20–2512–006; ER20–2515–006; ER20–2663–006; ER21–2406–005; ER21–2407–005; ER21–2408–005; ER21–2409–005; ER21–2638–005; ER22–734–004; ER22–2028–003; ER22–2421–002; ER22–2423–002; ER22–2425–002; ER22–2427–002.

Applicants: SR Cedar Springs, LLC, SR Clay, LLC, SR DeSoto I Lessee, LLC, SR DeSoto I, LLC, SR Hazlehurst, LLC, SR Arlington, LLC, SR Perry, LLC, SR Snipesville II, LLC, SR Lumpkin, LLC, SR Georgia Portfolio II Lessee, LLC, Lancaster Solar LLC, SR Snipesville, LLC, SR Georgia Portfolio I MT, LLC, SR Baxley, LLC, Odom Solar LLC, SR Terrell, LLC, SR Arlington II MT, LLC, SR Arlington II, LLC, SR Meridian III, LLC, SR Hazlehurst III, LLC, SR South Loving LLC, Simon Solar, LLC, Hattiesburg Farm, LLC.

Description: Notice of Non-Material Change in Status of Hattiesburg Farm, LLC, et. al.

Filed Date: 10/31/23.
Accession Number: 20231031–5350.
Comment Date: 5 p.m. ET 11/21/23.

Docket Numbers: ER18–2511–006.
Applicants: NorthWestern Corporation.
Description: Notice of Change in Status of NorthWestern Corporation under ER18–2511.
Filed Date: 10/31/23.
Accession Number: 20231031–5332.
Comment Date: 5 p.m. ET 11/30/23.

Docket Numbers: ER19–647–004.
Applicants: Wolf Run Energy LLC.
Description: Compliance filing: Wolf Run Energy Informational Filing to be effective N/A.
Filed Date: 10/31/23.
Accession Number: 20231031–5281.
Comment Date: 5 p.m. ET 11/21/23.

Docket Numbers: ER19–2847–005.
Applicants: Oxbow Creek Energy LLC.
Description: Compliance filing: Oxbow Creek Energy Informational Filing to be effective N/A.
Filed Date: 10/31/23.
Accession Number: 20231031–5279.
Comment Date: 5 p.m. ET 11/21/23.

Docket Numbers: ER23–2234–001; ER23–2233–001; ER23–2235–001; ER23–2236–001; ER23–2237–001; ER23–2238–001; ER23–2240–001; ER23–2241–001; ER23–2242–001; ER23–2243–001; ER23–2244–001; ER23–2245–001.
Applicants: Pixley Solar Energy LLC, Pixley Solar Energy Holdings LLC, Lazbuddie Wind Energy LLC, Lazbuddie Wind Energy Holdings LLC, Flat Ridge 5 Wind Energy LLC, Flat Ridge 5 Wind Energy Holdings LLC, Flat Ridge 4 Wind, LLC, Flat Ridge 4 Wind Holdings LLC, Chisholm Trail Solar Energy LLC, Chisholm Trail Solar Energy Holdings LLC, Algodon Solar Energy Holdings LLC, Algodon Solar Energy LLC.
Description: Notice of Change in Status of Algodon Solar Energy LLC, et al.
Filed Date: 10/31/23.
Accession Number: 20231031–5313.
Comment Date: 5 p.m. ET 11/21/23.

Docket Numbers: ER23–2398–002.
Applicants: Arizona Public Service Company.
Description: Compliance filing: Amendment No. 1 to APS Compliance Filing on Interconnection Reforms to be effective 9/30/2023.
Filed Date: 10/31/23.
Accession Number: 20231031–5268.
Comment Date: 5 p.m. ET 11/21/23.

Docket Numbers: ER24–198–001.
Applicants: El Paso Electric Company.
Description: Tariff Amendment: Service Agreement No. 355, Simultaneous Exchange with Dynasty or Alternative to be effective 12/31/2023.
Filed Date: 10/31/23.
Accession Number: 20231031–5287.
Comment Date: 5 p.m. ET 11/21/23.

Docket Numbers: ER24–274–000.
Applicants: Duke Energy Carolinas, LLC.
Description: 205(d) Rate Filing: DEC-City of Orangeburg PPA Rate Schedule No. 631 to be effective 1/1/2024.
Filed Date: 10/31/23.
Accession Number: 20231031–5261.
Comment Date: 5 p.m. ET 11/21/23.

Docket Numbers: ER24–275–000.
Applicants: ISO New England Inc., New England Power Pool Participants Committee.
Description: 205(d) Rate Filing: ISO New England Inc. submits tariff filing per 35.13(a)(2)(iii): Rev. to Est. a Jointly Optimized Day-Ahead Mkt. for Energy & Ancillary Services to be effective 3/1/2025.
Filed Date: 10/31/23.
Accession Number: 20231031–5266.
Comment Date: 5 p.m. ET 11/21/23.

Docket Numbers: ER24–276–000.
Applicants: New England Power Pool Participants Committee.
Description: 205(d) Rate Filing: Nov 2023 Membership Filing to be effective 11/1/2023.
Filed Date: 10/31/23.
Accession Number: 20231031–5275.
Comment Date: 5 p.m. ET 11/21/23.

Docket Numbers: ER24–277–000.
Applicants: FirstEnergy Pennsylvania Electric Company.
Description: Baseline eTariff Filing: 2023–10–31—Revisions to Agmt to Which Met Ed, Penelec & West Penn are Parties to be effective 10/31/2023.
Filed Date: 10/31/23.
Accession Number: 20231031–5290.
Comment Date: 5 p.m. ET 11/21/23.

Docket Numbers: ER24–278–000.
Applicants: Hartree Partners, LP.
Description: Compliance filing: MBR Change of Status of Hartree Partners, LP to be effective 10/31/2023.
Filed Date: 10/31/23.
Accession Number: 20231031–5292.
Comment Date: 5 p.m. ET 11/21/23.

Docket Numbers: ER24–279–000.
Applicants: NE Renewable Power, LLC.
Description: Compliance filing: MBR Change in Status of NE Renewable Power, LLC to be effective 10/31/2023.
Filed Date: 11/1/23.
Accession Number: 20231101–5000.
Comment Date: 5 p.m. ET 11/22/23.

Docket Numbers: ER24–280–000.
Applicants: EIF Newark, LLC.
Description: Compliance filing: MBR Change in Status of Hartree-Meadowlands Newark, LLC to be effective 10/31/2023.
Filed Date: 11/1/23.
Accession Number: 20231101–5001.
Comment Date: 5 p.m. ET 11/22/23.

Docket Numbers: ER24–281–000.
Applicants: Newark Energy Center, LLC.
Description: Compliance filing: MBR Change in Status of Newark Energy Center, LLC to be effective 10/31/2023.
Filed Date: 11/1/23.
Accession Number: 20231101–5002.
Comment Date: 5 p.m. ET 11/22/23.

Docket Numbers: ER24–282–000.
Applicants: Pacific Gas and Electric Company.
Description: Tariff Amendment: APPENDIX IX : STAR Process Termination TO Tariff to be effective 1/1/2024.
Filed Date: 11/1/23.
Accession Number: 20231101–5005.
Comment Date: 5 p.m. ET 11/22/23.

Docket Numbers: ER24–283–000.
Applicants: Midcontinent Independent System Operator, Inc., ALLETE, Inc.
Description: 205(d) Rate Filing: Midcontinent Independent System Operator, Inc. submits tariff filing per 35.13(a)(2)(iii): 2023–11–01_SA 4162 MP–GRE T–T (Portage Lake) to be effective 10/30/2023.
Filed Date: 11/1/23.
Accession Number: 20231101–5010.
Comment Date: 5 p.m. ET 11/22/23.

The filings are accessible in the Commission's eLibrary system (*https://elibrary.ferc.gov/idmws/search/fercgensearch.asp*) by querying the docket number.

Any person desiring to intervene, to protest, or to answer a complaint in any of the above proceedings must file in accordance with Rules 211, 214, or 206 of the Commission's Regulations (18 CFR 385.211, 385.214, or 385.206) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

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Dated: November 1, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–24593 Filed 11–6–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #2

Take notice that the Commission received the following Complaints and Compliance filings in EL Dockets:

Docket Numbers: EL24–8–000.
Applicants: Elevate Renewables F7, LLC and Parkway Generation Operating LLC v. PJM Interconnection, L.L.C.
Description: Complaint of Elevate Renewables F7, LLC and Parkway Generation Operating LLC v. PJM Interconnection, L.L.C.
Filed Date: 10/31/23.
Accession Number: 20231031–5296.
Comment Date: 5 p.m. ET 11/30/23.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–2437–020.
Applicants: Arizona Public Service Company.
Description: Notice of Change in Status of Arizona Public Service Company.
Filed Date: 10/31/23.
Accession Number: 20231031–5372.
Comment Date: 5 p.m. ET 11/21/23.

Docket Numbers: ER10–2822–025; ER10–1291–026; ER10–2285–009; ER10–2812–019; ER10–2828–008; ER10–3001–008; ER10–3002–008; ER10–3004–009; ER10–3010–008; ER10–3031–008; ER10–3160–006; ER11–2112–012; ER12–96–011; ER12–422–009; ER12–2649–007; ER16–1250–019; ER16–1637–005; ER16–2285–006; ER17–1241–003; ER19–2361–003; ER10–2843–018.
Applicants: GenConn Middletown LLC, Otter Creek Wind Farm LLC, Deerfield Wind, LLC, Desert Wind Farm LLC, UIL Distributed Resources, LLC, Avangrid Renewables, LLC, Groton Wind, LLC, New England Wind, LLC, South Chestnut LLC, Blue Creek Wind Farm LLC, The United Illuminating Company, Streator-Cayuga Ridge Wind Power LLC, Providence Heights Wind, LLC, Locust Ridge Wind Farm II, LLC, Locust Ridge Wind Farm, LLC, Lempster Wind, LLC, Casselman Windpower LLC, GenConn Devon LLC, Central Maine Power Company, GenConn Energy LLC, Atlantic Renewable Projects II LLC.
Description: Notice of Change in Status of Atlantic Renewable Projects II LLC, et. al.
Filed Date: 10/31/23.
Accession Number: 20231031–5357.
Comment Date: 5 p.m. ET 11/21/23.

Docket Numbers: ER16–1720–025.
Applicants: Invenergy Energy Management LLC.
Description: Notice of Change in Status of Invenergy Energy Management LLC.
Filed Date: 10/31/23.
Accession Number: 20231031–5336.
Comment Date: 5 p.m. ET 11/21/23.

Docket Numbers: ER20–1734–006.
Applicants: Alabama Power Company.
Description: Compliance filing: Order No. 864 Settlement and Resubmitted Compliance Filing to be effective 1/27/2020.
Filed Date: 11/1/23.
Accession Number: 20231101–5126.
Comment Date: 5 p.m. ET 11/22/23.

Docket Numbers: ER23–2416–002.
Applicants: PJM Interconnection, L.L.C.
Description: Tariff Amendment: Errata to Designated Entity Agreement, SA No. 7001 in ER23–2416 to be effective 6/16/2023.
Filed Date: 11/1/23.
Accession Number: 20231101–5085.
Comment Date: 5 p.m. ET 11/22/23.

Docket Numbers: ER24–284–000.
Applicants: PJM Interconnection, L.L.C., FirstEnergy Pennsylvania Electric Company, Keystone Appalachian Transmission Company.
Description: 205(d) Rate Filing: PJM Interconnection, L.L.C. submits tariff filing per 35.13(a)(2)(iii: Revisions to OATT, OA and RAA re: FE PA Reorganization to be effective 12/31/9998.
Filed Date: 11/1/23.
Accession Number: 20231101–5066.
Comment Date: 5 p.m. ET 11/22/23.

Docket Numbers: ER24–285–000.
Applicants: PJM Interconnection, L.L.C., FirstEnergy Pennsylvania Electric Company, Keystone Appalachian Transmission Company.
Description: 205(d) Rate Filing: PJM Interconnection, L.L.C. submits tariff filing per 35.13(a)(2)(iii: Revisions to CTOA re: FE PA Reorganization to be effective 12/31/9998.
Filed Date: 11/1/23.
Accession Number: 20231101–5067.
Comment Date: 5 p.m. ET 11/22/23.

Docket Numbers: ER24–286–000.
Applicants: West Penn Power Company, PJM Interconnection, L.L.C.
Description: 205(d) Rate Filing: West Penn Power Company submits tariff filing per 35.13(a)(2)(iii: West Penn Power Company amends One ECSA, SA No. 5268 to be effective 12/31/9998.
Filed Date: 11/1/23.
Accession Number: 20231101–5069.
Comment Date: 5 p.m. ET 11/22/23.

Docket Numbers: ER24–287–000.
Applicants: Midcontinent Independent System Operator, Inc.
Description: 205(d) Rate Filing: 2023–11–01_Schedule 27 Base Output Calculation Update to be effective 1/1/2024.
Filed Date: 11/1/23.
Accession Number: 20231101–5072.
Comment Date: 5 p.m. ET 11/22/23.

Docket Numbers: ER24–288–000.
Applicants: Midcontinent Independent System Operator, Inc., ALLETE, Inc.
Description: 205(d) Rate Filing: Midcontinent Independent System Operator, Inc. submits tariff filing per 35.13(a)(2)(iii: 2023–11–01_ALLETE Depreciation Rates Filing to be effective 1/1/2023.
Filed Date: 11/1/23.
Accession Number: 20231101–5075.
Comment Date: 5 p.m. ET 11/22/23.

Docket Numbers: ER24–289–000.
Applicants: Southwest Power Pool, Inc.
Description: Compliance filing: Order No. 895 Compliance Filing to Permit Credit-Related Information Sharing to be effective 10/21/2023.
Filed Date: 11/1/23.
Accession Number: 20231101–5076.
Comment Date: 5 p.m. ET 11/22/23.

Docket Numbers: ER24–290–000.
Applicants: FirstEnergy Pennsylvania Electric Company.
Description: 205(d) Rate Filing: 2023–11–01—Revisions to Certain Agreements to Which West Penn Power is a Party to be effective 12/31/9998.
Filed Date: 11/1/23.
Accession Number: 20231101–5082.
Comment Date: 5 p.m. ET 11/22/23.

Docket Numbers: ER24–291–000.
Applicants: Metropolitan Edison Company, PJM Interconnection, L.L.C.
Description: 205(d) Rate Filing: Metropolitan Edison Company submits tariff filing per 35.13(a)(2)(iii: Met-Ed Amends Three ECSAs, SA Nos. 6403, 6413 and 6626 to be effective 12/31/9998,
Filed Date: 11/1/23.
Accession Number: 20231101–5089.
Comment Date: 5 p.m. ET 11/22/23.

Docket Numbers: ER24–292–000.

Applicants: FirstEnergy Pennsylvania Electric Company.
Description: 205(d) Rate Filing: 2023–11–01—Revisions to Certain Agreements to Which Met Ed Company is a Party to be effective 12/31/9998.
Filed Date: 11/1/23.
Accession Number: 20231101–5091.
Comment Date: 5 p.m. ET 11/22/23.

Docket Numbers: ER24–293–000.
Applicants: Tri-State Generation and Transmission Association, Inc.
Description: 205(d) Rate Filing: Initial Filing of Service Agreement FERC Nos. 613 Through 618 to be effective 10/2/2023.
Filed Date: 11/1/23.
Accession Number: 20231101–5094.
Comment Date: 5 p.m. ET 11/22/23.

Docket Numbers: ER24–294–000.
Applicants: Southwest Power Pool, Inc.
Description: 205(d) Rate Filing: 4168 NextEra Energy Resources Surplus Interconnection GIA to be effective 12/31/2023.
Filed Date: 11/1/23.
Accession Number: 20231101–5095.
Comment Date: 5 p.m. ET 11/22/23.

Docket Numbers: ER24–295–000.
Applicants: EnerSmart El Cajon BESS LLC.
Description: 205(d) Rate Filing: Request for Authority to Make Sales of Capacity at Market-Based Rates to be effective 1/1/2024.
Filed Date: 11/1/23.
Accession Number: 20231101–5096.
Comment Date: 5 p.m. ET 11/22/23.

Docket Numbers: ER24–296–000.
Applicants: EnerSmart Imperial Beach BESS LLC.
Description: 205(d) Rate Filing: Request for Authority to Make Sales of Capacity at Market-Based Rates to be effective 1/1/2024.
Filed Date: 11/1/23.
Accession Number: 20231101–5097.
Comment Date: 5 p.m. ET 11/22/23.

Docket Numbers: ER24–297–000.
Applicants: EnerSmart Mesa Heights BESS LLC.
Description: 205(d) Rate Filing: Request for Authority to Make Sales of Capacity at Market-Based Rates to be effective 1/1/2024.
Filed Date: 11/1/23.
Accession Number: 20231101–5098.
Comment Date: 5 p.m. ET 11/22/23.

Docket Numbers: ER24–298–000.
Applicants: Southwestern Electric Power Company.
Description: 205(d) Rate Filing: ETEC and NTEC PSA to be effective 1/1/2024.
Filed Date: 11/1/23.
Accession Number: 20231101–5106.
Comment Date: 5 p.m. ET 11/22/23.

Docket Numbers: ER24–299–000.
Applicants: Southwestern Electric Power Company.
Description: 205(d) Rate Filing: Bentonville PSA to be effective 1/1/2024.
Filed Date: 11/1/23.
Accession Number: 20231101–5110.
Comment Date: 5 p.m. ET 11/22/23.

Docket Numbers: ER24–300–000.
Applicants: DATC Path 15, LLC.
Description: 205(d) Rate Filing: Normal filing 2024 Appendix I to be effective 1/1/2024.
Filed Date: 11/1/23.
Accession Number: 20231101–5111.
Comment Date: 5 p.m. ET 11/22/23.

Docket Numbers: ER24–301–000.
Applicants: Southwestern Electric Power Company.
Description: 205(d) Rate Filing: Hope PSA to be effective 1/1/2024.
Filed Date: 11/1/23.
Accession Number: 20231101–5112.
Comment Date: 5 p.m. ET 11/22/23.

Docket Numbers: ER24–302–000.
Applicants: Southwestern Electric Power Company.
Description: 205(d) Rate Filing: Minden PSA to be effective 1/1/2024.
Filed Date: 11/1/23.
Accession Number: 20231101–5113.
Comment Date: 5 p.m. ET 11/22/23.

Docket Numbers: ER24–303–000.
Applicants: The Connecticut Light and Power Company.
Description: 205(d) Rate Filing: Design and Engineering Agreement—WE 400 Groton Road, LLC to be effective 11/2/2023.
Filed Date: 11/1/23.
Accession Number: 20231101–5115.
Comment Date: 5 p.m. ET 11/22/23.

Docket Numbers: ER24–304–000.
Applicants: Southwestern Electric Power Company.
Description: 205(d) Rate Filing: NTEC PSA to be effective 1/1/2024.
Filed Date: 11/1/23.
Accession Number: 20231101–5116.
Comment Date: 5 p.m. ET 11/22/23.

Docket Numbers: ER24–305–000.
Applicants: Southwestern Electric Power Company.
Description: 205(d) Rate Filing: Prescott PSA to be effective 1/1/2024.
Filed Date: 11/1/23.
Accession Number: 20231101–5120.
Comment Date: 5 p.m. ET 11/22/23.

Docket Numbers: ER24–306–000.
Applicants: Pacific Gas and Electric Company.
Description: 205(d) Rate Filing: Turlock Irrigation District IA (SA 467) to be effective 1/1/2024.
Filed Date: 11/1/23.
Accession Number: 20231101–5124.
Comment Date: 5 p.m. ET 11/22/23.

Docket Numbers: ER24–307–000.
Applicants: Roundhouse Interconnect, LLC.
Description: Baseline eTariff Filing: Roundhouse Interconnect, LLC Shared Facilities Agreement to be effective 12/1/2023.
Filed Date: 11/1/23.
Accession Number: 20231101–5140.
Comment Date: 5 p.m. ET 11/22/23.

Docket Numbers: ER24–308–000.
Applicants: Roundtop Energy LLC, Beaver Dam Energy LLC, Milan Energy LLC, Alpaca Energy LLC, Wolf Run Energy LLC, Oxbow Creek Energy LLC.
Description: Petition for Limited Waiver of Roundtop Energy LLC, et al.
Filed Date: 11/1/23.
Accession Number: 20231101–5157.
Comment Date: 5 p.m. ET 11/22/23.

The filings are accessible in the Commission's eLibrary system (*https://elibrary.ferc.gov/idmws/search/fercgensearch.asp*) by querying the docket number.

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Dated: November 1, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–24592 Filed 11–6–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #3

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG24–25–000.
Applicants: Condor Energy Storage, LLC.
Description: Condor Energy Storage, LLC submits Notice of Self–Certification of Exempt Wholesale Generator Status.
Filed Date: 11/1/23.
Accession Number: 20231101–5162.
Comment Date: 5 p.m. ET 11/22/23.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER23–2560–001.
Applicants: PJM Interconnection, L.L.C.
Description: Tariff Amendment: Response to Commission's 10/2/2023 Deficiency Letter in Docket No. ER23–2560 to be effective 7/5/2023.
Filed Date: 11/1/23.
Accession Number: 20231101–5173.
Comment Date: 5 p.m. ET 11/22/23.

Docket Numbers: ER24–309–000.
Applicants: FirstEnergy Pennsylvania Electric Company.
Description: 205(d) Rate Filing: 2023–11–01—Filing Revisions to Certain Agreements to Which Penelec is a Party to be effective 12/31/9998.
Filed Date: 11/1/23.
Accession Number: 20231101–5178.
Comment Date: 5 p.m. ET 11/22/23.

Docket Numbers: ER24–310–000.
Applicants: Entergy Arkansas, LLC, Entergy Mississippi, LLC, Entergy New Orleans, LLC, Entergy Texas, Inc., Entergy Services, LLC, Entergy Louisiana, LLC.
Description: 205(d) Rate Filing: Entergy Arkansas, LLC submits tariff filing per 35.13(a)(2)(iii: ERSC Rate Schedule Amendment to be effective 1/1/2024.
Filed Date: 11/1/23.
Accession Number: 20231101–5184.
Comment Date: 5 p.m. ET 11/22/23.

Docket Numbers: ER24–311–000.
Applicants: Condor Energy Storage, LLC.
Description: Baseline eTariff Filing: Condor Energy Storage, LLC MBR Tariff to be effective 1/1/2024.
Filed Date: 11/1/23.
Accession Number: 20231101–5198.
Comment Date: 5 p.m. ET 11/22/23.

The filings are accessible in the Commission's eLibrary system (*https://elibrary.ferc.gov/idmws/search/fercgensearch.asp*) by querying the docket number.

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Dated: November 1, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–24591 Filed 11–6–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas and Oil Pipeline Rate and Refund Report filings:

Filings Instituting Proceedings

Docket Numbers: PR24–5–000.
Applicants: UGI Utilities, Inc.
Description: 284.123(g) Rate Filing: Rate Election 11–1–2023 to be effective 11/1/2023.
Filed Date: 10/31/23.
Accession Number: 20231031–5161.
Comment Date: 5 p.m. ET 11/21/23.
Protest Date: 5 p.m. ET 1/2/24.

Docket Numbers: RP24–101–000.
Applicants: El Paso Natural Gas Company, L.L.C.
Description: 4(d) Rate Filing: Negotiated Rate Agreement Update (SoCal Nov 23) to be effective 11/1/2023.
Filed Date: 10/31/23.
Accession Number: 20231031–5158.
Comment Date: 5 p.m. ET 11/13/23.

Docket Numbers: RP24–102–000.
Applicants: Texas Eastern Transmission, LP.
Description: 4(d) Rate Filing: TETLP ASA DEC 2023 Filing to be effective 12/1/2023.
Filed Date: 10/31/23.
Accession Number: 20231031–5171.
Comment Date: 5 p.m. ET 11/13/23.

Docket Numbers: RP24–103–000.
Applicants: Natural Gas Pipeline Company of America LLC.
Description: 4(d) Rate Filing: Negotiated Rate Agreements—Various Shippers 2023 to be effective 11/1/2023.
Filed Date: 10/31/23.
Accession Number: 20231031–5188.
Comment Date: 5 p.m. ET 11/13/23.

Docket Numbers: RP24–104–000.
Applicants: Dauphin Island Gathering Partners.
Description: 4(d) Rate Filing: Negotiated Rate Filing—11.01.23 Chevron MDQ to be effective 11/1/2023.
Filed Date: 10/31/23.
Accession Number: 20231031–5203.
Comment Date: 5 p.m. ET 11/13/23.

Docket Numbers: RP24–105–000.
Applicants: Rockies Express Pipeline LLC.
Description: 4(d) Rate Filing: REX 2023–10–31 Negotiated Rate Agreements to be effective 11/1/2023.
Filed Date: 10/31/23.
Accession Number: 20231031–5207.
Comment Date: 5 p.m. ET 11/13/23.

Docket Numbers: RP24–106–000.
Applicants: NEXUS Gas Transmission, LLC.
Description: 4(d) Rate Filing: Negotiated Rates—Union Gas contract 860007 to be effective 11/1/2023.
Filed Date: 10/31/23.
Accession Number: 20231031–5211.
Comment Date: 5 p.m. ET 11/13/23.

Docket Numbers: RP24–107–000.
Applicants: Texas Eastern Transmission, LP.
Description: 4(d) Rate Filing: Negotiated Rates—Bug Co Nat 911814 Releases 11–01–23 to be effective 11/1/2023.
Filed Date: 10/31/23.
Accession Number: 20231031–5212.
Comment Date: 5 p.m. ET 11/13/23.

Docket Numbers: RP24–108–000.
Applicants: Destin Pipeline Company, L.L.C.
Description: 4(d) Rate Filing: Destin Pipeline Negotiated Rate Agreement Filing to be effective 11/1/2023.
Filed Date: 10/31/23.

Accession Number: 20231031–5231.
Comment Date: 5 p.m. ET 11/13/23.

Docket Numbers: RP24–109–000.
Applicants: Ruby Pipeline, L.L.C.
Description: 4(d) Rate Filing: RP 2023–10–31 FL&U and EPC Rate Adjustment to be effective 12/1/2023.
Filed Date: 10/31/23.
Accession Number: 20231031–5233.
Comment Date: 5 p.m. ET 11/13/23.

Docket Numbers: RP24–110–000.
Applicants: Sierrita Gas Pipeline LLC.
Description: 4(d) Rate Filing: 2023 Oct Quarterly FL&U Filing to be effective 12/1/2023.
Filed Date: 10/31/23.
Accession Number: 20231031–5237.
Comment Date: 5 p.m. ET 11/13/23.

Docket Numbers: RP24–111–000.
Applicants: LA Storage, LLC.
Description: 4(d) Rate Filing: Filing of Negotiated Rate, Conforming IW Agreements to be effective 11/1/2023.
Filed Date: 10/31/23.
Accession Number: 20231031–5238.
Comment Date: 5 p.m. ET 11/13/23.

Docket Numbers: RP24–112–000.
Applicants: Northern Natural Gas Company.
Description: 4(d) Rate Filing: 20231031 Negotiated Rate to be effective 11/1/2023.
Filed Date: 10/31/23.
Accession Number: 20231031–5264.
Comment Date: 5 p.m. ET 11/13/23.
Docket Numbers: RP24–113–000.
Applicants: Texas Eastern Transmission, LP.
Description: 4(d) Rate Filing: Negotiated Rates—Keyspan 8985743 Releases to be effective 11/1/2023.
Filed Date: 11/1/23.
Accession Number: 20231101–5014.
Comment Date: 5 p.m. ET 11/13/23.

Docket Numbers: RP24–114–000.
Applicants: Enable Mississippi River Transmission, LLC.
Description: Compliance filing: 2023 Annual Report of Penalty Revenue Credits to be effective N/A.
Filed Date: 11/1/23.
Accession Number: 20231101–5035.
Comment Date: 5 p.m. ET 11/13/23.

Docket Numbers: RP24–115–000.
Applicants: Enable Gas Transmission, LLC.
Description: Compliance filing: 2023 Annual Report of Total Penalty Revenue Credits to be effective N/A.
Filed Date: 11/1/23.
Accession Number: 20231101–5036.
Comment Date: 5 p.m. ET 11/13/23.

Docket Numbers: RP24–116–000.
Applicants: Enable Gas Transmission, LLC.
Description: Compliance filing: 2023 Annual Report of Linked Firm Service Penalty Revenue Credits to be effective N/A.
Filed Date: 11/1/23.
Accession Number: 20231101–5039.
Comment Date: 5 p.m. ET 11/13/23.

Docket Numbers: RP24–117–000.
Applicants: Gulf Run Transmission, LLC.
Description: Compliance filing: 2023 Annual Report of Penalty Revenue Credits to be effective N/A.
Filed Date: 11/1/23.
Accession Number: 20231101–5042.
Comment Date: 5 p.m. ET 11/13/23.

Docket Numbers: RP24–118–000.
Applicants: Algonquin Gas Transmission, LLC.
Description: 4(d) Rate Filing: Negotiated Rates—November 2023 Clean Up Filing to be effective 12/1/2023.
Filed Date: 11/1/23.
Accession Number: 20231101–5052.
Comment Date: 5 p.m. ET 11/13/23.

Docket Numbers: RP24–119–000.
Applicants: Algonquin Gas Transmission, LLC.
Description: 4(d) Rate Filing: Negotiated Rates—Various Releases eff 11–1–23 to be effective 11/1/2023.
Filed Date: 11/1/23.
Accession Number: 20231101–5054.
Comment Date: 5 p.m. ET 11/13/23.

Docket Numbers: RP24–120–000.
Applicants: Carlsbad Gateway, LLC.
Description: 2023 Penalty Revenue Crediting Report of Carlsbad Gateway, LLC.
Filed Date: 11/1/23.
Accession Number: 20231101–5071.
Comment Date: 5 p.m. ET 11/13/23.

Docket Numbers: RP24–121–000.
Applicants: Columbia Gas Transmission, LLC.
Description: 4(d) Rate Filing: OTRA Winter 2023 to be effective 12/1/2023.
Filed Date: 11/1/23.
Accession Number: 20231101–5081.
Comment Date: 5 p.m. ET 11/13/23.

Docket Numbers: RP24–122–000.
Applicants: NEXUS Gas Transmission, LLC.
Description: 4(d) Rate Filing: Negotiated Rates—Various Releases to be effective 11/1/2023.
Filed Date: 11/1/23.
Accession Number: 20231101–5087.
Comment Date: 5 p.m. ET 11/13/23.

Docket Numbers: RP24–123–000.
Applicants: Alliance Pipeline L.P.
Description: 4(d) Rate Filing: Negotiated Rates—Various Nov 1 2023 Contract Adjustments to be effective 11/1/2023.
Filed Date: 11/1/23.
Accession Number: 20231101–5090.
Comment Date: 5 p.m. ET 11/13/23.

Docket Numbers: RP24–124–000.
Applicants: Maritimes & Northeast Pipeline, L.L.C.
Description: 4(d) Rate Filing: Negotiated Rates—Northern to NRG Business 3018 to be effective 11/1/2023.
Filed Date: 11/1/23.
Accession Number: 20231101–5092.
Comment Date: 5 p.m. ET 11/13/23.

Docket Numbers: RP24–125–000.
Applicants: Alliance Pipeline L.P.
Description: 4(d) Rate Filing: Negotiated Rates—Various Nov 1 2023 Releases to be effective 11/1/2023.
Filed Date: 11/1/23.
Accession Number: 20231101–5093.
Comment Date: 5 p.m. ET 11/13/23.

Docket Numbers: RP24–126–000.
Applicants: Equitrans, L.P.
Description: 4(d) Rate Filing: Negotiated Rate Capacity Release Agreement—11/1/2023 to be effective 11/1/2023.
Filed Date: 11/1/23.
Accession Number: 20231101–5100.
Comment Date: 5 p.m. ET 11/13/23.

Docket Numbers: RP24–127–000.
Applicants: Texas Gas Transmission, LLC.
Description: 4(d) Rate Filing: Cap Rel Neg Rate Agmt (Kaiser Ohio 35448 to Kaiser Appalachian 57364) to be effective 11/1/2023.
Filed Date: 11/1/23.
Accession Number: 20231101–5123.
Comment Date: 5 p.m. ET 11/13/23.

Docket Numbers: RP24–128–000.
Applicants: Gulf South Pipeline Company, LLC.
Description: 4(d) Rate Filing: Cap Rel Neg Rate Agmt (Methanex 42805 to Tenaska 57451) to be effective 11/1/2023.
Filed Date: 11/1/23.
Accession Number: 20231101–5131.
Comment Date: 5 p.m. ET 11/13/23.

Docket Numbers: RP24–129–000.
Applicants: Gulf South Pipeline Company, LLC.
Description: 4(d) Rate Filing: Cap Rel Neg Rate Agmts (Osaka 46429 to ConocoPhillips 57488, Texla 57490) to be effective 11/1/2023.
Filed Date: 11/1/23.
Accession Number: 20231101–5132.
Comment Date: 5 p.m. ET 11/13/23.

Any person desiring to intervene, to protest, or to answer a complaint in any of the above proceedings must file in accordance with Rules 211, 214, or 206 of the Commission's Regulations (18 CFR 385.211, 385.214, or 385.206) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

Filings in Existing Proceedings

Docket Numbers: RP19–351–007.

Applicants: Tennessee Gas Pipeline Company, L.L.C.

Description: Compliance filing: Cost-Revenue Study Docket No. RP19–351__to be effective N/A.

Filed Date: 11/1/23.

Accession Number: 20231101–5073.

Comment Date: 5 p.m. ET 11/13/23.

Docket Numbers: RP23–1038–000.

Applicants: Transcontinental Gas Pipe Line Company, LLC.

Description: Report Filing: In-Service Notice_REA Interim_a_Docket No. CP21–94 to be effective N/A.

Filed Date: 10/31/23.

Accession Number: 20231031–5157.

Comment Date: 5 p.m. ET 11/13/23.

Docket Numbers: RP23–1055–000.

Applicants: Transcontinental Gas Pipe Line Company, LLC.

Description: Report Filing: In-Service Notice_REA Interim_b_Docket No. CP21–94 to be effective N/A.

Filed Date: 10/31/23.

Accession Number: 20231031–5164.

Comment Date: 5 p.m. ET 11/13/23.

Any person desiring to protest in any the above proceedings must file in accordance with Rule 211 of the Commission's Regulations (18 CFR 385.211) on or before 5:00 p.m. Eastern time on the specified comment date.

The filings are accessible in the Commission's eLibrary system (*https://elibrary.ferc.gov/idmws/search/fercgensearch.asp*) by querying the docket number.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202) 502–6595 or *OPP@ferc.gov.*

Dated: November 1, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–24590 Filed 11–6–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 7883–020]

Powerhouse Systems, Inc.; Notice of Technical Conference

On Wednesday, November 15, 2023, Commission staff will hold a technical conference to provide clarification to Powerhouse Systems, Inc (Powerhouse) regarding the Exhibit F Supporting Design Report (SDR), for the Weston Dam Hydroelectric Project No. 7883.

The conference will be held via teleconference beginning at 10:30 a.m. eastern standard time. Discussion topics for the technical conference include: (1) the information provided in the Powerhouse's Exhibit F SDR filed on October 2, 2023; and (2) information required to provide an updated SDR that meets Commission regulations.

All local, State, and Federal agencies, Indian Tribes, and other interested parties are invited to participate. There will be no transcript of the conference, but a summary of the meeting will be prepared for the project record. If you are interested in participating in the meeting you must contact John Baummer at (202) 502–6837 or *john.baummer@ferc.gov* by November 10, 2023 to receive specific instructions on how to participate.

Dated: November 1, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–24589 Filed 11–6–23; 8:45 am]

BILLING CODE 6717–01–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 November 22, 2023.

A. Federal Reserve Bank of Kansas City (Jeffrey Imgarten, Assistant Vice President) One Memorial Drive, Kansas City, Missouri, 64198. Comments can also be sent electronically to *KCapplicationcomments@kc.frb.org:*

1. *Sarah George, Louisburg, Kansas;* to join the Shannon Family Control Group, a group acting in concert, to acquire voting shares of Central Kansas Bancshares, Inc., Woodbine, Kansas, and thereby indirectly acquire voting shares of The Citizens State Bank and Trust Company, Council Grove, Kansas.

Board of Governors of the Federal Reserve System.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2023–24571 Filed 11–6–23; 8:45 am]

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[CMS–6093–N]

RIN 0938–ZB79

Medicare, Medicaid, and Children's Health Insurance Programs; Provider Enrollment Application Fee Amount for Calendar Year 2024

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

ACTION: Notice.

SUMMARY: This notice announces a $709.00 calendar year (CY) 2024 application fee for institutional providers that are initially enrolling in the Medicare or Medicaid program or the Children's Health Insurance Program (CHIP); revalidating their Medicare, Medicaid, or CHIP enrollment; or adding a new Medicare practice location. This fee is required with any enrollment application submitted on or after January 1, 2024 and on or before December 31, 2024.

DATES: The application fee announced in this notice is effective on January 1, 2024.

FOR FURTHER INFORMATION CONTACT: Frank Whelan, (410) 786–1302.

SUPPLEMENTARY INFORMATION:

I. Background

In the February 2, 2011 **Federal Register** (76 FR 5862), we published a final rule with comment period titled ''Medicare, Medicaid, and Children's Health Insurance Programs; Additional Screening Requirements, Application Fees, Temporary Enrollment Moratoria, Payment Suspensions and Compliance Plans for Providers and Suppliers.'' This rule finalized, among other things, provisions related to the submission of application fees as part of the Medicare, Medicaid, and CHIP provider enrollment processes. As provided in section 1866(j)(2)(C)(i) of the Social Security Act (the Act) and in 42 CFR 424.514, ''institutional providers'' that are initially enrolling in the Medicare or Medicaid programs or CHIP, revalidating their enrollment, or adding a new Medicare practice location are required to submit a fee with their enrollment application. An ''institutional provider'' for purposes of Medicare is defined at § 424.502 as ''any provider or supplier that submits a paper Medicare enrollment application using the CMS–855A, CMS–855B (not including physician and non-physician practitioner organizations), CMS–855S, or associated internet-based PECOS enrollment application.'' As we explained in the February 2, 2011 final rule (76 FR 5914), in addition to the providers and suppliers subject to the application fee under Medicare, Medicaid-only and CHIP-only institutional providers would include nursing facilities, intermediate care facilities for persons with intellectual disabilities (ICF/IID), and psychiatric residential treatment facilities; they may also include other institutional provider types designated by a state in accordance with their approved state plan.

As indicated in § 424.514 and § 455.460, the application fee is not required for either of the following:

- A Medicare physician or non-physician practitioner submitting a CMS–855I.
- A prospective or revalidating Medicaid or CHIP provider—

++ Who is an individual physician or non-physician practitioner; or

++ That is enrolled as an institutional provider in Title XVIII of the Act or another state's Title XIX or XXI plan and has paid the application fee to a Medicare contractor or another state.

II. Provisions of the Notice

Section 1866(j)(2)(C)(i)(I) of the Act established a $500 application fee for institutional providers in CY 2010. Consistent with section 1866(j)(2)(C)(i)(II) of the Act, § 424.514(d)(2) states that for CY 2011 and subsequent years, the preceding year's fee will be adjusted by the percentage change in the consumer price index (CPI) for all urban consumers (all items; United States city average, CPI–U) for the 12-month period ending on June 30 of the previous year. Consequently, each year since 2011 we have published in the **Federal Register** an announcement of the application fee amount for the forthcoming CY based on this formula. Most recently, in the December 5, 2022 **Federal Register** (87 FR 74422), we published a notice announcing a fee amount for the period of January 1, 2023 through December 31, 2023 of $688.00. The $688.00 fee amount for CY 2023 will be used to calculate the fee amount for 2024 as specified in § 424.514(d)(2).

According to Bureau of Labor Statistics (BLS) data, the CPI–U increase for the period of July 1, 2022 through June 30, 2023 was 3.0 percent. As required by § 424.514(d)(2), the preceding year's fee of $688 will be adjusted by 3.0 percent. This results in a CY 2024 application fee amount of $708.64 ($688 x 1.03). As we must round this to the nearest whole dollar amount, the resultant application fee amount for CY 2024 is $709.00.

III. Collection of Information Requirements

This document does not impose information collection requirements (that is, reporting, recordkeeping, or third-party disclosure requirements). Accordingly, there is no need for review by the Office of Management and Budget under the authority of the Paperwork Reduction Act of 1995. However, it does reference previously approved information collections. The CMS–855A, CMS–855B, CMS–855I, and CMS–855S applications are approved under, respectively, OMB control numbers 0938–0685, 0938–1377, 0938–1355, and 0938–1056.

IV. Regulatory Impact Statement

A. Background and Review Requirements

We have examined the impact of this notice as required by Executive Order 12866 on Regulatory Planning and Review (September 30, 1993), Executive Order 13563 on Improving Regulation and Regulatory Review (January 18, 2011), 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), and Executive Order 13132 on Federalism (August 4, 1999).

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). The Executive Order 14094 entitled ''Modernizing Regulatory Review'' (hereinafter, the Modernizing E.O.) amends section 3(f)(1) of Executive Order 12866 (Regulatory Planning and Review). The amended section 3(f) of Executive Order 12866 defines a ''significant regulatory action'' as an action that is likely to result in a rule: (1) having an annual effect on the economy of $200 million or more in any 1 year (adjusted every 3 years by the Administrator of OIRA for changes in gross domestic product), or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, territorial, or tribal governments or communities; (2) creating a serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise legal or policy issues for which centralized review would meaningfully further the President's priorities or the principles set forth in this Executive order, as specifically authorized in a timely manner by the Administrator of OIRA in each case.

A regulatory impact analysis (RIA) must be prepared for major rules with significant regulatory action/s and/or with significant effects as per section 3(f)(1) ($200 million or more in any 1 year). Accordingly, we have prepared a Regulatory Impact Analysis that to the best of our ability presents the costs and benefits of the rulemaking. Based on our estimates, OMB's Office of Information and Regulatory Affairs has determined that this notice is ''not significant'' and ''not major''.

B. Costs

The costs associated with this notice involve the increase in the application fee amount that certain providers and suppliers must pay in CY 2024. The CY 2024 cost estimates are as follows:

1. Medicare

Based on CMS data, we estimate that in CY 2024 approximately—

- 14,232 newly enrolling institutional providers will be subject to and pay an application fee; and
- 36,142 revalidating institutional providers will be subject to and pay an application fee.

Using a figure of 50,374 (14,232 newly enrolling + 36,142 revalidating) institutional providers, we estimate an increase in the cost of the Medicare application fee requirement in CY 2024 of $1,057,854 (or 50,374 x $21 (or $709 minus $688)) from our CY 2023 projections.

2. Medicaid and CHIP

Based on CMS and state statistics, we estimate that approximately 30,000 (9,000 newly enrolling + 21,000 revalidating) Medicaid and CHIP institutional providers will be subject to an application fee in CY 2024. Using this figure, we project an increase in the cost of the Medicaid and CHIP application fee requirement in CY 2024 of $630,000 (or 30,000 × $21 (or $709 minus $688)) from our CY 2023 projections.

3. Total

Based on the foregoing, we estimate the total increase in the cost of the application fee requirement for Medicare, Medicaid, and CHIP providers and suppliers in CY 2024 to be $1,687,854 ($1,057,854 + $630,000) from our CY 2023 projections.

We do not anticipate any negative impact on equity from the increase in the application fee amount, which we calculated in accordance with the requirements specified in statute and regulation. Prior application fee increases have had no such discernable effect, and we reiterate that the fee requirement does not apply to individual physicians and non-physician practitioners completing the CMS–855I, who represent the overwhelming preponderance of the more than 2 million Medicare-enrolled providers and suppliers.

The RFA requires agencies to analyze options for regulatory relief of small businesses. 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 less than $9 million to $47 million in any 1 year. Individuals and states are not included in the definition of a small entity. As we stated in the RIA for the February 2, 2011 final rule (76 FR 5952), we do not believe that the application fee will have a significant impact on small entities.

In addition, section 1102(b) of the Act requires us to prepare a regulatory impact analysis 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 of 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 notice 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 (UMRA) 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, that threshold was approximately $198million. The Agency has determined that there will be minimal impact from the costs of this notice, as the threshold is not met under the UMRA.

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 notice does not impose substantial direct costs on state or local governments, the requirements of Executive Order 13132 are not applicable.

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

The Administrator of the Centers for Medicare & Medicaid Services (CMS), Chiquita Brooks-LaSure, having reviewed and approved this document, authorizes Chyana Woodyard, who is the Federal Register Liaison, to electronically sign this document for purposes of publication in the **Federal Register**.

Chyana Woodyard,

Federal Register Liaison, Centers for Medicare & Medicaid Services.

[FR Doc. 2023–24607 Filed 11–6–23; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2023–N–4742]

Phibro Animal Health Corp.; Proposal To Withdraw Approval of New Animal Drug Applications for Carbadox in Medicated Swine Feed; Opportunity for a Hearing

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or the Agency), Center for Veterinary Medicine (CVM), is proposing to withdraw approval of all new animal drug applications (NADAs) providing for use of carbadox in medicated swine feed, for which Phibro Animal Health Corp., Glenpointe Centre East, Third Floor, 300 Frank W. Burr Blvd., Suite 21, Teaneck, NJ 07666–6712, is the sponsor, and is announcing an opportunity for the holder of the NADAs to request a hearing on this proposal. This action is based on CVM's determination that there is no approved regulatory method to detect the residue of carcinogenic concern in the edible tissues of the treated swine.

DATES: The sponsor of the NADAs may submit a written request for a hearing by December 7, 2023. Submit all data, information, and analyses upon which a request for a hearing relies by December 7, 2023. Either electronic or written comments on the notice must be submitted by December 7, 2023.

ADDRESSES: The request for a hearing may be submitted by the sponsor of the NADAs by either of the following methods:

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments to submit your request for hearing. Your request for a hearing submitted electronically, including any attachments to the request for hearing, to *https://www.regulations.gov* will be posted to the docket unchanged.

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand Delivery/Courier (for written/paper request for a hearing):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

• Because your request for a hearing will be made public, you are solely responsible for ensuring that your request does not include any confidential information that you or a third party may not wish to be publicly posted, such as confidential business information (*e.g.,* a manufacturing process). The request for a hearing must include the Docket No. FDA–2023–N–4742 for ''Phibro Animal Health Corp.; Proposal to Withdraw Approval of New Animal Drug Applications for Carbadox in Medicated Swine Feed; Opportunity for a Hearing.'' The request for a hearing will be placed in the docket and publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

The sponsor of the NADAs may submit all data and analyses upon which the request for a hearing relies in the same manner as the request for a hearing except as follows:

• Confidential Submissions—To submit any data and analyses with confidential information that you do not wish to be made publicly available, submit your data and analyses only as a written/paper submission. You should submit two copies total of all data and analyses. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of any decisions on this matter. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov* or available at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday. Submit both copies to the Dockets Management Staff. Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law.

Comments Submitted by Other Interested Parties: For all comments submitted by other interested parties, submit comments as follows. Please note that late, untimely filed comments will not be considered. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of December 7, 2023. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are received on or before that date.

Electronic Submissions

Submit electronic comments in the following way:

• *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*

• If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

• *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

• For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2023–N–4742 for ''Phibro Animal Health Corp.; Proposal to Withdraw Approval of New Animal Drug Applications for Carbadox in Medicated Swine Feed; Opportunity for a Hearing.'' Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

• Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

FOR FURTHER INFORMATION CONTACT:

Diane Heinz, Center for Veterinary Medicine (HFV–6), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 240–402–5692.

SUPPLEMENTARY INFORMATION:

I. Approved NADAs for Use of Carbadox in Swine Feed

Carbadox, a quinoxaline derivative, is a synthetic organic acid antimicrobial. Currently, there are three approved NADAs for use of carbadox in medicated swine feed, either by itself or in combination with other approved new animal drugs. Phibro Animal Health Corp., Glenpointe Centre East, Third Floor, 300 Frank W. Burr Blvd., Suite 21, Teaneck, NJ 07666–6712, is currently the sponsor of all three approved NADAs.

Carbadox is marketed as a Type A medicated article used to manufacture complete Type C medicated feeds that are administered ad libitum (available at all times) to swine. Carbadox is

indicated for the control of dysentery and bacterial enteritis, and for growth promotion. A tolerance of 30 parts per billion (ppb) has been established for residues of quinoxaline-2-carboxylic acid (QCA), the marker residue, in liver of swine (21 CFR 556.100). The combination products containing carbadox (carbadox and pyrantel, and carbadox and oxytetracycline) are also approved for additional indications related to the non-carbadox active ingredient.

The following three NADAs are approved for the use of carbadox:

NADA 041–061, originally approved in 1972 (37 FR 20683, October 3, 1972), provides for the use of MECADOX 10 (carbadox) Type A medicated article to manufacture single-ingredient Type C medicated swine feeds for the following conditions of use:

Carbadox at 10 to 25 grams per ton (g/ton) of feed for increased rate of weight gain and improved feed efficiency; and

Carbadox at 50 g/ton of feed for control of swine dysentery (vibrionic dysentery, bloody scours, or hemorrhagic dysentery); for control of bacterial swine enteritis (salmonellosis or necrotic enteritis caused by *Salmonella choleraesuis*); and for increased rate of weight gain and improved feed efficiency.

In January 1998, CVM approved a supplemental application to NADA 041–061, which included the approved method.

In October 1998, CVM approved an additional supplemental NADA for NADA 041–061, changing the withdrawal period for carbadox medicated feeds from 70 days to 42 days.

Currently, the withdrawal period for these uses of carbadox is 42 days (§ 558.115(d)(1)(ii) and (d)(2)(ii) (21 CFR 558.115(d)(1)(ii) and (d)(2)(ii))).

NADA 092–955, originally approved in 1975 (40 FR 45164, October 1, 1975), provides for the use of MECADOX 10 (carbadox) Type A medicated article with BANMINTH (pyrantel tartrate) Type A medicated article to manufacture two-way, combination drug Type C medicated swine feeds for the following conditions of use:

Carbadox at 50 g/ton of feed plus pyrantel tartrate at 96 g/ton of feed for control of swine dysentery (vibrionic dysentery, bloody scours, or hemorrhagic dysentery); for control of bacterial swine enteritis (salmonellosis or necrotic enteritis caused by *Salmonella choleraesuis*); as an aid in the prevention of migration and establishment of large roundworm (*Ascaris suum*) infections; and as an aid in the prevention of establishment of nodular worm (*Oesophagostomum*) infections.

The withdrawal period for the use of this drug combination is 70 days (§ 558.115(d)(3)(ii)).

NADA 141–211, originally approved in 2004 (69 FR 51173, August 18, 2004), provides for the use of MECADOX 10 (carbadox) Type A medicated article with TERRAMYCIN 50, TERRAMYCIN 100, or TERRAMYCIN 200 (oxytetracycline) Type A medicated articles to manufacture two-way, combination drug Type C medicated swine feeds for the following conditions of use:

Carbadox at 10 to 25 g/ton of feed plus oxytetracycline at levels in feed to deliver 10 mg oxytetracycline per pound of body weight for treatment of bacterial enteritis caused by *Escherichia coli* and *S. choleraesuis* susceptible to oxytetracycline; for treatment of bacterial pneumonia caused by *Pasteurella multocida* susceptible to oxytetracycline; and for increased rate of weight gain and improved feed efficiency.

The withdrawal period for the use of this animal drug combination is 42 days (§ 558.115(d)(4); § 558.450(e)(3)(iii)).

II. Basis for Withdrawal of Approval

FDA is providing notice of an opportunity for a hearing (NOOH) on CVM's proposal to withdraw approval of the NADAs providing for use of carbadox in medicated swine feeds. New evidence demonstrates that the Delaney Clause in section 512(d)(1)(I) of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 360b(d)(1)(I)), which requires that no residue of a carcinogenic drug can be found in any edible portion of the animal after slaughter, applies because the Diethylstilbestrol (DES) Proviso exception is no longer met (see section III).

Section 512(e)(1)(B) of the FD&C Act provides grounds for withdrawal of approval of an NADA if new evidence not contained in such application or not available until after such application was approved, tests by new methods, or tests by methods not deemed reasonably applicable when such application was approved, evaluated together with the evidence available when the application was approved, shows that the Delaney Clause, section 512(d)(1)(I) of the FD&C Act, applies to the drug. Under the Delaney Clause, the Secretary shall not approve a new animal drug application if ''such drug induces cancer when ingested by man or animal or, after tests which are appropriate for the evaluation of the safety of such drug, induces cancer in man or animal'' (section 512 (d)(1)(I) of the FD&C Act). An exception to this general rule, referred to as the ''DES Proviso,'' allows for the approval of a carcinogenic new animal drug where FDA finds that, under the approved conditions of use: (1) The drug will not adversely affect the animals treated with the drug, and (2) no residues of the drug will be found by an approved regulatory method in any edible tissues of or in any foods yielded by the animal (section 512(d)(1)(I)(i) through (ii) of the FD&C Act).

Evidence available at the time of the approvals showed that carbadox was carcinogenic. At the time of the January 1998 supplemental approval, CVM concluded that carcinogenic residues, including desoxycarbadox (DCBX), a known carcinogenic metabolite of carbadox, depleted quickly (within 72 hours) while QCA residues depleted more slowly (Ref. 1). However, new evidence not available at the time of the approval, including studies conducted by the sponsor and submitted to FDA from 2005 to 2016 and a study conducted by a third party and summarized in a publication in 2022,[1] demonstrates that the residue of carcinogenic concern persists longer than previously known (Refs. 2 to 4). Because there is no established relationship between concentrations of QCA measured by the approved method and concentrations of the residue of carcinogenic concern, the approved regulatory method cannot be used to measure the residue of carcinogenic concern.

Elsewhere in today's **Federal Register**, FDA is publishing a final order (Ref. 5) revoking the approved regulatory method for carbadox that measures QCA as a marker residue to detect the presence of any residue of carcinogenic concern (Ref. 6). Currently, therefore, there is no approved regulatory method for carbadox, and the second prong of the DES Proviso is not met.

III. Background Information Regarding the Regulation of Carcinogenic New Animal Drugs

Under the Delaney Clause of the FD&C Act, the Secretary shall not approve a carcinogenic new animal drug application unless the DES Proviso applies (section 512(d)(1)(I)(i) through (ii) of the FD&C Act). FDA has issued implementing regulations that set the requirements for demonstrating that no residues of the drug will be found by an approved regulatory method in any

[1] ''Metabolism and Tissue Depletion of Carbadox in Swine, Broilers, and Rats,'' Jie Zhang, Wei Qu, Zongchao Wang, and Yuanhu Pan, *ACS Agricultural Science & Technology* 2022 *2* (3), 477–485.

edible tissues of or in any foods yielded from the animal (21 CFR part 500, subpart E). These regulations, referred to as the sensitivity of the method regulations (SOM regulations), describe how FDA determines whether the regulatory method proposed by a sponsor is sufficiently sensitive to ensure that residues of carcinogenic concern in edible tissues will not exceed concentrations that represent no significant increase in the risk of cancer to humans.

Pursuant to these regulations, FDA determines for each drug and each drug metabolite (on the basis of the results of chronic bioassays and other information) whether the drug or any of its metabolites are carcinogenic (§ 500.84(a) (21 CFR 500.84(a))). For the drug and each metabolite determined to be carcinogenic, FDA calculates, based upon submitted assays, the concentration of the test compound in the total diet of the test animal that corresponds to a maximum lifetime risk of cancer in the test animal of 1 in 1 million (§§ 500.82(b) (21 CFR 500.82(b)) and 500.84(c)(1)). FDA designates the lowest value thus calculated as the S_o (§§ 500.82(b) and 500.84(c)(1)). The S_o corresponds to a concentration of residue of carcinogenic concern in the total human diet that represents no significant increase in the risk of cancer to people (§ 500.82(b)). Residue of carcinogenic concern includes all compounds in the total residue of a demonstrated carcinogen excluding any compound judged by FDA not to present a carcinogenic risk (§ 500.82(b)). The total residues of carcinogenic concern (the drug and all of its metabolites less metabolites shown to be noncarcinogenic) are regulated based on the most potent carcinogenic residue (§ 500.84(c)(1)). This approach ensures that use of the drug does not present a significant increase in the risk of cancer when considering all residues in edible tissues.

Because the total diet is not derived only from food-producing animals, the SOM regulations make adjustments for human food intake of edible tissues and determine the concentration of residues of carcinogenic concern in a specific edible tissue that corresponds to no significant increase in the risk of cancer to the human consumer. FDA assumes for purposes of these regulations that this value will correspond to the concentration of residues in a specific edible tissue that corresponds to a maximum lifetime risk of cancer in test animals of 1 in 1 million. This value is termed the S_m (§§ 500.82(b) and 500.84(c)(1)).

Based on residue depletion data submitted by a sponsor, FDA selects a target tissue (the edible tissue selected to monitor for residues in the target animals) and a marker residue (a residue whose concentration is in a known relationship to the concentration of the residues of carcinogenic concern in the last tissue to deplete to the S_m) and designates the concentration of the marker residue that the regulatory method must be capable of detecting in the target tissue (§ 500.86(a) through (c) (21 CFR 500.86(a) through (c))). This value, termed the R_m, is the concentration of a marker residue in the target tissue when the residue of carcinogenic concern is equal to S_m (§ 500.82(b)). When the marker residue is at or below the R_m, the residue of carcinogenic concern in the human diet does not exceed S_o (§ 500.86(c)). This regulation ensures that when the marker residue is no longer detectable, the residue of carcinogenic concern does not exceed S_m in any of the edible tissues (§§ 500.82(b) and 500.86(c)).

A sponsor must submit a regulatory method that is able to detect the marker residue at or below the R_m (21 CFR 500.88(b) and 500.84(c)(2)) (''The LOD [Limit of Detection for the regulatory method] must be less than or equal to R_m.'')). If a method is not developed that can detect the marker residue at or below the R_m, the requirements of the SOM regulations are not satisfied, and FDA cannot approve the drug. The DES Proviso and FDA's implementing regulations are satisfied where no marker residue is detectable using the approved regulatory method under the proposed conditions of use of the drug, including the proposed preslaughter withdrawal period (§ 500.84(c)(3)).

IV. Notice of Opportunity for a Hearing

CVM is proposing to withdraw approval of the three NADAs that provide for use of carbadox in swine feed because new evidence demonstrates that the drug does not meet the DES Proviso exception to the Delaney Clause. There is currently no approved regulatory method for carbadox.

Therefore, notice is given to Phibro Animal Health Corp., Glenpointe Centre East, Third Floor, 300 Frank W. Burr Blvd., Suite 21, Teaneck, NJ 07666–6712, and to all other interested persons, that the Deputy Commissioner for Policy, Legislation, and International Affairs, Office of Policy, Legislation, and International Affairs proposes to issue an order under section 512(e) of the FD&C Act withdrawing approval of all NADAs providing for use of carbadox in medicated swine feed.

In accordance with section 512 of the FD&C Act and 21 CFR part 514 and under the authority delegated to the Deputy Commissioner for Policy, Legislation, and International Affairs, Office of Policy, Legislation, and International Affairs by the Commissioner of Food and Drugs, Phibro Animal Health Corp., the sponsor, is hereby given an opportunity for a hearing to show why approvals of NADA 041–061, 092–955, and 141–211 should not be withdrawn.

If the sponsor, Phibro Animal Health Corp., wishes to request a hearing, the sponsor must file the following: (1) a written notice of participation and request for a hearing (see **DATES** and **ADDRESSES**) and (2) the data, information, and analyses relied on to demonstrate that there is a genuine and substantial issue of fact that requires a hearing (see **DATES** and **ADDRESSES**). Any other interested person may also submit comments on this notice. Procedures and requirements governing this NOOH, a notice of appearance and request for a hearing, submission of data, information, and analyses to justify a hearing, other comments, and a grant or denial of a hearing, are contained in § 514.200 (21 CFR 514.200) and 21 CFR part 12.

The failure of a holder of an approval to timely file a request for a hearing as required by § 514.200 constitutes an election by the holder not to avail itself of the opportunity for a hearing and constitutes a waiver of any contentions concerning the legal status of any such drug product, and the Director of CVM will summarily enter a final order withdrawing the approvals. Any new animal drug product marketed without an approved NADA is subject to regulatory action at any time.

A request for a hearing may not rest upon mere allegations or denials but must set forth specific facts showing that there is a genuine and substantial issue of fact that requires a hearing. If it conclusively appears from the face of the data, information, and factual analyses in the request for hearing that there is no genuine and substantial issue of fact that precludes the withdrawal of approval of the applications, or when a request for hearing is not made in the required format or with the required analyses, the Commissioner of Food and Drugs will enter summary judgment against the person who requests a hearing, making findings and conclusions, and denying a hearing.

If a hearing is requested and is justified by the sponsor's response to this NOOH, the issues will be defined,

a presiding officer will be assigned, and a written notice of the time and place at which the hearing will commence will be issued as soon as practicable.

This notice is issued under section 512 of the FD&C Act and under the authority delegated to the Deputy Commissioner for Policy, Legislation, and International Affairs, Office of Policy, Legislation, and International Affairs.

V. Environmental Impact

The Agency has determined under 21 CFR 25.33(g) that this action is of a type that does not individually or cumulatively have a significant impact on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

VI. References

The following references are on display in the Dockets Management Staff (see **ADDRESSES**) and are available for viewing by interested persons between 9 a.m. and 4 p.m., Monday through Friday; they are also available electronically at *https://www.regulations.gov.* Although FDA verified the website addresses in this document, please note that websites are subject to change over time.

1. FDA, Freedom of Information Summary, NADA 041–061, MECADOX 10 (carbadox) Type A medicated article, supplemental approval January 30, 1998. Available at *https://animaldrugsatfda.fda.gov/adafda/app/search/public/document/downloadFoi/308.*
2. Evaluations of the Joint Food and Agriculture Organization of the United Nations/World Health Organization Expert Committee on Food Additives (JECFA). Carbadox. 2021. Available at: *https://apps.who.int/food-additives-contaminants-jecfa-database/Home/Chemical/2176.*
3. Memorandum to File entitled ''CVM Response to Phibro Animal Health Corporation's September 18, 2020 Comments on CVM's July 20, 2020 Proposed Order to Revoke the Regulatory Method for Carbadox'' (January 6, 2022).
4. Memorandum to File entitled ''CVM review of comments on the Zhang article that Phibro references in the document submitted to the Part 15 Hearing docket under cover letter dated June 9, 2022, and entitled, 'Phibro Animal Health Corporation's Reply to the January 6, 2022 'CVM Response to Phibro Animal Health Corporation's September 18, 2020 Comments on CVM's July 20, 2020 Proposed Order to Revoke the Regulatory Method for Carbadox.' ' '' (October 30, 2023).
5. Phibro Animal Health Corp.; Carbadox in Medicated Swine Feed; Revocation of Approved Method (November 7, 2023).
6. ''Determination of Carbadox as Quinoxaline-2-carboxylic Residues in Swine Liver and Muscle Tissues after Drug Withdrawal.'' Available at *https://www.fda.gov/media/136267/download.*

Dated: November 1, 2023.

Kimberlee Trzeciak,

Deputy Commissioner for Policy, Legislation, and International Affairs.

[FR Doc. 2023–24547 Filed 11–6–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2020–N–0955]

Phibro Animal Health Corp.; Carbadox in Medicated Swine Feed; Revocation of Approved Method

AGENCY: Food and Drug Administration, HHS.

ACTION: Final order.

SUMMARY: The Food and Drug Administration (FDA) is issuing a final order to revoke the approved method for detecting residues of carbadox, a carcinogenic new animal drug used in swine feed. An approved method is required by the Federal Food, Drug, and Cosmetic Act (FD&C Act), as implemented by regulation, to show that no residue of carcinogenic concern from a new animal drug persists in any edible tissue or in any food derived from treated animals. The approved method measures quinoxaline-2-carboxylic acid (QCA) as a marker residue to detect the presence of any residue of carcinogenic concern. QCA is a metabolite of carbadox that FDA has judged does not present a carcinogenic risk. FDA is revoking the approved method for carbadox based on its determination that the method is inadequate to monitor the residue of carcinogenic concern in compliance with FDA's operational definition of no residue because there is no established relationship between the concentration of QCA residues as measured by the approved method and the concentration of the residue of carcinogenic concern.

DATES: This order is effective November 7, 2023.

FOR FURTHER INFORMATION CONTACT: Diane Heinz, Center for Veterinary Medicine (HFV–6), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 240–402–5692.

SUPPLEMENTARY INFORMATION:

I. Introduction

On July 20, 2020, FDA's Center for Veterinary Medicine (CVM), the Center within FDA that reviews and approves new animal drug applications and supplemental applications, proposed to revoke the approved method for carbadox (Ref. 1), which measures QCA as the marker residue [1] to determine whether residues of carcinogenic concern [2] of carbadox are present (85 FR 43853, July 20, 2020). QCA is a metabolite of carbadox that FDA has judged does not present a carcinogenic risk. The proposal to revoke the approved method was based on FDA's determination that the method does not adequately monitor the residue of carcinogenic concern in compliance with FDA's operational definition of no residue (§ 500.82(b) (21 CFR 500.82(b)(defining ''no residue''; § 500.84(c)(3) (21 CFR 500.84(c)(3))). That is because the sponsor has not established the relationship between the concentration of the marker residue QCA and the concentration of the residue of carcinogenic concern.

On March 10, 2022, FDA held a public hearing under 21 CFR part 15, entitled, ''Scientific Data and Information Related to the Residue of Carcinogenic Concern for the New Animal Drug Carbadox'' to gather additional data and information. When FDA announced the hearing (87 FR 2093, January 13, 2022; *https://www.fda.gov/animal-veterinary/workshops-conferences-meetings/part-15-public-hearing-scientific-data-and-information-related-residue-carcinogenic-concern-new*), we requested public comments and presentations at the public hearing, particularly: (1) on data to inform our knowledge of the residue of carcinogenic concern not summarized in the FOI Summary for the 1998 supplemental approvals, including additional data regarding the fraction of noncarcinogenic residues in the total radiolabeled residues of carbadox; (2) for any given concentration of a marker residue, the corresponding

[1] See § 500.82(b) (defining ''marker residue'' as the residue whose concentration is in a known relationship to the concentration of the residue of carcinogenic concern in the last tissue to deplete to the S_m and defining ''S_m'' as the concentration of a residue of carcinogenic concern in a specific edible tissue corresponding to no significant increase in the risk of cancer to the human consumer).

[2] Consistent with FDA regulations, CVM treats unidentified residues of a carcinogenic drug as carcinogenic. See § 500.82(b) (defining ''residue of carcinogenic concern'' as all compounds in the total residue of a demonstrated carcinogen excluding any compounds judged by FDA not to present a carcinogenic risk).

concentration of the residue of carcinogenic concern; (3) on additional information related to the adequacy of the current approved method to measure QCA as a marker residue for the residue of carcinogenic concern for the new animal drug carbadox not already contained in Docket No. FDA–2020–N–0955, ''Phibro Animal Health Corp.; Carbadox in Medicated Swine Feed; Revocation of Approved Method''; (4) on any method, other than the current approved method, that demonstrates ''no residue'' for the new animal drug carbadox in conformance with 21 CFR part 500, subpart E; and (5) on detailed information on the conduct and quality of studies providing data to support the points above, including information on the extraction process and the stability of residues being analyzed.

In addition to presentations from CVM and from the sponsor of the carbadox approved applications, several other stakeholders gave presentations. FDA also opened a docket (Docket No. FDA–2021–N–1326) to receive additional stakeholder comment on the topics listed above. After reviewing the comments to this docket (FDA–2020–N–0955), and presentations and the comments received in the docket for the public hearing (Docket No. FDA–2021–N–1326), FDA is now finalizing the order revoking the approved method for detecting residues of carbadox.

Elsewhere in this issue of the **Federal Register**, FDA is publishing a notice of opportunity for hearing (NOOH) proposing to withdraw approval of all new animal drug applications for use of carbadox based on the lack of an approved method for measuring the residue of carcinogenic concern. An approved method for measuring the residue of carcinogenic concern that complies with part 500, subpart E (21 CFR part 500, subpart E) is required by section 512(d)(1)(I) of the FD&C Act (21 U.S.C. 360b(d)(1)(I)).

II. Background

A. Regulation of Carcinogenic New Animal Drugs

The Delaney Clause of the FD&C Act generally prohibits the approval of carcinogenic animal drugs unless the ''Diethylstilbestrol (DES) Proviso'' applies. See section 512(d)(1)(I) of the FD&C Act. Under the DES Proviso exception, a carcinogenic new animal drug may be approved if, among other things, no residue of such drug will be found by methods of examination prescribed or approved by the Secretary of Health and Human Services (HHS) by regulations in any edible portion of such animals after slaughter or in any food yielded by or derived from the living animals.

As part of a new animal drug application (NADA), the sponsor must include a description of practicable methods for determining the quantity, if any, of the new animal drug in or on food and any substance formed in or on food because of its use, and the proposed tolerance or withdrawal period or other use restrictions to ensure that the proposed use of this drug will be safe (§ 514.1(b)(7) (21 CFR 514.1(b)(7))). Carcinogenic drugs, such as carbadox, must also meet the requirements in part 500, subpart E (§ 514.1(b)(7)(ii)). These regulations, known as the sensitivity of the method (SOM) regulations, set out the requirements to demonstrate that no residues of the drug will be found by an approved method in any edible tissues of or in any foods obtained from the animal, as required to comply with the DES Proviso.

Specifically, the SOM regulations require FDA to determine if any animal drug or any of its metabolites is a carcinogen (§ 500.84(a)). For the drug and each metabolite that FDA decides should be regulated as a carcinogen, FDA calculates, based on submitted assays, the concentration of the test compound in the total diet of the test animal that corresponds to a maximum lifetime risk of cancer in the test animal of 1 in 1 million (§ 500.84(c)(1)). FDA designates the lowest concentration (*i.e.,* the concentration of the most potent carcinogen) thus calculated as the S_o (§ 500.84(c)(1)). The S_o corresponds to a concentration of residue of carcinogenic concern in the total human diet that represents no significant increase in the risk of cancer to people (§ 500.82(b)). Because FDA relies on the S_o from the most potent carcinogen, this approach ensures that use of the drug does not present a significant increase in the risk of cancer when considering all residues in edible tissues.

Because the total human diet is not derived only from food-producing animals, the SOM regulations make adjustments for human food intake of edible tissues and determine the concentration of residue of carcinogenic concern in a specific edible tissue (such as muscle, liver, kidney, milk, or eggs) that corresponds to no significant increase in the risk of cancer to the human consumer. FDA assumes for purposes of these regulations that this value will correspond to the concentration of residues in a specific edible tissue that corresponds to a maximum lifetime risk of cancer in the test animals of 1 in 1 million. This value is designated as the S_m (§§ 500.82(b) and 500.84(c)(1)). By limiting the concentration of residue of carcinogenic concern to a value at or below the S_m, consumers can eat a specific edible tissue every day for an entire lifetime with no significant increase in the risk of cancer.

Based on data submitted by a sponsor, FDA selects a target tissue [3] and a marker residue [4] and designates the concentration of the marker residue that the method must be able to detect in the target tissue (§ 500.86(a) through (c) (21 CFR 500.86(a) through (c))). This value, termed the R_m, is the concentration of a marker residue in the target tissue when the residue of carcinogenic concern is equal to S_m (500.82(b)). When the marker residue is at or below the R_m, the residue of carcinogenic concern in the human diet does not exceed S_o (§ 500.86(c)). This regulation ensures that when the marker residue is no longer detectable, the residue of carcinogenic concern does not exceed S_m in any of the edible tissues (§§ 500.82(b) and 500.86(c)). For any given drug, there may be several different compounds to consider for use as a marker residue. The R_m would be different depending upon the compound selected as the marker residue.

A sponsor must submit a method that is able to detect the marker residue at or below the R_m (§§ 500.88(b) (21 CFR 500.88(b)) and 500.84(c)(2)). There may be multiple methods available to detect a particular marker residue; however, under the SOM regulations, a method must be able to confirm the identity of the marker residue in the target tissue at a minimum concentration corresponding to the R_m. The Limit of Detection (LOD) for the method must be less than or equal to the R_m (§ 500.84(c)(2)). FDA will determine the LOD from the submitted analytical method validation data (§ 500.88(b)).[5] If

[3] See § 500.82(b) (defining target tissue as the edible tissue selected to monitor for residues in the target animals, including, where appropriate, milk or eggs).

[4] See *supra* note 1 (defining ''marker residue'').

[5] As discussed above, the Delaney Clause prohibits the use of carcinogenic animal drugs unless the DES Proviso applies (see section 512(d)(1)(I) of the FD&C Act). The DES Proviso requires that, among other things, no residue of such drug will be found (by methods of examination prescribed or approved by the Secretary of HHS by regulations) in any edible portion of such animals after slaughter or in any food yielded by or derived from the living animals. FDA's SOM regulations establish the process by which a carcinogenic new animal drug may satisfy the DES Proviso. The SOM regulations were amended in 2002 to revise the operational definition of the term ''no residue.'' Previously, FDA determined there was ''no residue'' in edible

Continued

a method is not developed that can detect the marker residue at or below the R_m, the requirements of the SOM regulations are not satisfied, and FDA cannot approve the drug (see 21 U.S.C. 360b(d)(1)(I); § 500.88).

B. History of Carbadox Approvals

Currently, there are three approved NADAs for use of carbadox in medicated swine feed, either alone or in combination with other approved new animal drugs. Carbadox, a quinoxaline derivative, is a synthetic antimicrobial used to manufacture medicated feeds that are administered ad libitum (available at all times) to swine. Phibro Animal Health Corp. (Phibro), GlenPointe Centre East, 3d Floor, 300 Frank W. Burr Blvd., Suite 21, Teaneck, NJ 07666, is currently the sponsor of all three approved NADAs.

1. NADA 041–061

NADA 041–061, originally approved in 1972 (37 FR 20683, October 3, 1972), provides for the use of MECADOX 10 (carbadox) Type A medicated article to manufacture single-ingredient Type C medicated swine feeds at the rate of 10 to 25 grams per ton (g/ton) of feed for increased rate of weight gain and improved feed efficiency; and at 50 g/ton of feed for control of swine dysentery (vibrionic dysentery, bloody scours, or hemorrhagic dysentery), control of bacterial swine enteritis (salmonellosis or necrotic enteritis caused by *Salmonella choleraesuis*), and for increased rate of weight gain and improved feed efficiency.

In January 1998, CVM approved a supplemental application to NADA 041–061, which included the approved method (Ref. 2). However, this method was not published in the **Federal Register** as required in § 500.88, and the method that had been published for the 1972 approval was removed from the Code of Federal Regulations. Nevertheless, since the January 1998 approval of the supplemental NADA, CVM and the sponsor have treated the method approved as part of the 1998 supplemental application as the method of examination prescribed or approved by the Secretary of HHS by regulations for purposes of applying section 512(d)(1)(I) of the FD&C Act, the Delaney Clause, to carbadox.

In October 1998, CVM approved an additional supplemental NADA for NADA 041–061, changing the withdrawal period for carbadox medicated feeds from 70 days to 42 days. This supplemental NADA was approved based on the previous approval of a tolerance of 30 parts per billion (ppb) for QCA as the marker residue and a residue depletion study using the approved method that showed residues of QCA in liver depleted below 30 ppb by 42 days (Ref. 3).

2. NADA 092–955

NADA 092–955, originally approved in 1975 (40 FR 45164, October 1, 1975), provides for the use of MECADOX 10 (carbadox) Type A medicated article with BANMINTH (pyrantel tartrate) Type A medicated article to manufacture two-way, combination drug Type C medicated swine feeds at 50 g/ton of feed plus pyrantel tartrate at 96 g/ton of feed for control of swine dysentery (vibrionic dysentery, bloody scours, or hemorrhagic dysentery), control of bacterial swine enteritis (salmonellosis or necrotic enteritis caused by *S. choleraesuis*), as an aid in the prevention of migration and establishment of large roundworm (*Ascaris suum*) infections, and as an aid in the prevention of establishment of nodular worm (*Oesophagostomum*) infections. The withdrawal period for the use of this drug combination is 70 days (§ 558.115(d)(3)(ii) (21 CFR 558.115(d)(3)(ii))).

3. NADA 141–211

NADA 141–211, originally approved in 2004 (69 FR 51173, August 18, 2004), provides for the use of MECADOX 10 (carbadox) Type A medicated article with TERRAMYCIN 50, TERRAMYCIN 100, or TERRAMYCIN 200 (oxytetracycline) Type A medicated articles to manufacture two-way, combination drug Type C medicated swine feeds at 10 to 25 g/ton of feed plus oxytetracycline at levels in feed to deliver 10 mg carbadox per pound of body weight for treatment of bacterial enteritis caused by *Escherichia coli* and *S. choleraesuis* susceptible to oxytetracycline, for treatment of bacterial pneumonia caused by *Pasteurella multocida* susceptible to oxytetracycline, and for increased rate of weight gain and improved feed efficiency. The withdrawal period for the use of this animal drug combination is 42 days (§ 558.115(d)(4); § 558.450(e)(3)(iii) (21 CFR 558.450(e)(3)(iii)).

C. Statutory Authority To Issue Order

Under 5 U.S.C. 554(e) (section 5(d) of the Administrative Procedure Act (APA)), an agency, in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty. The APA defines ''order'' as the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rulemaking but including licensing (5 U.S.C. 551(6)). The APA defines ''adjudication'' as agency process for the formulation of an order (5 U.S.C. 551(7)). FDA's regulations, consistent with the APA, define ''order'' to mean the final Agency disposition, other than the issuance of a regulation, in a proceeding concerning any matter (§ 10.3(a) (21 CFR 10.3(a)). Our regulations also define ''proceeding and administrative proceeding'' to mean any undertaking to issue, amend, or revoke a regulation or order, or to take or not to take any other form of administrative action, under the laws administered by FDA (§ 10.3(a)). Moreover, our regulations establish that the Commissioner of Food and Drugs may initiate an administrative proceeding to issue, amend, or revoke an order (§ 10.25(b) (21 CFR 10.25(b)).

On our own initiative, FDA is issuing a 5 U.S.C. 554(e) declaratory order to remove uncertainty regarding the approved method for carbadox that measures QCA as a marker residue. An order is the most appropriate procedure to revoke the approved method because there is no rule to amend. The approved method is not currently published in the **Federal Register**, contrary to § 500.88, and the method that had been published for the 1972 approval was removed from the Code of Federal Regulations in 1998 and is no longer the approved method. The FD&C Act does not provide the procedure we must use to determine whether an approved method of examination that was never published in the Code of Federal Regulations satisfies the regulatory requirements of part 500, subpart E. Thus, we are choosing to issue a declaratory order to remove uncertainty.

III. Discussion

When CVM approved the supplemental NADA for carbadox in January 1998, it did not require the sponsor to provide data establishing a known relationship between the concentration of the marker residue (QCA) and the concentration of the

tissues when the concentration of the marker residue was at or below R_m. However, in 1995, the Department of Justice (DOJ)'s Office of Legal Counsel determined that FDA's interpretation was not legally supportable. Specifically, it opined that, if a method detected residue (even if the concentration of that residue fell below the R_m) the DES Proviso requirement for ''no residue'' was not satisfied. Accordingly, in 2002, FDA revised the definition of ''no residue'' to mean when the concentration of the marker residue is below the LOD of the method, meaning nondetectable by the method (67 FR 78174; see also DOJ, Mem. Op. for the Assistant Administrator & Gen. Counsel EPA & Gen. Counsel DHHS (October 13, 1995), *https://www.justice.gov/d9/olc/opinions/1995/10/31/op-olc-v019-p0247_0.pdf*).

residue of carcinogenic concern (§ 500.86). At that time, CVM did not believe that such information was necessary because of previous conclusions that it had made about the persistence of carcinogenic residue in the edible tissues of animals administered carbadox. CVM's understanding, at that time, was that carcinogenic residues, including desoxycarbadox (DCBX), a known carcinogenic metabolite of carbadox, depleted quickly (within 72 hours) while QCA residues depleted more slowly. However, results from subsequent studies led CVM to reexamine the conclusions it made in 1998 and conclude, based on data from these studies, that it is necessary to establish a known relationship between the marker residue and the residue of carcinogenic concern, as required by regulation.

FDA is revoking the approved method for carbadox that measures QCA as the marker residue because it is inadequate to monitor the residue of carcinogenic concern. The approved method cannot adequately monitor residue of carcinogenic concern because CVM is not aware of any data to establish a relationship between QCA and the residue of carcinogenic concern. That means that determining the concentration of QCA in animal tissue does not allow CVM to determine whether the residue of carcinogenic concern remains in the edible tissue. Thus, the approved method does not comply with part 500, subpart E, and therefore does not satisfy the statutory requirement of section 512(d)(1)(I) of the FD&C Act.

A. CVM's Conclusions in the January 1998 Approval

In reviewing information for the supplemental NADA for carbadox in January 1998, CVM relied on studies conducted by the sponsor [6] and academic researchers (Ref. 2) to establish an S_o and an S_m for the most potent of the carcinogenic compounds. As part of the supplemental NADA, the sponsor submitted toxicology studies, including carcinogenicity bioassays with carbadox, DCBX, and hydrazine (another carcinogenic metabolite of carbadox). These studies indicated that DCBX was the most potent of the three identified carcinogenic residues of carbadox. Based on the carcinogenicity of DCBX, CVM calculated an S_o of 0.061 ppb for residue of carcinogenic concern for carbadox in the total diet. CVM calculated an S_m value for the residue of carcinogenic concern in muscle at 0.305 ppb, in liver at 0.915 ppb, and in kidney and fat at 1.830 ppb. Because liver residues persist the longest, CVM assigned it as the target tissue. Therefore, 0.915 ppb is the S_m value for the residue of carcinogenic concern for carbadox and liver is the target tissue (Ref. 2).

Based on information submitted as part of the supplemental NADA approved in January 1998, CVM made conclusions about how long carcinogenic residues persist in the edible tissues of swine after treatment with carbadox and about the appropriate marker residue to select to monitor carbadox use. As stated in the FOI Summary for the January 1998 approval of the supplemental NADA, CVM concluded that the data:

> [S]how that carbadox, desoxycarbadox and hydrazine do not persist in edible tissue as detectable residues beyond 72 hours. The agency's evaluation of these data, and the new information provided by the sponsor, demonstrate that following administration, parent carbadox is rapidly metabolized; that the metabolism of carbadox is similar among species; that the in vivo metabolism of the compounds of carcinogenic concern is also rapid and irreversible such that the resulting metabolic products cannot regenerate compounds of carcinogenic concern; that the unextractable residues are related to noncarcinogenic compounds, quinoxaline-2-carboxylic acid (QCA) and quinoxaline-2-carboxaldehyde; and that QCA is the only residue detectable in the edible tissues beyond 72 hours post dosing. Thus, the agency concludes that the unextractable bound residue is not of carcinogenic concern and that QCA is a reliable marker residue for carbadox.

CVM made the following conclusions during the review of the supplemental NADA for carbadox approved in January 1998:

1. Carcinogenic residues do not persist in animal tissue beyond 72 hours postdosing.
2. Extractable QCA is the only residue detectable in edible tissues 72 hours postdosing.
3. Unextractable residues are noncarcinogenic residues related to QCA.
4. QCA is a reliable marker residue for carbadox and its metabolites.
5. No residue of carcinogenic concern, even below the S_o, is detectable by any method after 72-hours postdosing.

Because of the conclusions made at that time, CVM did not require the sponsor to submit data to meet the requirements of the part 500, subpart E, regulations [7] despite the fact that carbadox is a carcinogen. CVM instead established a tolerance of 30 ppb for QCA and granted the supplemental approval for carbadox.

B. The Approved Method That Measures QCA as the Marker Residue for Carbadox Is Inadequate

Under section 512(d)(1)(I) of the FD&C Act, carcinogenic new animal drugs, such as carbadox, must have a method of detection, prescribed or approved by regulation, to ensure that no residue of carcinogenic concern persists in any edible portion of the treated animals after slaughter or in any food derived from treated animals. FDA has implemented this statutory requirement through its SOM regulations in part 500, subpart E, which require that each carcinogenic new animal drug have a marker residue with a known relationship to the residue of carcinogenic concern. This relationship is necessary to establish a concentration of the marker residue (the R_m) that ensures any residue of carcinogenic concern in a specific edible tissue is below the level corresponding to maximum lifetime risk of cancer in the test animal of 1 in 1 million (the S_m), based on calculations that consider the entire human diet (the S_o). The approved method must have a limit of detection less than or equal to the R_m.

Although CVM approved the method for carbadox as part of the supplemental NADA in January 1998 and designated the S_m and S_o, it did not require the sponsor to provide data showing the relationship between QCA and the residue of carcinogenic concern and therefore could not designate an R_m. Nor did CVM require the sponsor to identify

[6] Pfizer, Inc. was the sponsor for carbadox until 2001. The current sponsor is Phibro.

[7] These regulations require the sponsor to submit data that allows FDA to designate an R_m (the concentration of the marker residue in the target tissue at which the residue of carcinogenic concern in the diet of people represents no significant increase in the risk of cancer to people) based on a known relationship between the marker residue and the residue of carcinogenic concern. In addition, the sponsor must provide a method that can detect the marker residue at or below the R_m. Under § 500.86, the necessary steps to meet the operational definition of ''no residue'' for carbadox are: (1) measure the depletion of the residue of carcinogenic concern until its concentration is at or below the S_m (0.915 ppb) in liver; (2) measure the depletion of the marker residue until the concentration of the residue of carcinogenic concern is at or below the S_m; (3) use the information in (1) and (2) to establish an R_m; and, (4) according to the regulations as they existed in 1998, develop a method that could detect the marker residue of the drug, as long as the marker residue would only be detected at or below the R_m under the proposed conditions of use. According to the current regulations, step (4) requires the development of a method that complies with the operational definition of no residue (the method's LOD is less than or equal to the R_m and the marker residue depletes to a concentration that cannot be detected by the method).

a method with a limit of detection less than or equal to the R_m. Without an R_m and an appropriate method for detecting the marker residue (*i.e.,* a method sensitive enough to detect residues at or below the R_m), it is impossible to determine that the residue of carcinogenic concern falls below the S_m. Accordingly, based on information currently available to CVM, it is impossible to use the approved method or any other method to ensure compliance with the operational definition of no residue.

Furthermore, based on studies conducted since 1998, CVM reevaluated the conclusions that originally led it to determine that assignment of a tolerance of 30 ppb for QCA in swine liver would ensure that the residue of carcinogenic concern would remain at or below its respective S_o in all edible tissues (Refs. 4–6). Based on a review of these data, CVM concluded that: (1) carcinogenic residues persist in animal tissue more than 72 hours postdosing and (2) QCA is not the only residue detectable in animal tissue after 72 hours postdosing.

For the 2003 Joint Food and Agriculture Organization (FAO)/World Health Organization (WHO) Expert Committee on Food Additives (JECFA) meeting, the sponsor provided data in which it reported that DCBX is measurable quantitatively (specific concentration measured) at 15 days postdosing (the last sampling timepoint in the study) (Refs. 4 and 5). Based on those studies, which showed the persistence of genotoxic, carcinogenic residues, JECFA recommended withdrawal of the previously established Codex Alimentarius Commission [8] (Codex) Maximum Residue Limit (MRL). Codex subsequently agreed because the amount of residues of carbadox in human food that would have no adverse health effects in consumers could not be determined. Following that meeting, the Codex Committee on Residues of Veterinary Drugs in Foods withdrew the MRL for carbadox (Ref. 7). Carbadox has been removed from the market in many foreign jurisdictions, including the European Union (Ref. 8), Canada (Ref. 9), and Australia (Ref. 10).

In 2005, the sponsor provided CVM with summary reports for the studies evaluated by the 2003 JECFA. CVM responded later that year, informing the sponsor that: (1) because the summaries indicated that carcinogenic residues persist longer than previously known and there is no established relationship between QCA and the residue of carcinogenic concern, CVM was concerned that the use of the 30 ppb tolerance for QCA and the use of QCA generally as a marker residue may not be appropriate and (2) accordingly, the sponsor would need to submit existing or new studies to address the relationship of QCA at 30 ppb and the residue of carcinogenic concern. CVM also told the sponsor that, if it was determined that QCA is not appropriate as the marker residue, the sponsor would need to conduct additional metabolism and residue depletion studies to identify an appropriate marker residue and tolerance in order to maintain the carbadox approvals.

Between 2005 and 2011, CVM continued to meet with the sponsor and to review various submissions from the sponsor, including but not limited to a study the sponsor conducted in 2008 to 2009 and submitted in 2009 (hereinafter ''the 2008 study''). None of the submissions, however, contained reports of studies that were designed to generate the needed information. Therefore, in 2011, pursuant to section 512(*l*)(1) of the FD&C Act, FDA ordered the sponsor to provide FDA with all data, studies, analyses, reviews, reports, or other scientific evaluations in its possession related to the persistence of DCBX in edible tissues, the appropriateness of QCA as an analyte for residue monitoring and for establishing a withdrawal time for the use of carbadox in pigs, and whether an analytical method for monitoring carbadox-related carcinogenic residues in edible tissues can be developed that would comply with part 500, subpart E. The sponsor responded with, among other submissions, the complete study reports for the studies evaluated by the 2003 JECFA. CVM reviewed the reports and determined that the data show qualitatively (specific concentration not measured) that carbadox and DCBX are present in liver tissue samples at 48 hours and at 15 days withdrawal, respectively. For samples exposed to enzymes to mimic human digestion, CVM concluded that the mass spectrometry chromatograms and the reported DCBX concentration data provide qualitative confirmation of the presence of DCBX at 15 days withdrawal. These reports show that the known carcinogenic residues (DCBX) persist beyond 72 hours and that QCA is not the only residue detectable after 72 hours.

In response to CVM's proposal to withdraw approval of the carbadox containing new animal drug applications in 2016,[9] the sponsor submitted reports from six studies (hereinafter ''the 2016 studies''). These studies, some of which began in 2012, were initiated without agreement from CVM that they would provide the necessary data to address CVM's concerns (specifically, data to demonstrate that the approved method was adequate to measure the residue of carcinogenic concern in compliance with FDA's SOM regulations, or that an alternative method to do so was available).

Finally, the sponsor and others submitted presentations, documents, and information in response to the 2020 proposed order, at the March 10, 2022, public hearing, and/or to the docket for the public hearing. CVM reviewed the presentations, documents, and information, and determined that they were not sufficient to establish a relationship between QCA and the residue of carcinogenic concern, which includes carbadox and DCBX. Additionally, there were no data to establish the residue level of QCA at which the residue of carcinogenic concern in the diet of people represents no significant increase in the risk of cancer to people. Without these data, CVM cannot establish the R_m and the sponsor cannot demonstrate ''no residue'' of carcinogenic concern as required by the SOM regulations in part 500, subpart E, which implement the FD&C Act at 21 U.S.C. 360b(d)(1)(I).

In sum, based on review of data submitted following the 1998 approval of the method, CVM concludes that: (1) carcinogenic residues persist in animal tissue more than 72 hours postdosing and (2) QCA is not the only residue detectable in animal tissue after 72 hours postdosing. CVM also concludes that data and information submitted since 1998, including to this docket and to Docket No. FDA–2021–N–1326 by the sponsor and others, do not provide information needed to establish the relationship between QCA and the residue of carcinogenic concern. Without knowing this relationship and without a method for measuring a marker residue with a limit of detection

[8] For more information about Codex, see *https://www.fao.org/fao-who-codexalimentarius/committees/cac/about/en/.*

[9] CVM issued a Notice of Opportunity for Hearing (NOOH) on a proposal to withdraw approval of the carbadox containing NADAs on April 12, 2016. [81 FR 21559; (Correction published on April 21, 2016 (81 FR 23499), to correct the telephone number for the individual to be contacted for further information. The address for Phibro Animal Health Corp. was also corrected.)] Phibro submitted data from the 2008 study in its Request for a Hearing in response to the NOOH. [*https://www.regulations.gov/document/FDA-2016-N-0832-0029*] Phibro also submitted to that same docket reports from additional studies in July 2016. CVM withdrew the 2016 NOOH on July 20, 2020 (85 FR 43852).

at or below the R_m, the approved method is inadequate for monitoring compliance with FDA's operational definition of no residue (see § 500.84(c)(3)). Accordingly, the approved method for carbadox does not satisfy the statutory or regulatory requirements and is being revoked.

IV. Comments Received on the Proposed Order and Public Hearing

A. Comments Submitted by the Sponsor

The sponsor of the carbadox NADAs submitted information to the docket of the proposed order, presented information at the public hearing, and submitted information to the docket for that hearing. CVM's scientific review of the sponsor's submitted data, analysis, and comments prior to the hearing is discussed below and in ''CVM Response to Phibro Animal Health Corporation's September 18, 2020 Comments on CVM's July 20, 2020 Proposed Order to Revoke the Regulatory Method for Carbadox'' (January 6, 2022), which was posted to the public docket before the hearing (Ref. 6). Information submitted during or after the hearing is discussed below and in ''CVM's review of documents Phibro submitted to Docket No. FDA–2021–N–1326 and presentation at the March 10, 2022 Part 15 Hearing'' (October 30, 2023) (Ref. 11), and ''CVM review of comments on the Zhang Article that Phibro references in the document submitted to the Part 15 Hearing docket under cover letter dated June 9, 2022, and entitled, 'Phibro Animal Health Corporation's Reply to the January 6, 2022 ''CVM Response to Phibro Animal Health Corporation's September 18, 2020 Comments on CVM's July 20, 2020 Proposed Order to Revoke the Regulatory Method for Carbadox'' ' '' (October 30, 2023) (Ref. 12). CVM's review of the sponsor's procedural and policy objections is reflected below and in the denials of the sponsor's citizen petition (Docket No. FDA–2020–P–2312) and petition for stay of action (Docket No. FDA–2020–P–2313), available at *https://www.regulations.gov.*

In the sponsor's comments and oral presentation, it argued that QCA is an adequate marker residue and defended the approved method, which measures QCA. The comments defended the use of the 30 ppb QCA tolerance and 42-day withdrawal period as sufficient to protect human and animal safety. The sponsor alternatively suggested use of the U.S. Department of Agriculture Food Safety and Inspection Service (FSIS) method to measure QCA. The sponsor also proposed that DCBX could be used as a marker residue. For measuring DCBX, the sponsor proposed the Canadian Food inspection Agency (CFIA) method. The sponsor also suggested that other unnamed methods were available. Finally, the sponsor argued that a final order was not the appropriate process to revoke an approved method and that an NOOH is required instead.

Comment on use of QCA as a marker residue. The sponsor states that an R_m can be calculated for QCA based on the available data and submitted an expert opinion about the R_m for QCA. By analyzing QCA and DCBX concentrations, the sponsor's expert states that the R_m for QCA is either 28.49 ppb (using the 2008 study data and the approved method) or 28.61 ppb (using the data submitted for the 1998 supplemental approval and the approved method). The sponsor also asserted that even if DCBX residues persist longer than previously known, no residue of carcinogenic concern persists beyond the current 42-day withdrawal period. The sponsor stated that either the approved method or FSIS method could be used to measure QCA.

Response to use of QCA as a marker residue. After reviewing the sponsor's studies submitted to the 2003 JECFA, the 2008 study, the 2016 studies, and other comments and analyses provided by the sponsor, CVM concludes that it lacks the data to establish an R_m for QCA or any other marker residue. The sponsor's expert opinion estimated the concentration of QCA when DCBX is 0.915 ppb (the S_m for the residue of carcinogenic concern in liver for carbadox). This analysis relied solely on residues of DCBX instead of considering the residue of carcinogenic concern. DCBX is only one metabolite of carbadox and therefore just one component of the residue of carcinogenic concern, which includes all compounds in the total residue of a demonstrated carcinogen excluding any compounds judged by FDA not to present a carcinogenic risk (§ 500.82). Because QCA and another metabolite, methyl carbazate, are the only compounds of carbadox that FDA has judged to not present a carcinogenic risk, the residue of carcinogenic concern for carbadox includes all carbadox residues except for QCA and methyl carbazate. The sponsor did not provide an R_m for the marker residue QCA that accounted for the residue of carcinogenic concern, nor is CVM able to calculate one based on the data available. Without an R_m, CVM cannot determine if the approved method, FSIS method, or any other method that measures QCA as the marker residue is sufficiently sensitive to satisfy the regulatory and statutory requirements.

Contrary to the sponsor's assertion that the residue of carcinogenic concern does not persist beyond the 42-day withdrawal period, data quantifying the residue of carcinogenic concern for carbadox from the 1998 supplemental approval indicates that a marker residue would exceed the R_m (the concentration associated with no increase in risk to the human consumer) more than 70 days post-dosing. The data submitted for the 1998 supplemental approval showed that the total radiolabeled residues have a concentration of 13.3 ppb at 70 days post-dosing, the last timepoint in the study. After removing the 9.9 percent QCA residues detected at 70 days,[10] the remaining residue has a concentration of 11.98 ppb. This concentration far exceeds the S_m value of 0.915 ppb for carbadox and therefore these data cannot be used to calculate an R_m. At most, these data indicate that a marker residue would not reach the R_m until more than 70 days post-dosing, well past the current 42-day withdrawal period.

The sponsor's 2008 study and 2016 studies did not provide the information to determine the residue of carcinogenic concern. The sponsor's 2008 study does not provide information on the residue of carcinogenic concern because it measured only QCA and DCBX, not total residues of carbadox. In addition, CVM concluded that the data from that study cannot be considered quantitative because of poor method performance. Likewise, the sponsor's 2016 studies do not provide quantitative data on the residue of carcinogenic concern. Additionally, although the sponsor attempted to separate the residues and measure the presence of each compound individually, it failed to demonstrate that the analytical procedures used did not cause carcinogenic compounds to degrade to noncarcinogenic compounds. CVM's review of the method performance issues and analytical flaws in the sponsor's studies is discussed in greater detail in Refs. 6 and 11.

CVM also reviewed the information provided by the sponsor during the public hearing and to the docket following the hearing and concluded that such information does not allow CVM to determine an R_m for the approved method. The new information concerns the procedures, analysis, and documentation for the 2016 studies; however, none of the new information

[10] According to the 1998 FOI Summary, QCA and methyl carbazate are noncarcinogenic metabolites of carbadox (Ref. 2). The sponsor provided quantitative measurements for QCA, but not for methyl carbazate.

provides the data necessary to calculate an R_m because the studies were not designed to generate the quantitative data necessary to make these calculations. CVM's review of the new information is discussed in greater detail in Ref. 11.

Comment on use of DCBX as a marker residue. The sponsor proposed the use of DCBX as a marker residue and suggested the CFIA method for detecting DCBX. According to an expert opinion submitted by the sponsor, DCBX depletes to a concentration of 0.915 ppb at approximately 23 days post-dosing and depletes to the 0.015 ppb detection limit for the CFIA method at 75 days post-dosing.

Response to use of DCBX as a marker residue. Because DCBX is only part of the residue of carcinogenic concern, the sponsor's expert opinion and analysis are insufficient to ensure compliance with the SOM regulations. The residue of carcinogenic concern for carbadox includes all carbadox residues excluding residues judged by FDA not to present a carcinogenic risk (§ 500.82(b)). For carbadox, only the compounds QCA and methyl carbazate have been judged by FDA to be noncarcinogenic. All other compounds cannot be excluded from the residue of carcinogenic concern. At most, the expert's opinion indicates that the concentration of the residue of carcinogenic concern would reach the S_m at some point after 23 days (since DCBX is only part of the residue of carcinogenic concern) and that detectable residues of a carcinogenic new animal drug are present at 75 days post-dosing, which is 33 days longer than the current withdrawal period and 72 days longer than was known in 1998. This information is insufficient to determine an R_m for DCBX as a marker residue. Without an R_m, CVM cannot determine if the CFIA method or any other method to measure DCBX is sufficiently sensitive to satisfy the regulatory and statutory requirements (§ 500.88(b)).

Comment on carbadox metabolism. During the public hearing, the sponsor stated that the metabolism for carbadox is well-known and asserted that carbadox depletes to DCBX, which in turn depletes to the noncarcinogenic QCA. The sponsor addressed an April 2022 study (Ref. 13) about the metabolism and residue depletion of carbadox and asserted that compounds other than DCBX and QCA are intermediates that are present ''only fleetingly.'' The sponsor also stated during the public hearing that it would be willing to conduct additional studies.

Response on carbadox metabolism. CVM reviewed the sponsor's comments regarding a study published in April 2022 that describes metabolism and residue depletion of carbadox (Ref. 12). The study identified eight different metabolites of carbadox (DCBX, QCA, and six others) and proposed two different metabolic pathways for the degradation of carbadox. The study contradicts the sponsor's claim that DCBX represents the entirety of the residue of carcinogenic concern. Although the sponsor states that the six non-QCA, non-DCBX carbadox residues identified in the April 2022 study are present ''only fleetingly,'' the method used in that study was not capable of detecting carbadox metabolites below 20 ppb, a concentration far greater than the S_m. Further, FDA regulations prohibit us from excluding compounds from the residue of carcinogenic concern until they have been judged to be noncarcinogenic. Only compounds known to be noncarcinogenic can be subtracted from the total residues for the determination of residue of carcinogenic concern. Although the 2022 study adds to our knowledge about previously unidentified carbadox residues, it does not provide total residue data that could be used to calculate the residue of carcinogenic concern or to determine a relationship between a marker residue and the residue of carcinogenic concern for establishment of an R_m. Finally, although the sponsor stated that it would be willing to conduct additional studies, it has not submitted additional studies to date.

Comment on process to revoke the method. The sponsor also argued that CVM cannot lawfully revoke an approved method using a final order under the FD&C Act and its implementing regulations, agency precedent, the Administrative Procedure Act, and the Due Process Clause of the U.S. Constitution and must rely instead on an NOOH and an evidentiary hearing before an impartial adjudicator to address the adequacy of the approved method. Alternatively, the sponsor asserted that revocation of the method requires rulemaking under the APA instead of a declaratory order. The sponsor also argued that it is arbitrary and capricious to revoke an approved method without establishing an alternative method and that a public hearing is not a substitute for a formal evidentiary hearing.

Response on process to revoke the method. It is appropriate under the FD&C Act and its regulations, agency precedent, the Administrative Procedure Act, and the Due Process Clause of the U.S. Constitution to address the adequacy of the approved method through a declaratory order as a threshold matter before proceeding to an NOOH on withdrawal of the drug's approval. Although the FD&C Act requires an opportunity for a hearing prior to withdrawing an animal drug approval (which FDA is providing by issuing an NOOH and considering any request for hearing it receives), the FD&C Act does not require a specific procedure to determine whether a particular method of examination satisfies the statutory and regulatory requirements, nor does it address the situation when an agency did not follow a regulatory requirement to publish that method in the **Federal Register**. A declaratory order is an appropriate process under the FD&C Act and APA to determine whether a statutory exclusion applies. *See Weinberger* v. *Hynson, Westcott & Dunning, Inc.,* 412 U.S. 609, 626 (1973) (holding that FDA could issue a declaratory order to terminate controversy and remove uncertainty regarding whether a new drug and ''me-too'' drugs were exempt from providing efficacy data).

In *Weinberger,* the Supreme Court agreed with FDA's conclusion that efficacy data was required for a class of drugs but held that a hearing was necessary before withdrawal because the drug sponsor had submitted substantial evidence of efficacy in line with FDA's regulatory requirements for well-controlled studies. *Id.* at 622–23. Here, FDA concludes that the approved method, which relies on a tolerance of 30 ppb for QCA, does not comply with the statute and implementing regulations because there is no R_m for the marker residue QCA and no determination that the approved method is sufficiently sensitive to detect the marker residue at or below the R_m. Unlike the situation in *Weinberger,* where the drug sponsor submitted efficacy data in line with the regulatory and statutory requirements, the drug sponsor does not assert here that the current tolerance of 30 ppb for QCA has a known relationship with the residue of carcinogenic concern and therefore has not submitted evidence that the approved method satisfies the statutory and regulatory requirements. Instead, the drug sponsor's expert states that the R_m for QCA is either 28.49 ppb (using the 2008 data and the approved method) or 28.61 ppb (using the data submitted for the 1998 supplemental approval and the approved method) based on a calculation that estimates concentrations of QCA when the estimated concentration of DCBX is 0.915 ppb. DCBX is not the only

carcinogenic residue that must be considered when determining an R_m, so the sponsor's calculations do not account for the entire residue of carcinogenic concern. However, even if we were to assume that DCBX is the only carcinogenic residue present, the sponsor's assertion essentially admits that its own expert does not think the current tolerance satisfies the regulatory requirements because the current tolerance of 30 ppb is more than 28.49 ppb or 28.61 ppb (the R_m identified by the sponsor's expert).

Currently, edible tissues may enter the food supply if they contain a concentration of QCA at or below 30 ppb. According to the expert's calculation, when QCA is more than 28.49 ppb or 28.61 ppb, edible tissues would still contain carcinogenic DCBX above 0.915 ppb, the level that corresponds to no significant increase in the risk of cancer to the human consumer. If we accept the expert's calculations as true,[11] edible tissues with a QCA concentration of 29 ppb, for example, could contain carcinogenic residues above 0.915 ppb, yet those edible tissues could enter the food supply because the QCA tolerance would be satisfied. The sponsor argues that the current 42-day withdrawal period provides an additional margin of safety sufficient to meet the statutory and regulatory requirements because the sponsor's expert estimates that DCBX depletes to 0.915 ppb at 23 days, 19 days before the end of the withdrawal period. However, edible tissues are analyzed for residue concentrations; the length of time since the animal was treated is not measurable from tissue analysis. Thus, safety is assured by measuring the concentration of a marker residue that tracks the residue of carcinogenic concern in edible tissues to determine whether the concentration is below or above the R_m. Regardless of the length of the withdrawal period, the ''no residue'' requirement cannot be met if the marker residue is above the R_m. Even if we accepted the sponsor's calculations as true, a tolerance of 30 ppb for QCA would not be at or below the R_m (calculated by the sponsor's expert as 28.49 ppb or 28.61 ppb) in edible tissues of treated swine. Thus, even the sponsor's own expert opinion supports FDA's conclusion that the approved method does not satisfy the statutory and regulatory requirements.

CVM spent a decade (2005 to 2015) in discussions with the sponsor regarding the data necessary to identify an adequate method and did, and continues to, invite the sponsor to provide that data. At this time, as discussed above, the sponsor has not submitted that data.

The method revocation and withdrawal of NADA approvals are not so intertwined as to require a hearing on revocation under the statute or FDA's regulations. While a sponsor may have an opportunity at a hearing held on either NADA approvability or NADA withdrawal to show whether there is an approvable method to meet the DES Proviso, the FD&C Act does not require an opportunity for a hearing on the interlocutory revocation of an approved method. 21 U.S.C. 360b(c)(1) and (e)(1)(B). Furthermore, CVM's decision to revoke the method separately from (and before) taking action on the NADA is consistent with D.C. Circuit opinions regarding the DES withdrawal proceedings, which declined to apply the Delaney Clause when there were currently approved methods that did not result in detectable levels of residue. In *Hess & Clark, Division of Rhodia, Inc.* v. *FDA,* 495 F.2d 975 (D.C. Cir. 1974), and its companion case, *Chemetron Corp.* v. *U.S. Dep't of Health, Educ. & Welfare,* 495 F.2d 995 (D.C. Cir. 1974), the court overturned FDA's withdrawal of approvals of DES because it held that the NOOH preceding the withdrawals did not adequately provide notice and a meaningful opportunity to respond to test results that FDA claimed supported withdrawal. *Hess & Clark,* 495 F.2d at 983; *Chemetron,* 495 F.2d at 999. Notably, the test results were from a method that the U.S. Department of Agriculture (USDA) utilized that was different from the approved methods for DES. In discussing the USDA method, the court stated that ''the Delaney Clause is plainly inapplicable'' where ''the only method by which residues have been detected is [an unapproved method].'' *Hess & Clark,* 495 F.2d at 991; *see also Chemetron,* 495 F.2d at 999 (''The 'DES' exception to the Delaney Clause . . . continues effective unless the agency detects residues in a slaughtered animal while using an approved test method. And the residues detected by [USDA] were not found by an 'approved method.' ''). Under this logic, the Delaney Clause will only apply after the approved method has been revoked or residue is found by the approved method. Consistent with these cases (the only court cases that address the applicability of the Delaney Clause when there is still an approved method), CVM is addressing the adequacy of the approved method for carbadox before relying on the Delaney Clause to take action to withdraw the NADAs.[12] FDA's decision to revoke the approved method relies on the information submitted to date by the drug sponsor. This revocation does not prevent the drug sponsor from providing new or additional data to establish an R_m for a marker residue in accordance with the statute and regulations.

On the two previous occasions when FDA withdrew approval for carcinogenic animal drugs (DES and a class of drugs called ''nitrofurans''), FDA relied on both the Delaney Clause and the general safety clause, so these prior situations differ significantly from a withdrawal based solely on the Delaney Clause. Furthermore, both sets of withdrawal proceedings began before FDA finalized the SOM regulations in 1987 and therefore provide no guidance on the appropriate process to determine whether a method complies with the SOM regulations. The SOM regulations (which implement the DES Proviso) are a rule of general applicability because they set forth the general requirements for all regulatory methods for carcinogenic new animal drugs; by contrast, this final order revoking the method is appropriate as a declaratory order because it determines whether one specific method satisfies these general requirements. Notably, FDA does not approve regulatory methods through notice-and-comment rulemaking under the APA. *See* 76 FR 72617, November 25, 2011 (publishing regulatory method to detect residues of carcinogen without notice-and-comment rulemaking). Because notice-and-comment rulemaking is not required to publish a regulatory method, it is not required to revoke a regulatory method. *See Perez* v. *Mortg. Bankers Ass'n,* 575 U.S. 92, 101 (2015).

CVM provided notice of the proposed order and a meaningful opportunity to be heard. The drug sponsor and other interested parties had an opportunity to provide comments and other information. The public hearing served as an additional opportunity for the sponsor and the public to comment on this matter. The sponsor presented orally and submitted additional comments to the public hearing docket. In addition, the sponsor remains able to market carbadox lawfully, so the

[11] As discussed above, DCBX is not the only residue of carcinogenic concern and we have concerns regarding the quality of data from the 2008 study.

[12] While, subsequent to the 1974 DES decisions, FDA proceeded to a hearing on the withdrawal of DES without revoking the method first, FDA relied on both the general safety clause and the Delaney Clause as the basis for withdrawal and, upon subsequent challenge, the D.C. Circuit declined to address FDA's application of, or procedure regarding, the Delaney Clause. *Rhone-Poulenc, Inc., Hess & Clark Division* v. *FDA,* 636 F.2d 750, 751–52 & n.2 (D.C. Cir. 1980).

sponsor has not been deprived of a property right.

CVM, as the component of FDA charged with applying the Delaney Clause and DES Proviso, is appropriately advising on this order and its involvement does not infect any subsequent proceedings with any bias. Elsewhere in this issue of the **Federal Register**, FDA is publishing an NOOH and, pursuant to FDA regulations, were the sponsor to request a hearing, the adjudicator of that request would be affiliated with FDA's Office of the Commissioner and would have had no previous role in the proceedings to date.

Comment on policy considerations. The sponsor asserts that revoking the approved method for carbadox and the resulting withdrawal of carbadox, if it were to occur, would be poor policy because carbadox supports animal health and serves the public interest in preventing antimicrobial resistance and because the swine industry and U.S. economy would face significant costs following revocation of the method and/or withdrawal of approval of the NADAs. The sponsor also asserts that carbadox is safe in that it has been used for over 50 years and has not been linked to a single instance of cancer in pigs or humans.

Response to comment on policy considerations. These comments are not relevant to whether the approved method meets our regulatory requirements and is adequate to monitor the residue of carcinogenic concern in compliance with FDA's operational definition of no residue or provide information needed to establish the relationship of QCA to the residue of carcinogenic concern. Without an adequate method, the drug cannot meet the DES Proviso in section 512(d)(1)(I) of the FD&C Act that permits the approval of carcinogenic animal drugs under certain conditions. The carcinogenicity studies of carbadox provided clear evidence that carbadox caused cancer in mice and rats under laboratory conditions; therefore, the Delaney Clause applies because ''such drug induces cancer when ingested by man or animal.'' 21 U.S.C. 360b(d)(1)(I).

CVM considered the sponsor's other comments and concluded that they were not relevant to determining whether the approved method, the CFIA method, the FSIS method, or any other method complies with the regulatory and statutory requirements. The comments are discussed in greater detail in CVM's memoranda regarding carbadox (Refs. 6, 11, and 12) and denials of the sponsor's citizen petition (Docket No. FDA–2020–P–2312) and petition for stay of action (Docket No. FDA–2020–P–2313). Based on the available evidence, there currently is no analytical method for which CVM can conclude that the SOM regulations are met, nor has the sponsor provided the data to establish an R_m for any marker residue. Without this information, CVM is unable to conclude that there is no residue of carcinogenic concern in swine treated with carbadox.

B. Comments Submitted by Other Stakeholders

The non-sponsor comments submitted to this docket and to Docket No. FDA–2021–N–1326, and non-sponsor presentations at the part 15 hearing, generally concerned the need for carbadox for animal health and projected economic losses to the swine industry from a decrease in animal health; the increase in the use of medically important antimicrobials if carbadox were no longer available; human food safety and environmental safety; and requests for FDA to work with the sponsor to develop and approve an adequate method. However, none of the non-sponsor comments contained any data or information demonstrating that the approved method meets our regulatory requirements and is adequate to monitor the residue of carcinogenic concern in compliance with FDA's operational definition of no residue or that a different method meets the requirements.

Comments on animal health and projected economic losses to the swine industry. FDA received several comments stating that carbadox is the only effective option for stopping swine dysentery and that alternatives (including vaccines) either do not exist or do not work as well. Several comments indicated that removing carbadox from the market would lead to animal suffering and death, and several cited a survey of veterinarians conducted in 2016 and again in 2020 that estimates the removal of carbadox would result annually in sickness for 53.5 million otherwise healthy pigs and cost the nation's hog industry $5.3 billion over the next decade. Other comments noted that the approved uses of carbadox are limited to growth promotion, the control of swine dysentery, and control of salmonellosis caused by *Salmonella choleraesuis.* A comment stated that swine dysentery and *S. choleraesuis* are rare in U.S. swine herds and can be managed without antibiotics, pointing to countries that have banned the use of carbadox.

Comments on antimicrobial resistance. Some comments stated that the only alternatives to carbadox that could be used to treat swine dysentery are medically important antibiotics for humans, such as aminoglycosides, and that removing carbadox is contrary to FDA's strategy with respect to antimicrobial resistance. We also received comments stating that research has shown that the use of carbadox in swine increases gene transfer, creating its own resistance problems.

Comments on human food safety and environmental safety issues. We received several comments defending the human food safety of swine administered carbadox. One comment pointed out that *Salmonella* is zoonotic and could result in food safety issues if not controlled and that there is an expectation that *Salmonella* and *Brachyspira* would make their way into slaughterhouses, potentially resulting in lower meat quality and increased contamination if carbadox is no longer available. We also received comments that asserted that the use of carbadox creates dangerous residues in food products and results in residues of carbadox and its metabolites in surface waters in states with large numbers of pig-producing facilities, and that carbadox poses allergen and genotoxicity hazards to the farm and feed mill workers who handle products containing the drug.

Response to comments on animal health, industry economic losses, antimicrobial resistance, and human food safety. These comments are not relevant to whether the approved method meets our regulatory requirements and is adequate to monitor the residue of carcinogenic concern in compliance with FDA's operational definition of no residue or provide information needed to establish the relationship of QCA or any other marker residue to the residue of carcinogenic concern. Without an adequate method, the drug cannot meet the provisions of section 512(d)(1)(I) of the FD&C Act.

Comments on process to develop a new method. Several comments requested that FDA work with the sponsor to develop and approve a new method. Comments also presented the view that FDA did not provide the sponsor of carbadox with a clear path forward and that FDA diverged from its established process, urging that FDA work with the sponsor or publish an NOOH regarding the adequacy of the approved method.

Response to comments on process to develop a new method. Before publishing the proposed order, CVM worked with the sponsor for many years (from 2005 to 2015), during which time it described the steps needed to be completed to obtain the necessary data

to establish an R_m. CVM has repeatedly requested data from the sponsor to establish the relationship between QCA and the residue of carcinogenic concern. During this time, the sponsor chose not to submit protocols for our review under CVM's generally available protocol review process, except for one study protocol submitted in 2006. That study would have been conducted under FDA's Good Laboratory Practices and would have provided preliminary information about residue depletion (although not the data necessary to establish an R_m), but the sponsor did not submit a report from this study and it does not appear this study was ever conducted.

These decade-long communications, along with the clear requirements of the regulatory text, provided the sponsor with notice of what is needed to meet the statutory requirements as well as ample time to carry out the necessary studies. To date, CVM has not received data demonstrating the approved method is adequate to measure the residue of carcinogenic concern in compliance with the requirements of FDA regulations or that an alternative analytical method would meet such requirements.

CVM, too, has made the swine industry and general public aware of its concerns with the adequacy of the approved method for carbadox. Its concern was discussed in the 2016 NOOH, the 2020 Proposed Order, and during the subsequent public hearing. Indeed, members of the industry and the general public submitted comments to the dockets and made oral presentations at the public hearing. While we take seriously the concept that the sponsor, veterinarians, swine producers, and consumers have relied on the existence of the approved method for carbadox for the last 25 years (and the prior approved method for more than two decades before that) in the form of monetary and physical resource allocation decisions (including inventory decisions on the part of the industry), decisions about animal health, and consumer spending and costs, they have received notice of, and an opportunity to comment on, CVM's concerns and proposed actions. Additionally, were the sponsor to request a hearing in response to the NOOH and point to new or additional data to support the approved method or another approvable method, it may follow that a hearing is granted on that basis and/or that the carbadox NADAs are not withdrawn for that or any other applicable reason. Those considerations together with the considerations discussed throughout this order—including that the larger purpose of an approved method is to protect against the presence of residue of carcinogenic concern in animal tissues consumed by the public—outweigh any such reliance interests.

V. Conclusion and Order

Although CVM previously determined that carbadox and its metabolites, including DCBX, induce cancer in animals, in the January 1998 approval of the supplemental NADA for carbadox, CVM determined that no such residues of the drug would be found in edible tissues after the preslaughter withdrawal period by the approved method. The failure to establish an R_m (which depends on knowing the relationship between a marker residue and the residue of carcinogenic concern) during the 1998 process, coupled with analysis of new information showing that carcinogenic residues persist longer than previously known, means that the approved method does not meet the requirements of the FD&C Act and the SOM regulations and is inadequate to monitor carbadox residues in compliance with FDA's operational definition of no residue. The new information available since the approval of the January 1998 supplemental NADA reinforces the importance of having an approved method that complies with the SOM regulations.

Nothing submitted to this docket or presented at the public hearing or submitted to Docket No. FDA–2021–N–1326 demonstrates that the approved method is adequate to monitor the residue of carcinogenic concern in compliance with FDA's operational definition of ''no residue.'' No new information was submitted or presented that establishes the relationship between QCA and the residue of carcinogenic concern. Such a relationship must be known in order for the method to determine that there is no residue of carcinogenic concern. In addition, no information was submitted or presented that demonstrates an alternative method is adequate to monitor the residue of carcinogenic concern in compliance with FDA's regulations.

Therefore, FDA is revoking the approved method.

VI. References

The following references are on display at the Dockets Management Staff (see **ADDRESSES**) and are available for viewing by interested persons between 9 a.m. and 4 p.m., Monday through Friday, and are available electronically at *https://www.regulations.gov.* Although FDA verified the website addresses in this document, please note that websites are subject to change over time.

1. ''Determination of Carbadox as Quinoxaline-2-Carboxylic Residues in Swine Liver and Muscle Tissues after Drug Withdrawal.'' Available at *https://www.fda.gov/media/136267/download.*
2. FDA, Freedom of Information (FOI) Summary, NADA 041–061, MECADOX 10 (carbadox) Type A medicated article, supplemental approval January 30, 1998. Available at *https://animaldrugsatfda.fda.gov/adafda/app/search/public/document/downloadFoi/308.*
3. FDA, FOI Summary, NADA 041–061, MECADOX 10 (carbadox) Type A medicated article, supplemental approval October 5, 1998. Available at *https://animaldrugsatfda.fda.gov/adafda/app/search/public/document/downloadFoi/1673.*
4. Suárez, A.F. and Arnold, D., Addendum to the carbadox monograph prepared by the 36th meeting of the Committee and published in the FAO Food and Nutrition Paper 41/3, Rome 1991, *http://www.fao.org/fileadmin/user_upload/vetdrug/docs/41-15-carbadox.pdf.*
5. Evaluations of the Joint FAO/WHO Expert Committee on Food Additives (JECFA). Carbadox, *https://apps.who.int/food-additives-contaminants-jecfa-database/chemical.aspx?chemID=2176.*
6. Memorandum to File entitled, ''CVM Response to Phibro Animal Health Corporation's September 18, 2020 Comments on CVM's July 20, 2020 Proposed Order to Revoke the Regulatory Method for Carbadox'' (January 6, 2022).
7. Report from Codex Alimentarius International Food Standards FAO/WHO ''Maximum Residue Limits (MRLs) and Risk Management Recommendations (RMRs) for Residues of Veterinary Drugs in Foods, CX/MRL 2–2021,'' Carbadox, page 47, *https://www.fao.org/fao-who-codexalimentarius/sh-proxy/en/?lnk=1&url=https://workspace.fao.org/sites/codex/Standards/CXM+2/MRL2e.pdf.*
8. WHO FOOD ADDITIVES SERIES: 51 CARBADOX (addendum), ''Toxicological Evaluation of Certain Veterinary Drug Residues in Food,'' prepared by the Sixtieth Meeting of the Joint FAO/WHO Expert Committee on Food Additives (JECFA), WHO, Geneva, 2003, *https://iris.who.int/bitstream/handle/10665/42800/924166051X.pdf?sequence=1.*
9. Health Canada, Drug and health products, Veterinary drugs, ''List of Maximum Residue Limits (MRLs) for Veterinary Drugs in Foods,'' *https://www.canada.ca/en/health-canada/services/drugs-health-products/veterinary-drugs/maximum-residue-limits-mrls/list-maximum-residue-limits-mrls-veterinary-drugs-foods.html (not listing carbadox as an approved veterinary drug in food).*
10. Australian Pesticides and Veterinary Medicines Authority, ''Substances Not Permitted for Use on Food-Producing Animals in Australia,'' *https://apvma.gov.au/node/11626.*

11. Memorandum to File entitled, ''CVM's review of documents Phibro submitted to Docket No. FDA–2021–N–1326 and presentation at the March 10, 2022 Part 15 Hearing'' (October 30, 2023).
12. Memorandum to File entitled, ''CVM review of comments on the Zhang Article that Phibro references in the document submitted to the Part 15 Hearing docket under cover letter dated June 9, 2022, and entitled, 'Phibro Animal Health Corporation's Reply to the January 6, 2022 ''CVM Response to Phibro Animal Health Corporation's September 18, 2020 Comments on CVM's July 20, 2020 Proposed Order to Revoke the Regulatory Method for Carbadox'' ' '' (October 30, 2023).
13. Zhang, J., W. Qu, Z. Wang, and Y. Pan, ''Metabolism and Tissue Depletion of Carbadox in Swine, Broilers, and Rats,'' *ACS Agricultural Science & Technology* 2022 2(3), 477–485. Abstract is available at *https://pubs.acs.org/doi/abs/10.1021/acsagscitech.1c00260.*

Dated: November 1, 2023.

Kimberlee Trzeciak,

Deputy Commissioner for Policy, Legislation, and International Affairs.

[FR Doc. 2023–24548 Filed 11–6–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Agency Information Collection Activities: Submission to OMB for Review and Approval; Public Comment Request; National Practitioner Data Bank for Adverse Information on Physicians and Other Health Care Practitioners—45 CFR Part 60 Regulations and Forms, OMB No. 0915–0126—Revision

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, HRSA submitted an Information Collection Request (ICR) to the Office of Management and Budget (OMB) for review and approval. Comments submitted during the first public review of this ICR will be provided to OMB. OMB will accept further comments from the public during the review and approval period. OMB may act on HRSA's ICR only after the 30-day comment period for this notice has closed.

DATES: Comments on this ICR should be received no later than December 7, 2023.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: To request a copy of the clearance requests submitted to OMB for review, Joella Roland, the HRSA Information Collection Clearance Officer, at *paperwork@hrsa.gov* or call (301) 443–3983.

SUPPLEMENTARY INFORMATION: When submitting comments or requesting information, please include the information request collection title for reference.

Information Collection Request Title: National Practitioner Data Bank for Adverse Information on Physicians and Other Health Care Practitioners—45 CFR Part 60 Regulations and Forms, OMB No. 0915–0126—Revision.

Abstract: This is a request for a revision of OMB approval of the information collection contained in regulations found in 45 CFR part 60 governing the National Practitioner Data Bank (NPDB) and the forms to be used in registering with, reporting information to, and requesting information from the NPDB. Administrative forms are also included to aid in monitoring compliance with federal reporting and querying requirements. Responsibility for NPDB implementation and operation resides in HRSA's Bureau of Health Workforce.

The intent of the NPDB is to improve the quality of health care by encouraging entities such as hospitals, state licensing boards, professional societies, and other eligible entities [1] providing health care services to identify and discipline those who engage in unprofessional behavior, and to restrict the ability of incompetent health care practitioners, providers, or suppliers to move from state to state without disclosure or discovery of previous damaging or incompetent performance. It also serves as a fraud and abuse clearinghouse for the reporting and disclosing of certain final adverse actions taken against health care practitioners, providers, or suppliers by health plans, federal agencies, and state agencies (excluding settlements in which no findings of liability have been made). Users of the NPDB include reporters (entities that are required to submit reports) and queriers (entities and individuals that are authorized to request information).

The reporting forms, request for information forms (query forms), and administrative forms (used to monitor compliance) are accessed, completed, and submitted to the NPDB electronically through the NPDB website at *https://www.npdb.hrsa.gov/.* All reporting and querying is performed through the secure portal of this website. This revision proposes changes to improve navigation through the secure portal.

A 60-day notice published in the **Federal Register** on August 22, 2023, vol. 88, No. 161; pp. 57118–120. There were no public comments.

Need and Proposed Use of the Information: The NPDB acts primarily as a flagging system; its principal purpose is to facilitate comprehensive review of practitioners' professional credentials and background. Information is collected from, and disseminated to, eligible entities (entities that are entitled to query and/or report to the NPDB as authorized in Title 45 CFR part 60 of the Code of Federal Regulations) on the following: (1) medical malpractice payments, (2) licensure actions taken by Boards of Medical Examiners, (3) state licensure and certification actions, (4) federal licensure and certification actions, (5) negative actions or findings taken by peer review organizations or private accreditation entities, (6) adverse actions taken against clinical privileges, (7) federal or state criminal convictions related to the delivery of a health care item or service, (8) civil judgments related to the delivery of a health care item or service, (9) exclusions from participation in federal or state health care programs, and (10) other adjudicated actions or decisions. It is intended for NPDB information to be considered with other relevant information in evaluating credentials of health care practitioners, providers, and suppliers.

Likely Respondents: Eligible entities or individuals that are entitled to query and/or report to the NPDB as authorized in regulations found at 45 CFR part 60.

[1] ''Other *eligible entities*'' that participate in the NPDB are defined in the provisions of Title IV, Section 1921, Section 1128E, and implementing regulations. In addition, a few federal agencies also participate with the NPDB through federal memorandums of understanding. Eligible entities are responsible for complying with all reporting and/or querying requirements that apply; some entities may qualify as more than one type of eligible entity. Each eligible entity must certify its eligibility in order to report to the NPDB, query the NPDB, or both. Information from the NPDB is available only to those entities specified as eligible in the statutes and regulations. Not all entities have the same reporting requirements or level of query access.

Burden Statement: Burden in this context means the time expended by persons to generate, maintain, retain, disclose, or provide the information requested. This includes the time needed to review instructions; to develop, acquire, install, and utilize technology and systems for the purpose of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information; to search data sources; to complete and review the collection of information; and to transmit or otherwise disclose the information. The total annual burden hours estimated for this ICR are summarized in the table below.

TOTAL ESTIMATED ANNUALIZED BURDEN HOURS

Regulation citation	Form name	Number of respondents	Number of responses per respondent	Total responses	Average burden per response (in hours)	Total burden hours (rounded up)
§ 60.6: Reporting errors, omissions, revisions or whether an action is on appeal.	Correction, Revision-to-Action, Void, Notice of Appeal (manual).	8,897	1	8,897	.2500	2,225
	Correction, Revision-to-Action, Void, Notice of Appeal (automated).	14,982	1	14,982	.0003	5
§ 60.7: Reporting medical malpractice payments.	Medical Malpractice Payment (manual).	11,080	1	11,080	.7500	8,310
	Medical Malpractice Payment (automated).	447	1	447	.0003	1
§ 60.8: Reporting licensure actions taken by Boards of Medical Examiners.	State Licensure or Certification (manual).	13,996	1	13,996	.7500	10,497
§ 60.9: Reporting licensure and certification actions taken by States.	State Licensure or Certification (automated).	14,636	1	14,636	.0003	5
§ 60.10: Reporting Federal licensure and certification actions.	DEA/Federal Licensure	555	1	555	.7500	417
§ 60.11: Reporting negative actions or findings taken by peer review organizations or private accreditation entities.	Peer Review Organization	10	1	10	.7500	8
	Accreditation	10	1	10	.7500	8
§ 60.12: Reporting adverse actions taken against clinical privileges.	Title IV Clinical Privileges Actions.	782	1	782	.7500	587
	Professional Society	27	1	27	.7500	21
§ 60.13: Reporting Federal or State criminal convictions related to the delivery of a health care item or service.	Criminal Conviction (Guilty Plea or Trial) (manual).	979	1	979	.7500	735
	Criminal Conviction (Guilty Plea or Trial) (automated).	406	1	406	.0003	1
	Deferred Conviction or Pre-Trial Diversion.	60	1	60	.7500	45
	Nolo Contendere (no contest plea).	75	1	75	.7500	57
	Injunction	10	1	10	.7500	8
§ 60.14: Reporting civil judgments related to the delivery of a health care item or service.	Civil Judgment	6	1	6	.7500	5
§ 60.15: Reporting exclusions from participation in Federal or State health care programs.	Exclusion or Debarment (manual).	1,287	1	1,287	.7500	966
	Exclusion or Debarment (automated).	2,610	1	2,610	.0003	1
§ 60.16: Reporting other adjudicated actions or decisions.	Government Administrative (manual).	1,367	1	1,367	.7500	1,026
	Government Administrative (automated).	632	1	632	.0003	1
	Health Plan Action	391	1	391	.7500	294

TOTAL ESTIMATED ANNUALIZED BURDEN HOURS—Continued

Regulation citation	Form name	Number of respondents	Number of responses per respondent	Total responses	Average burden per response (in hours)	Total burden hours (rounded up)
§ 60.17 Information which hospitals must request from the National Practitioner Data Bank.	One-Time Query for an Individual (manual).	1,790,355	1	1,790,355	.0800	143,229
§ 60.18 Requesting Information from the NPDB.	One-Time Query for an Individual (automated).	3,945,360	1	3,945,360	.0003	1,184
	One-Time Query for an Organization (manual).	77,095	1	77,095	.0800	6,168
	One-Time Query for an Organization. (automated)	33,993	1	33,993	.0003	11
	Self-Query on an Individual	223,589	1	223,589	.4200	93,908
	Self-Query on an Organization.	879	1	879	.4200	370
	Continuous Query (manual)	1,030,917	1	1,030,917	.0800	82,474
	Continuous Query (automated).	900,661	1	900,661	.0003	271
§ 60.21: How to dispute the accuracy of NPDB information.	Subject Statement and Dispute.	4,015	1	4,015	.7500	3,012
	Request for Dispute Resolution.	83	1	83	8.0000	664
Administrative	Entity Registration (Initial)	3,252	1	3,252	1.0000	3,252
	Entity Registration (Renewal & Update).	12,990	1	12,990	.2500	3,248
	State Licensing Board Data Request.	87	1	87	10.5000	914
	State Licensing Board Attestation.	360	1	360	1.0000	360
	Authorized Agent Attestation.	171	1	171	1.0000	171
	Health Center Attestation	724	1	724	1.0000	724
	Hospital Attestation	3,238	1	3,238	1.0000	3,238
	Medical Malpractice Payer, Peer Review Organization, or Private Accreditation Organization Attestation.	267	1	267	1.0000	267
	Other Eligible Entity Attestation.	4,790	1	4,790	1.0000	4,790
	Corrective Action Plan (Entity).	10	1	10	.0800	1
	Reconciling Missing Actions	1,371	1	1,371	.0800	110
	Agent Registration (Initial)	78	1	78	1.0000	78
	Agent Registration (Renewal & Update).	318	1	318	.0800	26
	Electronic Funds Transfer Authorization.	734	1	734	.0800	59
	Authorized Agent Designation.	183	1	183	.2500	46
	Account Discrepancy	4	1	4	.2500	1
	New Administrator Request	215	1	215	.0800	18
	Purchase Query Credits	5,590	1	5,590	.0800	448
	Education Request	10	1	10	.0800	1
	Account Balance Transfer	10	1	10	.0800	1
	Missing Report From Query Form.	10	1	10	.0800	1
	TOTAL	8,114,604		8,114,604		374,268

Maria G. Button,

Director, Executive Secretariat.

[FR Doc. 2023–24606 Filed 11–6–23; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Trusted Exchange Framework and Common Agreement Version 1.1

AGENCY: Office of the National Coordinator for Health Information Technology (ONC), Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: This notice fulfills an obligation under the Public Health Service Act (PHSA), which requires the National Coordinator for Health Information Technology to publish on the Office of the National Coordinator for Health Information Technology's public internet website, and in the **Federal Register**, the common agreement developed under the PHSA. This notice is for publishing an updated version of the Common Agreement, version 1.1.

FOR FURTHER INFORMATION CONTACT: Mark Knee, Office of the National Coordinator for Health Information Technology, 202–664–2058.

SUPPLEMENTARY INFORMATION: This notice fulfills the obligation under section 3001(c)(9)(C) of the Public Health Service Act (PHSA) to publish the common agreement, developed under section 3001(c)(9)(B) of the PHSA (42 U.S.C. 300jj–11(c)(9)(B)), in the **Federal Register**.

BILLING CODE 4150–45–P

COMMON AGREEMENT FOR NATIONWIDE HEALTH INFORMATION INTEROPERABILITY

Version 1.1

November 2023

This document was published by the U.S. Department of Health and Human Services, Office of the National Coordinator for Health Information Technology and was produced at U.S. taxpayer expense.

This document meets the requirement in section 3001(c)(9)(C) of the Public Health Service Act for the National Coordinator for Health Information Technology to publish on the Office of the National Coordinator for Health Information Technology's public Internet website, and in the Federal Register, the common agreement (42 U.S.C. 300jj-11(c)(9)(C)).

The Common Agreement
for Nationwide Health Information Interoperability

This Common Agreement for Nationwide Health Information Interoperability (the "Common Agreement" or "Agreement") is entered into as of the _____ day of _____, _____ (the "Effective Date"), by and between The Sequoia Project, Inc., a Virginia non-stock corporation, acting as the current Recognized Coordinating Entity as defined below (the "RCE") and _____, a _____ ("Signatory"). RCE and Signatory may also be referred to herein individually as a "Party" or collectively as the "Parties."

RECITALS

WHEREAS, Section 4003 of the 21st Century Cures Act directed the U.S. Department of Health and Human Services (HHS) National Coordinator to, "in collaboration with the National Institute of Standards and Technology and other relevant agencies within the Department of Health and Human Services, for the purpose of ensuring full network-to-network exchange of health information, convene public-private and public-public partnerships to build consensus and develop or support a trusted exchange framework, including a common agreement among health information networks nationally;"

WHEREAS, this Common Agreement (including the documents incorporated herein by reference) is the common agreement developed pursuant to Section 4003 of the 21st Century Cures Act;

WHEREAS, The Sequoia Project has been selected by the Office of the National Coordinator for Health Information Technology (ONC) to serve as the RCE for purposes of implementing, maintaining, and updating this Common Agreement, including the Qualified Health Information Network (QHIN) Technical Framework, as well as managing the activities associated with the designation of interested health information networks (HINs) as QHINs (as defined and set forth in this Common Agreement);

WHEREAS, Signatory wishes to be designated as a QHIN and has completed the application process toward such designation;

WHEREAS, Signatory must, among other conditions set forth in this Common Agreement, agree to be bound by the terms of this Common Agreement before Signatory may

be designated as a QHIN and, upon signing this Common Agreement, Signatory agrees to be so bound as a Signatory and as a QHIN, if so designated, as the case may be;

NOW, THEREFORE, in consideration of the mutual promises set forth herein and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties, intending to be legally bound, mutually agree as set forth below.

AGREEMENT

1. Definitions and Relevant Terminology

1.1. Defined Terms. Capitalized terms used in this Common Agreement shall have the meaning set forth below. Where a definition includes one or more citations to a statute, regulation, or standard, the definition shall be interpreted to refer to such statute, regulation, or standard as may be amended from time-to-time.

Applicable Law: all federal, state, local, or tribal laws and regulations then in effect and applicable to the subject matter herein. For the avoidance of doubt, federal agencies are only subject to federal law.

Business Associate: has the meaning assigned to such term at 45 CFR § 160.103.

Business Associate Agreement (BAA): a contract, agreement, or other arrangement that satisfies the implementation specifications described within 45 CFR § 164.504(e), as applicable.

Common Agreement: unless otherwise expressly indicated, this document, the QHIN Technical Framework (QTF), all Standard Operating Procedures (SOPs), and all other attachments, exhibits, and artifacts incorporated herein by reference.

Confidential Information:

Any information that is designated as Confidential Information by the person or entity that discloses it (a "Discloser"), or that a reasonable person would understand to be of a confidential nature, and is disclosed to another person or entity (a "Recipient") pursuant to this Common Agreement. For the avoidance of doubt, "Confidential Information" does not include electronic protected health information (ePHI), as defined in this Common Agreement, that is subject to a Business Associate Agreement and/or other provisions of this Common Agreement.

Notwithstanding any label to the contrary, "Confidential Information" does **not** include any information that: (i) is or becomes known publicly through no fault

of the Recipient; or (ii) is learned by the Recipient from a third party that the Recipient reasonably believes is entitled to disclose it without restriction; or (iii) is already known to the Recipient before receipt from the Discloser, as shown by the Recipient's written records; or (iv) is independently developed by Recipient without the use of or reference to the Discloser's Confidential Information, as shown by the Recipient's written records, and was not subject to confidentiality restrictions prior to receipt of such information from the Discloser; or (v) must be disclosed under operation of law, provided that, to the extent permitted by Applicable Law, the Recipient gives the Discloser reasonable notice to allow the Discloser to object to such redisclosure, and such redisclosure is made to the minimum extent necessary to comply with Applicable Law.

Connectivity Services: the technical services provided by a QHIN consistent with the requirements of the then-applicable QHIN Technical Framework and pursuant to this Common Agreement with respect to all Exchange Purposes.

Contract: the Contract by and between The Sequoia Project and HHS, or, if applicable, a successor agreement between The Sequoia Project and HHS or a successor agreement between a different RCE and HHS.

Covered Entity: has the meaning assigned to such term at 45 CFR § 160.103.

Cybersecurity Council: the council established by the RCE to enhance cybersecurity commensurate with the risks to QHIN-to-QHIN exchange, as more fully set forth in an SOP.

Designation (including its correlative meanings "Designate," "Designated," and "Designating"): the RCE's written confirmation to ONC and Signatory that Signatory has satisfied all the requirements of the Common Agreement, the QHIN Technical Framework, and all applicable SOPs, and is now a QHIN.

Direct Relationship: a relationship between (i) an Individual and (ii) a QHIN, Participant, or Subparticipant, that arises when the QHIN, Participant, or Subparticipant, as applicable, offers services to the Individual in connection with one or more of the Framework Agreements, and the Individual agrees to receive such services.

Disclosure (including its correlative meanings "Disclose," "Disclosed," and "Disclosing"): the release, transfer, provision of access to, or divulging in any manner of TI outside the entity holding the information.

Discovery: for purposes of determining the date on which a TEFCA Security Incident was discovered, the term Discovery shall be determined consistent with 45 CFR § 164.404(a)(2) as if the TEFCA Security Incident were a breach (as defined in 45 CFR § 164.402) except that this term shall also apply to Non-HIPAA Entities.

Dispute: means (i) a disagreement about any provision of this Common Agreement, including any SOP, the QTF, and all other attachments, exhibits, and artifacts incorporated by reference; or (ii) a concern or complaint about the actions, or any failure to act, of Signatory, the RCE, or any other QHIN or another QHIN's Participant(s).

Dispute Resolution Process: has the meaning assigned to such term in Section 15.1 of this Common Agreement.

Downstream Subparticipant: a Subparticipant that has entered into a Downstream Subparticipant Agreement to use the services of another Subparticipant (referred to as the "Upstream Subparticipant") to send and/or receive information as described in Section 9 of this Common Agreement.

Downstream Subparticipant Agreement: an agreement that incorporates all of the Required Flow-Downs of this Common Agreement and is between a Subparticipant (referred to as the "Upstream Subparticipant") and one or more Subparticipants (each a "Downstream Subparticipant"), which enables the Downstream Subparticipant(s) to use the services of the Upstream Subparticipant as described in Section 9 of this Common Agreement to send and/or receive information for one or more Exchange Purposes; provided, however, that any provisions of said agreement that permit or require activities other than those required or permitted by the Common Agreement shall not be deemed part of the Downstream Subparticipant Agreement as defined herein. For example, if the agreement provides for transmission of information for reasons other than the Exchange Purposes, the provisions governing such activities shall not be deemed part of the Downstream Subparticipant Agreement as defined herein. Any Subparticipant may enter into a Downstream Subparticipant Agreement.

Electronic Protected Health Information (ePHI): has the meaning assigned to such term at 45 CFR § 160.103.

Exchange Purpose(s): means the reason, as authorized by this Common Agreement including the Exchange Purposes SOP, for a Request, Use, Disclosure, or Response transmitted via QHIN-to-QHIN exchange as one step in the transmission. Authorized

Exchange Purposes are: Treatment, Payment, Health Care Operations, Public Health, Government Benefits Determination, Individual Access Services, and any other purpose authorized as an Exchange Purpose by the Exchange Purposes SOP, each to the extent permitted under Applicable Law, under all applicable provisions of this Common Agreement, and, if applicable, under the implementation SOP for the applicable Exchange Purpose.

Framework Agreement(s): any one or combination of the Common Agreement, a Participant-QHIN Agreement, a Participant-Subparticipant Agreement, or a Downstream Subparticipant Agreement, as applicable.

FTC Rule: the Health Breach Notification Rule promulgated by the Federal Trade Commission set forth at 16 CFR Part 318.

Government Benefits Determination: a determination made by any federal, state, local, or tribal agency, instrumentality, or other unit of government as to whether an Individual qualifies for government benefits for any purpose other than health care (for example, Social Security disability benefits) to the extent permitted by Applicable Law. Disclosure of TI for this purpose may require an authorization that complies with Applicable Law.

Government Health Care Entity: any agency, instrumentality, or other unit of the federal, state, local, or tribal government to the extent that it provides health care services (e.g., Treatment) to Individuals but only to the extent that it is not acting as a Covered Entity.

Health Care Operations: has the meaning assigned to such term at 45 CFR § 164.501, except that this term shall apply to the applicable activities of a Health Care Provider regardless of whether the Health Care Provider is a Covered Entity.

Health Care Provider: has the meaning assigned to such term in the information blocking regulations at 45 CFR § 171.102 or in the HIPAA Rules at 45 CFR § 160.103.

Health Information Network (HIN): has the meaning assigned to the term "Health Information Network or Health Information Exchange" in the information blocking regulations at 45 CFR § 171.102.

HIPAA: the Health Insurance Portability and Accountability Act of 1996 codified at 42 U.S.C. § 300gg, 29 U.S.C. § 1181 *et seq.*, 42 U.S.C. § 1320d *et seq.*, and the Health Information Technology for Economic and Clinical Health (HITECH) Act of 2009 codified at 42 U.S.C. § 17921 et seq., and 42 U.S.C. § 17931 et seq.

HIPAA Rules: the regulations set forth at 45 CFR Parts 160, 162, and 164.

HIPAA Privacy Rule: the regulations set forth at 45 CFR Parts 160 and 164, Subparts A and E.

HIPAA Security Rule: the regulations set forth at 45 CFR Part 160 and Part 164, Subpart C.

Individual: one or more of the following:

(i) An individual as defined by 45 CFR 160.103;

(ii) Any other natural person who is the subject of the information being Requested, Used, or Disclosed;

(iii) A person who legally acts on behalf of a person described in paragraphs (i) or (ii) of this definition in making decisions related to health care as a personal representative, in accordance with 45 CFR 164.502(g);

(iv) A person who is a legal representative of and can make health care decisions on behalf of any person described in paragraphs (i) or (ii) of this definition; or

(v) An executor, administrator, or other person having authority to act on behalf of a deceased person described in paragraphs (i) or (ii) of this section or the individual's estate under Applicable Law.

IAS Provider: Each QHIN, Participant, and Subparticipant that offers Individual Access Services.

Individual Access Services (IAS): with respect to the Exchange Purposes definition, the services provided utilizing the Connectivity Services, to the extent consistent with Applicable Law, to an Individual with whom the QHIN, Participant, or Subparticipant has a Direct Relationship to satisfy that Individual's ability to access, inspect, or obtain a copy of that Individual's Required Information that is then maintained by or for any QHIN, Participant, or Subparticipant.

Individually Identifiable: refers to information that identifies an Individual or with respect to which there is a reasonable basis to believe that the information could be used to identify an Individual.

Minimum Necessary: refers to the provision in the HIPAA Rules that, under certain circumstances, requires a Covered Entity or a Business Associate to make reasonable efforts when Using or Disclosing PHI or when Requesting PHI from another Covered Entity or Business Associate to limit PHI to the minimum necessary to accomplish the intended purpose of the Use, Disclosure, or Request. See 45 CFR § 164.502(b) and § 164.514(d).

Non-HIPAA Entity (NHE): a QHIN, Participant, or Subparticipant that is neither a Covered Entity nor a Business Associate under HIPAA with regard to activities under this Common Agreement.

Onboarding: the process Signatory, a Participant, or a Subparticipant must undergo to become a QHIN, Participant, or Subparticipant and operational in the production environment under the Framework Agreement to which it is a party. For Signatory, the Onboarding requirements shall be set forth in the QHIN Onboarding & Designation SOP addressing the process toward Designation as a QHIN. For a Participant, the Onboarding requirements shall be set forth in the Participant-QHIN Agreement. For a Subparticipant, the Onboarding requirements shall be set forth in the Subparticipant Agreement or the Downstream Subparticipant Agreement, as applicable.

ONC: the U.S. Department of Health and Human Services Office of the National Coordinator for Health Information Technology.

Organized Health Care Arrangement: has the meaning assigned to such term at 45 CFR § 160.103.

Participant: to the extent permitted by applicable SOP(s), a U.S. Entity regardless of whether the entity is a Covered Entity or a Business Associate, that has entered into a Participant-QHIN Agreement whereby the QHIN agrees to transmit and receive information via QHIN-to-QHIN exchange on behalf of the party to the Participant-QHIN Agreement for the Exchange Purposes.

Participant-QHIN Agreement:

An agreement that incorporates all of the Required Flow-Downs of this Common Agreement and is between a QHIN and one or more Participants; provided, however, that any provisions of said agreement that permit or require activities other than those required or permitted by the Common Agreement shall not be deemed part of the Participant-QHIN Agreement as defined herein. For example, if the agreement provides for transmission of information for reasons

other than the Exchange Purposes, the provisions governing such activities shall not be deemed part of the Participant-QHIN Agreement as defined herein.

In the event of any conflict or inconsistency between or among Applicable Law, the Participant-QHIN Agreement, and any other terms and conditions, the following shall be the order of precedence to the extent of such conflict or inconsistency: (i) Applicable Law; (ii) the provisions of the Participant-QHIN Agreement that are Required Flow-Downs under this Common Agreement; (iii) to the extent applicable, the QTF; (iv) to the extent applicable, the SOPs; and (v) any other terms and conditions agreed to by the parties.

Participant-Subparticipant Agreement:

An agreement that incorporates all of the Required Flow-Downs of this Common Agreement and is between a Participant and one or more Subparticipants, which enables the Subparticipant(s) to use the services of the Participant as described in Section 9 of this Common Agreement to send and/or receive information for one or more Exchange Purposes; provided, however, that any provisions of said agreement that permit or require activities other than those required or permitted by the Common Agreement shall not be deemed part of the Participant-Subparticipant Agreement as defined herein. For example, if the agreement provides for transmission of information for reasons other than the Exchange Purposes, the provisions governing such activities shall not be deemed part of the Participant-Subparticipant Agreement as defined herein.

In the event of any conflict or inconsistency between or among Applicable Law, the Participant-Subparticipant Agreement, and any other terms and conditions, the following shall be the order of precedence to the extent of such conflict or inconsistency: (i) Applicable Law; (ii) the provisions of the Participant-Subparticipant Agreement that are Required Flow-Downs under this Common Agreement; (iii) to the extent applicable, the QTF; (iv) to the extent applicable, the SOPs; and (v) any other terms and conditions agreed to by the parties.

Payment: has the meaning assigned to such term at 45 CFR § 164.501.

Privacy and Security Notice: has the meaning assigned to such term in Section 10.3 of this Common Agreement.

Protected Health Information (PHI): has the meaning assigned to such term at 45 CFR § 160.103.

Public Health: with respect to the definition of Exchange Purposes, a Request, Use, Disclosure, or Response permitted under the HIPAA Rules and other Applicable Law for public health activities and purposes involving a Public Health Authority, where such public health activities and purposes are permitted by Applicable Law, including a Use or Disclosure permitted under 45 CFR § 164.512(b) and 45 CFR § 164.514(e). For the avoidance of doubt, a Public Health Authority may Request, Use, and Disclose TI hereunder for the Exchange Purpose of Public Health to the extent permitted by Applicable Law and the Framework Agreements.

Public Health Authority: has the meaning assigned to such term at 45 CFR § 164.501.

QHIN Technical Framework (QTF): the document described in Section 5.2 of this Common Agreement and incorporated by reference into this Common Agreement, as may be amended, that may include: (i) technical requirements, functional requirements, and privacy- and security-related requirements for the exchange of TI between QHINs; (ii) internal-QHIN functional requirements; (iii) technical, privacy, and security flow-down requirements from the QHIN to the Participants and/or Subparticipants (if any) in addition to the privacy and security Required Flow-Downs in the Common Agreement; and (iv) operational requirements that enable the exchange of TI between and among QHINs.

Qualified Health Information Network (QHIN): to the extent permitted by applicable SOP(s), a Health Information Network that is a U.S. Entity that has been Designated by the RCE and is a party to the Common Agreement countersigned by the RCE.

RCE Directory Service: a technical service provided by the RCE that enables QHINs, Participants, and Subparticipants to share directory information associated with other QHINs, Participants, and Subparticipants in order to enable the exchange of TI under the Common Agreement. The then-current technical endpoints and other identifying information of QHINs, Participants, and Subparticipants are included and maintained as part of the RCE Directory Service.

Recognized Coordinating Entity (RCE): the entity selected by ONC that will enter into the Common Agreement with QHINs in order to impose, at a minimum, the requirements of the Common Agreement, including the SOPs and the QTF, on the QHINs and administer such requirements on an ongoing basis. The RCE is a Party to this Common Agreement.

Request(s) (including its correlative uses/tenses "Requested" and "Requesting"): the act of asking for information in accordance with the applicable requirements of the Framework Agreements.

Required Flow-Down(s): the rights and obligations set forth within this Common Agreement that Signatory is required to incorporate in its Participant-QHIN Agreements and that Signatory is required to obligate its Participants to include in their Subparticipant Agreements and that Signatory must require Participants to obligate Subparticipants to impose on their Downstream Subparticipants, if any, through their Downstream Subparticipant Agreements. **Provisions of this Common Agreement containing such rights and obligations are identified in the section or applicable subsection title as "(Required Flow-Down(s)).**"

Required Information:

Electronic information maintained by any QHIN, Participant, or Subparticipant prior to or during the term of the applicable Framework Agreement:

(i) that would be ePHI if maintained by a Covered Entity or a Business Associate; and

(ii) regardless of whether the information is or has already been transmitted via QHIN-to-QHIN exchange.

Notwithstanding the foregoing, the following types of information are **not** Required Information:

(a) information compiled in reasonable anticipation of, or for use in, a civil, criminal, or administrative action or proceeding; or

(b) psychotherapy notes (as defined at 45 CFR 164.501).

Response(s) (including its correlative uses/tenses "Responded" and "Responding"): the act of providing information or the information provided in accordance with the applicable requirements of the Framework Agreements.

Signatory: the entity that has satisfied Section 4.1 and is a Party to this Common Agreement.

Standard Operating Procedure(s) or **SOP(s):** a written procedure or other provision that is adopted pursuant to the Common Agreement and incorporated by reference into this Common Agreement to provide detailed information or requirements related to the exchange activities under the Common Agreement, including all amendments thereto and any new SOPs that are adopted pursuant to the Common Agreement. SOPs will be adopted to address the application process, the

Onboarding process, and other operational processes. Each SOP identifies the relevant group(s) to which the SOP applies, including whether Participants and/or Subparticipants are required to comply with a given SOP. An SOP shall be deemed in effect when adopted pursuant to Section 5.3 of this Common Agreement and listed on the RCE's public website.

Subparticipant: to the extent permitted by applicable SOP(s), a U.S. Entity regardless of whether the entity is a Covered Entity or Business Associate, that has entered into either: (i) a Participant-Subparticipant Agreement to use the services of a Participant as described in Section 9 of this Common Agreement to send and/or receive information; or (ii) a Downstream Subparticipant Agreement pursuant to which the services of a Subparticipant are used as described in Section 9 of this Common Agreement to send and/or receive information.

TEFCA Information (TI): any information that is exchanged between QHINs for one or more of the Exchange Purposes pursuant to any of the Framework Agreements. As a matter of general policy, once TI is received by a QHIN, Participant, or Subparticipant that is a Covered Entity or Business Associate and is incorporated into such recipient's system of records, the information is no longer TI and is governed by the HIPAA Rules and other Applicable Law.

TEFCA Security Incident(s):

(i) An unauthorized acquisition, access, Disclosure, or Use of unencrypted TI in transit using the Connectivity Services or pursuant to any Framework Agreement between Signatory and its Participants, between Signatory's Participants and their Subparticipants, or between Subparticipants, but **NOT** including the following:

(a) Any unintentional acquisition, access, or Use of TI by a workforce member or person acting under the authority of a QHIN, Participant, or Subparticipant, if such acquisition, access, or Use was made in good faith and within the scope of authority and does not result in further Use or Disclosure in a manner not permitted under Applicable Law and this Common Agreement.

(b) Any inadvertent Disclosure by a person who is authorized to access TI at a QHIN, Participant, or Subparticipant to another person authorized to access TI at the same QHIN, Participant, or Subparticipant, or Organized Health Care Arrangement in which a QHIN, Participant, or Subparticipant participates or serves as a Business Associate, and the information received as a result of

such Disclosure is not further Used or Disclosed in a manner not permitted under Applicable Law and this Common Agreement.

(c) A Disclosure of TI where a QHIN, Participant, or Subparticipant has a good faith belief that an unauthorized person to whom the Disclosure was made would not reasonably have been able to retain such information.

(d) A Disclosure of TI that has been de-identified in accordance with the standard at 45 CFR § 164.514(a).

(ii) Other security events (e.g., ransomware attacks), as set forth in an SOP, that prevent the affected QHIN, Participant, or Subparticipant from responding to requests for information as required under this Common Agreement or otherwise adversely affect their participation in QHIN-to-QHIN exchange.

Threat Condition: (i) a breach of a material provision of this Common Agreement that has not been cured within fifteen (15) days of receiving notice of the material breach (or such other period of time to which the Parties have agreed), which notice shall include such specific information about the breach that the RCE has available at the time of the notice; or (ii) a TEFCA Security Incident; or (iii) an event that Signatory, its Participant, or their Subparticipant has reason to believe will disrupt normal exchange under the Framework Agreements, either due to actual compromise of or the need to mitigate demonstrated vulnerabilities in systems or data of the QHIN, Participant, or Subparticipant, as applicable, or could be replicated in the systems, networks, applications, or data of another QHIN, Participant, or Subparticipant.

Treatment: has the meaning assigned to such term at 45 CFR § 164.501.

United States: the 50 States, the District of Columbia, and the territories and possessions of the United States including, without limitation, all military bases or other military installations, embassies, and consulates operated by the United States government.

Unsecured: has the meaning assigned to such term at 45 CFR § 164.402 regarding PHI as if it applied to TI that is Individually Identifiable.

U.S. Entity/Entities: any corporation, limited liability company, partnership, or other legal entity that meets all of the following requirements:

(i) The entity is organized under the laws of a state or commonwealth of the United States or the federal law of the United States and is subject to the

jurisdiction of the United States and the state or commonwealth under which it was formed;

(ii) The entity's principal place of business, as determined under federal common law, is in the United States; and

(iii) None of the entity's directors, officers, or executives, and none of the owners with a five percent (5%) or greater interest in the entity, are listed on the *Specially Designated Nationals and Blocked Persons List* published by the United States Department of the Treasury's Office of Foreign Asset Control or on the Department of Health and Human Services, Office of Inspector General's List of Excluded Individuals/Entities.

Upstream Subparticipant: a Subparticipant that provides services to a Downstream Subparticipant pursuant to a Downstream Subparticipant Agreement to send and/or receive information as described in Section 9 of this Common Agreement.

Use(s) (including correlative uses/tenses, such as "Uses," "Used," and "Using"): with respect to TI, means the sharing, employment, application, utilization, examination, or analysis of such information within an entity that maintains such information.

1.2. Common Agreement Terminology.

1.2.1. References to Signatory and QHINs. As set forth in its definition and in the introductory paragraph of this Common Agreement, the term "Signatory" is used to refer to the specific entity that is a Party to this Common Agreement with the RCE. Any and all rights and obligations of a QHIN stated herein are binding upon Signatory upon signing the Common Agreement and are also binding upon all other QHINs. References herein to "other QHINs," "another QHIN," and similar such terms are used to refer to any and all other organizations that have signed the Common Agreement with the RCE.

1.2.2. References to "(Required Flow-Down(s))". Provisions of this Common Agreement containing Required Flow-Downs are identified in the applicable section/subsection title as "**(Required Flow-Down(s))**." For purposes of implementing the Required Flow-Downs, references in such sections/subsections to "Signatory" shall be interpreted to also mean "Participant(s)" and "Subparticipant(s)," as the case may be. References to "Common Agreement" shall be interpreted to mean the applicable Framework Agreement, as the case may be.

1.2.3. General Rule of Construction. For the avoidance of doubt, a reference to a specific section of the Common Agreement in a particular section does not mean that other sections of this Common Agreement that expressly apply to a QHIN (or to a Participant or a Subparticipant pursuant to a Required Flow-Down) are inapplicable.

2. **Incorporation of Recitals.** The Recitals set forth above are incorporated into this Common Agreement in their entirety and shall be given full force and effect as if set forth in the body of this Common Agreement.

3. **Governing Approach**

3.1. Role of the RCE and ONC. ONC was directed by Congress in the 21st Century Cures Act to, "in collaboration with the National Institute of Standards and Technology and other relevant agencies within the Department of Health and Human Services, for the purpose of ensuring full network-to-network exchange of health information, convene public-private and public-public partnerships to build consensus and develop or support a trusted exchange framework, including a common agreement among health information networks nationally." ONC entered into the Contract with the RCE to implement, maintain, and update the Common Agreement.

Under the Contract, the RCE is responsible for matters related to the development and operation of the exchange of TI and related activities.

ONC provides oversight of the RCE's work under the Contract. Under the Contract, ONC has the right to review the RCE's conduct, including Designation, corrective action, and/or termination decisions regarding QHINs, the proper execution of nondiscrimination and conflict of interest policies that demonstrate a commitment to transparent, fair, and nondiscriminatory treatment by the RCE of QHINs, and whether the RCE has adhered to the requirements imposed upon it by this Common Agreement. ONC may also address complaints made by a QHIN against the RCE as set forth in Section 15.6.1. QHINs have the right to appeal RCE decisions as set forth in Section 16 of this Common Agreement.

3.2. Participation in Governance. QHINs, Participants, and Subparticipants shall have the opportunity to engage in governance under the Common Agreement.

3.2.1. Role. The Transitional Council and the Governing Council, each as defined below, shall be responsible for the following:

(i) Serving as a resource to the RCE and a forum for orderly and civil discussion of any issues affecting exchange activities or other issues that may arise under the Common Agreement;

(ii) Supporting the RCE in its work to monitor the exchange of TI and other activities under the Common Agreement and serving as a resource to the RCE to identify possible corrective actions for conditions that disrupt exchange activities, including, but not limited to, the following:

(a) Provide advice on issues related to the Onboarding of QHINs;

(b) Assist in evaluating suspected or alleged non-compliance with requirements in this Common Agreement, the SOPs, and the QTF;

(c) Provide input regarding whether to suspend or terminate a QHIN's participation;

(d) Provide advice regarding issues before they become Disputes and are escalated to the formal Dispute Resolution Process; and

(e) Evaluate possible and actual TEFCA Security Incidents, other Threat Conditions, and information and/or recommendations from the Cybersecurity Council.

(iii) Reviewing proposed amendments to the Common Agreement, the QTF, and SOPs and providing feedback to the RCE on the proposed changes;

(iv) Participating in the development of new SOPs and providing feedback to the RCE on the proposed changes;

(v) Assisting the RCE with the Dispute Resolution Process as set forth in this Common Agreement and the Dispute Resolution SOP;

(vi) Informing the RCE on development and updating of the strategic roadmap for exchange activities under the Common Agreement; and

(vii) Advocating for the value of the exchange activities under the Common Agreement and promoting their success.

3.3. Transitional Council. To promote a speedy and efficient ramp-up of the Governing Council, a "Transitional Council" shall serve for a twelve- (12-) month term beginning within thirty (30) days after the RCE announces the first group of QHINs that the RCE Designates. The Transitional Council shall serve as the interim governing body for the activities conducted under the Framework Agreements, as more fully described below and in the Transitional Council SOP.

3.3.1. Transition to the Governing Council:

(i) Transition Plan Development – In addition to the responsibilities listed for participation in governance generally, the Transitional Council shall develop the transition plan to the Governing Council.

(ii) Formation of Caucuses – The RCE shall work with the Transitional Council to form the caucuses described in Section 3.4.1 as part of the transition plan. The caucuses are responsible for identifying individuals to serve on the Governing Council that will be established at the end of the twelve (12) months following the formation of the Transitional Council.

(iii) Transition Timing – At the end of the twelve (12) months following the formation of the Transitional Council, the Governing Council shall assume responsibility for participating in the governance of the exchange and related activities under the Common Agreement with the RCE.

(iv) Continuity – Notwithstanding the twelve- (12-) month term of the Transitional Council, the representatives on the Transitional Council will continue to serve in their governance role until the representatives of the Governing Council are elected and instated.

3.4. Governing Council. A Governing Council shall be established through election of individual members by each of the caucuses described below by the end of the first twelve (12) months following the date on which the RCE announces the first set of QHINs that it has Designated. The election process and constitution of the Governing Council is more fully set forth in the Governing Council SOP. The Governing Council shall serve as the permanent governing body for activities

conducted under the Framework Agreements, as more fully described in the Governing Council SOP.

3.4.1 Caucuses.

(i) QHIN Caucus – Every QHIN shall have the right to appoint one (1) individual who is affiliated with that QHIN, as either an employee or independent contractor, to serve as a member of the QHIN Caucus. The QHIN Caucus will be facilitated by the RCE and shall serve as a forum for QHINs to meet and discuss issues of interest directly related to the exchange of TI and related activities under the Common Agreement.

(ii) Participant/Subparticipant Caucus – Each QHIN shall have the right to appoint up to three (3) individuals who are affiliated with a Participant or a Subparticipant, either as an employee or independent contractor, to serve as a member of the Participant/Subparticipant Caucus. In appointing such individuals, QHINs should consider the composition of their Participants and Subparticipants and should endeavor to select persons who will be representative of the various perspectives of the QHIN's Participant/Subparticipant population. The Participant/Subparticipant Caucus will be facilitated by the RCE and shall provide a forum for Participants to meet and discuss issues of interest directly related to the exchange of TI and related activities under the Common Agreement.

3.5. Advisory Groups. The RCE, in consultation with the Governing Council and ONC, may establish "Advisory Groups," from time to time, for purposes of seeking input from distinct groups of stakeholders that are parties to or affected by activities under the Framework Agreements to better inform the governance process, provide input on certain topics, and promote inclusivity. The process for establishing Advisory Groups and selecting members is set forth in the applicable SOP.

4. QHIN Designation

4.1. Eligibility to be Designated. Signatory affirms that it meets the eligibility criteria listed below and the requirements for demonstrating satisfaction of these criteria that are included in the Onboarding & Designation SOP. Signatory must meet the following criteria at the time Signatory submits an application for Designation:

(i) Signatory must demonstrate that it meets the definition of a U.S. Entity and is not owned or controlled by any non-U.S. person(s) or entity(-ies). The specific, required means to demonstrate this are set forth in an SOP.

(ii) Signatory is able to exchange Required Information, as defined in this Common Agreement. The specific, required means to demonstrate this are set forth in an SOP.

(iii) Signatory must demonstrate that it has the ability to perform all of the required functions of a QHIN in the manner required by this Common Agreement, the SOPs, the QTF, and all other applicable guidance from the RCE. Signatory can demonstrate this by having been in operation and supporting the query functionality as outlined in the QTF, or other functionally comparable exchange method, for at least the twelve (12) calendar months immediately preceding its application to be Designated. However, the RCE will consider other evidence that Signatory may offer to demonstrate compliance with this eligibility criterion as more fully set forth in the applicable SOP. Notwithstanding the foregoing, if Signatory does not demonstrate that it has been supporting query functionality as outlined in the QTF, the RCE may deem this requirement to be satisfied on an interim basis and Designate Signatory under a provisional status, subject to additional monitoring as further provided in the Onboarding & Designation SOP, including additional review during a provisional period.

(iv) Signatory must demonstrate that it has in place, at the time of its application to be Designated, the organizational infrastructure and legal authority to comply with the obligations of the Common Agreement and a functioning system to govern its Health Information Network. In addition, Signatory must demonstrate it has the resources and infrastructure to support a reliable and trusted network. The specific, required means to demonstrate this are set forth in an SOP.

4.2. Affirmation of Application. Signatory represents and warrants that the information in its application is accurate and complete, to the best of its knowledge. Signatory acknowledges that the RCE is relying upon the information in its application to evaluate whether Signatory meets the criteria to be Designated and that violation of this representation and warranty is a material breach of this Common Agreement. If the RCE determines that material information in the application is not accurate or complete, the RCE may refuse to Designate Signatory and withdraw Signatory from Onboarding and terminate this Common Agreement in accordance with 16.2.2.

4.3. QHIN Designation Process. RCE and Signatory will work cooperatively and diligently to allow Signatory to demonstrate that it meets the QHIN eligibility requirements and can comply with the requirements included in this Common Agreement, the QTF, and the SOPs; however, the burden is upon Signatory to demonstrate that it does comply with such requirements. Signatory expressly acknowledges that the RCE is not required to Designate Signatory in the event that Signatory fails to meet the requirements. Signatory agrees that it will not represent that it is a QHIN unless, and until, the RCE formally Designates Signatory. The detailed process for the RCE to review Signatory's application shall be set out in an SOP.

4.4. Formal Designation as a QHIN. If Signatory demonstrates to the RCE that it meets the requirements to be Designated, and affirms that it is a HIN, then the RCE will inform Signatory of its QHIN Designation. The process for Signatory to be formally Designated shall be set out in an SOP.

5. Change Management

5.1. Change Management Framework. The RCE shall coordinate all changes to the Common Agreement, the QTF, and the SOPs in conjunction with ONC. In addition to the activities described below, ONC shall be available in a consultative role throughout the change management process to review any proposed amendments to the Common Agreement, the QTF, and the SOPs as well as the adoption of any new SOP and the repeal of any existing SOP. The RCE will work with ONC, the Governing Council, and the QHIN and Participant/Subparticipant Caucuses, as outlined below, to consider amendments to the Common Agreement, the QTF, or the SOPs and the adoption of any new SOP or the repeal of any existing SOP. Provided, however, that the actions described in Sections 5.1 through 5.3 of this Common Agreement by or with respect to the Governing Council, the QHIN Caucus, and the Participant/Subparticipant Caucus, as applicable, shall not be required until the respective body has been established as described in Section 3. Signatory acknowledges that it and the RCE do not have the sole legal authority to agree to changes to this Common Agreement, the QTF, or the SOPs because ONC will be available in a consultative role throughout the process and must approve all changes, additions, and deletions. The Common Agreement must be the same for all QHINs.

5.2. Amending the Common Agreement or the QTF. The RCE is tasked, under its Contract with ONC, with updating the Common Agreement and QTF. Proposed amendments to the Common Agreement or QTF may originate from multiple sources, including, but not limited to, ONC, the RCE, the Governing Council, the QHIN Caucus, or the Participant/Subparticipant Caucus. The RCE may consult with the Governing Council,

the QHIN Caucus, or the Participant/Subparticipant Caucus prior to submitting the proposed amendment(s) to ONC for consideration. The RCE shall collect all proposed amendments and submit them to ONC, who shall determine whether further action on a proposed amendment is warranted.

5.2.1. If ONC determines that a proposed amendment warrants further consideration, then the RCE will present the proposed amendment to the Governing Council for its feedback. The Governing Council will evaluate the proposed amendment and determine whether it will seek feedback from the QHIN Caucus, the Participant/Subparticipant Caucus, or both, as deemed necessary and appropriate. The Governing Council will provide the RCE with written feedback on the proposed amendment, which will include feedback from the QHIN and Participant/Subparticipant Caucuses as applicable and appropriate.

5.2.2. The RCE shall consult with ONC about the Governing Council feedback. ONC shall, after considering the feedback, determine whether the proposed amendment should proceed after making any changes to the amendment. If ONC decides to proceed with the amendment, it will advance the proposed amendment to the QHIN Caucus for approval by a written vote. An amendment will be approved if at least two-thirds (2/3) of the votes cast by the QHIN Caucus members within the timeframe established by ONC for the voting period are in favor of the proposed amendment. The requirement to consult with the Governing Council in this provision shall be satisfied by ONC's approval of the proposed amendment if, at the time of such approval, the Governing Council and the QHIN Caucus have not yet been established.

5.2.3. The time period for ONC to decide whether to proceed or not with a proposed amendment to the Common Agreement pursuant to section 5.2.2 above shall initially be three (3) months after ONC receives from the RCE feedback from the Governing Council pursuant to section 5.2.2 above; provided, however, that ONC may, in its discretion, extend this time for an unlimited number of additional three- (3-) month time periods.

5.2.4. The time period for ONC to decide whether to proceed or not with a proposed amendment to the QTF pursuant to section 5.2.2 above shall initially be three (3) months after ONC receives from the RCE feedback from the Governing Council pursuant to section 5.2.2 above; provided, however, that ONC may, in its discretion, extend this time for one (1) additional three- (3-) month time period.

5.2.5. If an amendment to the Common Agreement or QTF is approved as described above, the amendment shall become effective on the effective date identified by ONC as part of the amendment process and shall be binding on Signatory without any further action by Signatory or the RCE. If Signatory is not willing or able to comply with the amendment, then Signatory shall, within fifteen (15) business days of being notified by the RCE that the amendment has been approved by the QHIN Caucus, provide the RCE written notice of termination of this Common Agreement effective no later than the expiration of thirty (30) days from approval of the amendment.

5.2.6. Notwithstanding the foregoing, if the RCE determines that an amendment to the Common Agreement or QTF is required in order for the RCE to remain in compliance with Applicable Law, the RCE is not required to provide QHINs with an opportunity to vote on the amendment. However, the RCE shall still be required to provide sixty (60) days' advance written notice of the amendment and legal analysis of the need to use this expedited process, unless the RCE would be materially harmed by being out of compliance with Applicable Law if it provided the sixty (60) days' written notice, in which case it will provide as much notice as practicable under the circumstances. Any such amendment to this Common Agreement or the QTF shall be subject to ONC review and modification prior to the RCE providing advance written notice of the amendment to Signatory. Only those amendments that are approved by ONC will be enacted.

5.3. Amending, Adopting, or Repealing an SOP. The RCE is tasked, under its Contract with ONC, with developing an initial set of SOPs that will be considered adopted when initially made publicly available prior to the initial QHIN application period (i.e., prior to *anyone* signing the Common Agreement). The "amendment" process set forth below shall also apply to amending the initial set of SOPs through adopting one or more new SOPs, repealing an SOP in its entirety, or amending one of the initial SOPs.

5.3.1. Proposed amendments to the SOPs may originate from multiple sources including, but not limited to, ONC, the RCE, the Governing Council, the QHIN Caucus, or the Participant/Subparticipant Caucus. The RCE may consult with the Governing Council, the QHIN Caucus, or the Participant/Subparticipant Caucus prior to submitting the proposed amendment(s) to ONC for consideration. The RCE shall collect all proposed

amendments and submit them to ONC, who shall determine whether further action on a proposed amendment is warranted.

5.3.2. If ONC determines that a proposed amendment warrants further consideration, then the RCE will present the proposed amendment to the Governing Council for its feedback. The Governing Council will evaluate the proposed amendment and determine whether it will seek feedback from the QHIN Caucus, the Participant/Subparticipant Caucus, or both, as deemed necessary and appropriate. The Governing Council will evaluate proposed amendments in a timely manner and provide the RCE with written feedback on the proposed amendment.

5.3.3. The RCE shall consult with ONC about the Governing Council feedback. ONC shall, after considering the feedback determine whether the proposed amendment should proceed after making any changes to the amendment. If ONC decides to proceed with the amendment, it will advance the proposed amendment to the QHIN Caucus and the Participant/Subparticipant Caucus for approval by a written vote. An amendment will be approved if at least two-thirds (2/3) of the votes cast by the QHIN Caucus and at least two-thirds (2/3) of the votes cast by the Participant/Subparticipant Caucus within the timeframe established by ONC for the voting period are in favor of the proposed amendment. The requirement to consultation with the Governing Council in this provision shall be satisfied by the ONC's approval of the proposed amendment if, at the time of such approval, the QHIN Caucus and the Participant/Subparticipant Caucus have not yet been established.

5.3.4. The time period for ONC to decide whether to proceed or not with a proposed amendment to an SOP pursuant to section 5.3.3 above shall initially be three (3) months after ONC receives from the RCE feedback from the Governing Council; provided, however, that: (a) ONC may, in its discretion, extend this time for one (1) additional three- (3-) month time period; and (b) if ONC, in addition, determines in its reasonable discretion that the amendment affects or may be contrary to an ONC required policy or another policy of the Department of Health and Human Services or any Applicable Law, ONC may extend this time for an unlimited number of additional three- (3-) month time periods.

5.3.5. Notwithstanding the requirement for a Participant/Subparticipant vote set forth in 5.3.3, if the proposed amendment will not have a material impact on any Participants or Subparticipants, ONC may advance the proposed

amendment to the QHIN Caucus only, whereby the amendment will be approved if both of the following have occurred at least two-thirds (2/3) of the votes cast by the QHIN Caucus within the timeframe established by ONC for the voting period are in favor of the proposed amendment. The requirement to consult with the QHIN Caucus in this provision shall be satisfied by ONC's approval of the proposed amendment if, at the time of such approval, the QHIN Caucus has not yet been established. The RCE will determine an effective date for the approved amendment subject to approval of ONC.

5.3.6. Notwithstanding the foregoing, if the RCE determines, based on advice from legal counsel, that an amendment to an SOP is required in order for the RCE to remain in compliance with Applicable Law, the RCE is not required to provide the QHIN Caucus or the Participant/Subparticipant Caucus with an opportunity to vote on the amendment. However, the RCE shall still be required to provide sixty (60) days' advance written notice of the amendment and the legal analysis of the need to use this expedited process, unless the RCE would be materially harmed by being out of compliance with Applicable Law if it provided the sixty (60) days' written notice, in which case the RCE will provide as much notice as practicable under the circumstances. Any such amendment to an SOP shall be subject to ONC review and modification prior to enactment. Only those amendments that are approved by ONC will be enacted.

5.4. Voting Method. For purposes of the voting process set forth in this Section 5, the phrase "written vote" includes any process by which there is a voting record, which may include voting by electronic means.

6. Cooperation and Non-Discrimination

6.1. Cooperation **(Required Flow-Down).** Signatory understands and acknowledges that numerous activities with respect to this Common Agreement will likely involve other QHINs and their respective Participants and Subparticipants, as well as employees, agents, third-party contractors, vendors, or consultants of each of them. To the extent not in violation of Applicable Law, Signatory shall incorporate, and shall also require that its Participants and their Subparticipants incorporate, the following obligations into all Framework Agreements to which they are a party, if any:

(i) Respond in a timely manner, as may be further provided in an SOP, to inquiries from the RCE or other QHINs about possible issues related to their exchange of information under the Common Agreement;

(ii) Participate collaboratively in discussions coordinated by the RCE to address differing interpretations of requirements in this Common Agreement, the QTF, or any SOP prior to pursuing the Dispute Resolution Process;

(iii) Make reasonable efforts to notify the RCE and other QHINs, as appropriate, when persistent and widespread connectivity failures are occurring with Signatory or its Participants or their Subparticipants, so that all those affected can investigate the problems and identify the root cause(s) of the connectivity failures;

(iv) Work cooperatively, including, without limitation, facilitating contact between other QHINs or their Participants or their Subparticipants and Signatory's Participants or their Subparticipants, to address the root cause(s) of persistent and widespread connectivity failures;

(v) Provide information (or require its Participants to provide information or to require their Subparticipants to do so) to other QHINs in support of collaborative efforts to resolve issues or Disputes, provided that such information is subject to Signatory's right to restrict or condition its cooperation or disclosure of information in the interest of preserving privileges in any reasonably foreseeable litigation or protecting Confidential Information;

(vi) Provide information to aid the efforts of other QHINs or their respective Participants or Subparticipants to understand, contain, and mitigate a TEFCA Security Incident at the request of such other QHINs or their respective Participants or Subparticipants, provided that such information is subject to Signatory's right to restrict or condition its cooperation or disclosure of information in the interest of preserving privileges in any reasonably foreseeable litigation or protecting Confidential Information; and

(vii) Subject to Signatory's right to restrict or condition its cooperation or disclosure of information in the interest of preserving privileges in any reasonably foreseeable litigation or protecting Confidential Information, disclose to the RCE information that Signatory, or its Participants or their Subparticipants, may have that relates to the following:

(a) cybersecurity risk information sharing programs; or

(b) specific, identified security flaws in the operation of the QHIN or its Participants or their Subparticipants that may require the QHIN or its Participants or their Subparticipants to take specific steps to protect the security of their information technology systems and would not otherwise fall into subsection (a).

In no case shall Signatory be required to disclose TI or other information in violation of Applicable Law. In seeking cooperation, Signatory shall make all reasonable efforts to accommodate the other QHIN's(') schedules and reasonable operational concerns. The costs of cooperation to Signatory shall be borne by Signatory and shall not be charged to the RCE or other QHINs. Nothing in this Section 6.1 shall modify or replace the TEFCA Security Incident notification obligations under Section 12.3 and, if applicable, Section 10.5.3 of this Common Agreement.

6.2. Non-Discrimination.

6.2.1. Prohibition Against Exclusivity **(Required Flow-Down).** Neither Signatory nor the RCE shall prohibit or attempt to prohibit any QHIN, Participant, or Subparticipant from joining, exchanging with, conducting other transactions with, or supporting any other networks or exchange frameworks, using services *other than* the Connectivity Services, concurrently with the QHIN's, Participant's, or Subparticipant's participation in exchange activities conducted under the Framework Agreements.

6.2.2. No Discriminatory Limits on Exchange of TI **(Required Flow-Down).** Signatory shall not impede the exchange of information as permitted or required under the applicable Framework Agreements or limit interoperability with any other QHIN, Participant, Subparticipant, or Individual in a discriminatory manner. As used in this Section 6.2.2, a "discriminatory manner" means action that is inconsistently taken or not taken with respect to any similarly situated QHIN, Participant, Subparticipant, Individual, or group of them, whether it is a competitor, or whether it is affiliated with or has a contractual relationship with any other entity, or in response to an event. Notwithstanding the foregoing, limitations, load balancing of network traffic, or other activities, protocols, or rules shall not be deemed discriminatory to the extent that they: (i)

satisfy the requirements of the exception set forth in 45 CFR 171.205; and/or (ii) are based on a reasonable and good-faith belief that the other entity or group has not satisfied or will not be able to satisfy the applicable terms hereof (including compliance with Applicable Law) in any material respect, including, if applicable, any Required Flow-Down(s). One QHIN suspending its exchange activities with another QHIN in accordance with Section 16.4.2 shall not be deemed discriminatory.

6.2.3. Updates to Connectivity Services. In revising and updating its Connectivity Services from time to time, Signatory will use commercially reasonable efforts to do so in accordance with generally accepted industry practices and implemented in a non-discriminatory manner; provided, however, this provision shall not apply to limit modifications or updates to the extent that such revisions or updates are required by Applicable Law or implemented to respond promptly to newly discovered privacy or security threats.

6.2.4. Notice of Updates to Connectivity Services. Signatory shall implement a reporting protocol to provide reasonable prior written notice of all modifications or updates of its Connectivity Services to all other QHINs if such revisions or updates are expected to adversely affect the exchange of TI between QHINs or require changes in the Connectivity Services of any other QHIN, regardless whether they are necessary due to Applicable Law or newly discovered privacy or security threats.

7. Confidentiality and Accountability

7.1. Confidential Information **(Required Flow-Down).** Signatory and RCE each agree to use all Confidential Information received pursuant to this Common Agreement only as authorized in this Common Agreement and any applicable SOP(s) and solely for the purposes of performing its obligations under this Common Agreement or the proper exchange of information under the Common Agreement and for no other purpose. Each Party may act as a Discloser and a Recipient, accordingly. A Recipient will disclose the Confidential Information it receives only to its employees, subcontractors, and agents who require such knowledge and use in the ordinary course and scope of their employment or retention and are obligated to protect the confidentiality of the Discloser's Confidential Information in a manner substantially equivalent to the terms required herein for the treatment of Confidential Information. Otherwise, a Recipient agrees not to disclose the Confidential Information received to anyone except as permitted under this Common Agreement.

7.2. Disclosure of Confidential Information. Nothing herein shall be interpreted to prohibit the RCE from disclosing any Confidential Information to ONC. Signatory acknowledges that ONC, as a Federal government agency, is subject to the Freedom of Information Act ("FOIA"). Any disclosure of Signatory's Confidential Information to ONC or any ONC contractor will be subject to Applicable Law, as well as the limitations, procedures, and other relevant provisions included in any applicable SOP(s).

7.3. ONC's and the RCE's Approach when Requesting Confidential Information. As a matter of general policy, ONC will only request the limited set of Confidential Information that ONC believes is necessary to inform the specific facts and circumstances of a matter. The RCE will only request the limited set of Confidential Information that the RCE believes is necessary to inform the specific facts and circumstances of a matter.

7.4. QHIN Accountability.

7.4.1. Statement of General Principle. To the extent not prohibited by Applicable Law, Signatory shall be responsible for its acts and omissions, and the acts or omissions of its Participants and their Subparticipants, but not for the acts or omissions of any other QHINs or their Participants or Subparticipants. **For the avoidance of doubt, a Signatory that is also a governmental agency or instrumentality shall not be liable to the extent that the Applicable Law that governs Signatory does not expressly waive Signatory's sovereign immunity.** Notwithstanding any provision in this Common Agreement to the contrary, Signatory shall not be liable for any act or omission if a cause of action for such act or omission is otherwise prohibited by Applicable Law. This section shall not be construed as a hold-harmless or indemnification provision.

7.4.2. Harm to RCE. Subject to Sections 7.3 and 7.4 of this Common Agreement that exclude certain types of damages or limit overall damages, Signatory shall be responsible for harm suffered by the RCE to the extent that the harm was caused by Signatory's breach of this Common Agreement and/or any applicable SOP.

7.4.3. Harm to Other QHINs. Subject to Section 7.4 of this Common Agreement, which excludes certain types of damages or limits overall damages, Signatory shall be responsible for harm suffered by another QHIN to the

extent that the harm was caused by Signatory's breach of this Common Agreement and/or any applicable SOP.

7.5. RCE Accountability. Signatory will not hold the RCE, or anyone acting on its behalf, including but not limited to members of the Governing Council, Transitional Council, Caucuses, Cybersecurity Council, and any Advisory Group, work group, or subcommittee, its contractors, employees, or agents liable for any damages, losses, liabilities, or injuries arising from or related to this Common Agreement, except to the extent that such damages, losses, liabilities, or injuries are the direct result of the RCE's breach of this Common Agreement. This section shall not be construed as a hold-harmless or indemnification provision.

7.6. **LIMITATION ON LIABILITY. NOTWITHSTANDING ANYTHING IN THIS COMMON AGREEMENT TO THE CONTRARY, IN NO EVENT SHALL EITHER THE RCE'S OR SIGNATORY'S TOTAL LIABILITY TO EACH OTHER AND ALL OTHER QHINS ARISING FROM OR RELATING TO THIS COMMON AGREEMENT EXCEED AMOUNTS EQUAL TO TWO MILLION DOLLARS ($2,000,000) PER INCIDENT AND FIVE MILLION DOLLARS ($5,000,000) AGGREGATE PER ANNUM OR SUCH OTHER AMOUNTS AS STATED IN A THEN-IN-EFFECT SOP, IN ORDER TO ALLOW FOR THE PERIODIC ADJUSTMENT OF THIS LIABILITY LIMIT OVER TIME WITHOUT THE NEED TO AMEND THIS COMMON AGREEMENT. THIS AND ANY SUCH ADJUSTED LIMITATION ON LIABILITY SHALL APPLY REGARDLESS OF WHETHER A CLAIM FOR ANY SUCH LIABILITY OR DAMAGES IS PREMISED UPON BREACH OF CONTRACT, BREACH OF WARRANTY, NEGLIGENCE, STRICT LIABILITY, OR ANY OTHER THEORIES OF LIABILITY, EVEN IF SUCH PARTY HAS BEEN APPRISED OF THE POSSIBILITY OR LIKELIHOOD OF SUCH DAMAGES OCCURRING. IF SIGNATORY IS A GOVERNMENT AGENCY OR A GOVERNMENT INSTRUMENTALITY UNDER FEDERAL LAW, STATE LAW, LOCAL LAW, OR TRIBAL LAW AND IT IS PROHIBITED FROM LIMITING ITS RECOVERY OF DAMAGES FROM A THIRD PARTY UNDER APPLICABLE LAW, THEN THIS SECTION SHALL NOT APPLY TO EITHER SIGNATORY OR THE RCE. NOTHING IN THIS SECTION 7.4 OF THIS COMMON AGREEMENT SHALL BE CONSTRUED TO CREATE LIABILITY FOR A GOVERNMENTAL AGENCY OR INSTRUMENTALITY OR OTHERWISE WAIVE SOVEREIGN IMMUNITY.**

8. RCE Directory

8.1. Access to the RCE Directory Service. The RCE shall provide Signatory with access to the RCE Directory Service once Signatory has been approved for such access by the RCE. The timeframes and requirements for access to the RCE Directory Service and use of the RCE Directory Service are set out in the QTF and the Onboarding & Designation SOP.

8.2. Utilization of the RCE Directory Service **(Required Flow-Down).** The RCE Directory Service shall be used by Signatory and its Participants and their Subparticipants to create and maintain operational connectivity under the Common Agreement. The RCE is providing Signatory with access to, and the right to use, the RCE Directory Service on the express condition that Signatory only use and disclose information contained in the RCE Directory Service as necessary to advance the intended use of the RCE Directory Service or as required by Applicable Law. For example, Signatory is permitted to disclose information contained in the RCE Directory Service to the workforce members of its Participant's or Subparticipant's health information technology vendor who are engaged in assisting the Participant or Subparticipant with establishing and maintaining connectivity via this Common Agreement and other Framework Agreements. Further, Signatory shall not use the information contained in the RCE Directory Service for marketing or any form of promotion of its own products and services, unless such use or disclosure is primarily part of an effort by Signatory to expand, or otherwise improve, connectivity via the Common Agreement, and any promotion of Signatory's own products or services is only incidental to that primary purpose. In no event shall Signatory use or disclose the information contained in the RCE Directory Service in a manner that should be reasonably expected to have a detrimental effect on ONC, the RCE, other QHINs and/or their Participants or Subparticipants, or any other individual or organization. For the avoidance of doubt, information contained in the RCE Directory is Confidential Information except to the extent such information meets one of the exceptions to the definition of Confidential Information.

8.3. No Duplicative Entries. Before listing any entity in the RCE Directory Service under Signatory as the QHIN for that Participant or Subparticipant, Signatory must confirm that the Participant or Subparticipant, as the case may be, is not already listed in the RCE Directory Service as a Participant of, or a Subparticipant under, another QHIN. Signatory shall not list in the RCE Directory Service any such duplicative entry as a Participant or Subparticipant of Signatory. Signatory shall not prevent a Participant or Subparticipant from changing the QHIN through which the Participant or Subparticipant engages in exchange under a Framework Agreement.

8.4. Maintenance of RCE Directory Service. The RCE shall provide and maintain the RCE Directory Service on a continuous basis, taking all necessary steps to maintain nominal levels of performance and responsiveness, no less than 99.9% of the time. Communication regarding planned and unplanned downtime should be published to all Participants and Subparticipants promptly, in accordance with generally accepted industry service levels, to ensure that there will be no lapses in service that will materially disrupt the operations of Signatory and other QHINs.

9. TEFCA Exchange Activities

In addition to the requirements below, a QHIN, Participant, or Subparticipant may only Request information under the applicable Framework Agreement for a specific Exchange Purpose if the QHIN, Participant, or Subparticipant is the type of person or entity that is described in the definition of the applicable Exchange Purpose. Such a QHIN, Participant, or Subparticipant may use a Business Associate, agent, or contractor to make such a Request, Use, or Disclosure for the applicable Exchange Purpose. For example, only a Health Care Provider as described in the definition of Treatment (or a Business Associate, agent, or contractor acting on that Health Care Provider's behalf) may Request information for the Exchange Purpose of Treatment.

This Common Agreement specifies, among other things, the reasons for which information may be Requested and transmitted from one QHIN to another QHIN. Participants and Subparticipants should understand that, despite their participation under a Framework Agreement, QHINs are prohibited from engaging in QHIN-to-QHIN exchange for any purpose other than an Exchange Purpose under this Common Agreement. The RCE recognizes that Signatory may participate in other health information exchange networks and Signatory's Participants and their Subparticipants also likely participate in other networks, as well as non-network information exchange. This Common Agreement does not affect these other activities or the reasons for which Participants and Subparticipants may request and exchange information within their networks and/or subject to other agreements. Such activities are not in any way limited by the Framework Agreements.

9.1. Utilization of Connectivity Services. Signatory may not utilize the Connectivity Services for any purpose(s) other than the Exchange Purposes. Signatory is responsible for verifying the conformance of all transactions initiated by Signatory's Participants and their Subparticipants prior to transmission via QHIN-to-QHIN exchange, as set forth in the QTF. For the avoidance of doubt, a QHIN may only use the Connectivity Services to initiate a transaction as directed by its Participants or their Subparticipants or if the QHIN itself is authorized under the asserted Exchange Purpose.

9.2. Uses (Required Flow-Down). Signatory may Use TI in any manner that: (i) is not prohibited by Applicable Law; (ii) is consistent with Signatory's Privacy and Security Notice, if applicable; and (iii) is in accordance with Sections 11 and 12 of this Common Agreement, if applicable.

9.3. Disclosures (Required Flow-Down). Signatory may Disclose TI provided such Disclosure: (i) is not prohibited by Applicable Law; (ii) is consistent with Signatory's

Privacy and Security Notice, if applicable; and (iii) is in accordance with Sections 11 and 12 of this Common Agreement, if applicable.

9.4. Responses (Required Flow-Downs). Signatory must support **all** Exchange Purposes and must Respond to all Exchange Purposes that are identified as "required" in the Exchange Purposes SOP. Signatory must provide all Required Information that is relevant for a required Exchange Purpose, as may be further specified in an implementation SOP for the applicable Exchange Purpose, in Response to a Request transmitted via QHIN-to-QHIN exchange, unless providing the Required Information is prohibited by Applicable Law or this Common Agreement or if not providing the Required Information is consistent with all Applicable Law and this Common Agreement.

9.4.1. Exceptions to Required Responses. Notwithstanding the foregoing, Signatory is **permitted but not required** to Respond to a Request transmitted via QHIN-to-QHIN exchange in the circumstances set forth in 9.4.1(i)-(vi) below, provided the Response: (a) is not prohibited by Applicable Law; (b) is consistent with Signatory's Privacy and Security Notice, if applicable; and (c) is in accordance with this Common Agreement.

(i) If Signatory is a Public Health Authority;

(ii) If Signatory utilizes the Government Benefits Determination Exchange Purpose, including such an agency's agent(s)/contractor(s);

(iii) If the reason asserted for the Request is Individual Access Services and the information would not be required to be provided to an Individual pursuant to 45 CFR § 164.524(a)(2), regardless of whether Signatory is a NHE, a Covered Entity, or a Business Associate;

(iv) If the Requested information is not Required Information, provided such response would not otherwise violate the terms of this Common Agreement;

(v) If Signatory is a federal agency, to the extent that the Requested Disclosure of Required Information is not permitted under Applicable Law (e.g., it is Controlled Unclassified Information as defined at 32 CFR Part 2002, and the party requesting it does not

comply with the applicable policies and controls that the federal agency adopted to satisfy its requirements); or

(vi) If the Exchange Purpose is authorized but not required at the time of the Request, either under this Common Agreement or the Exchange Purposes SOP.

9.5. Special Legal Requirements **(Required Flow-Down).** If and to the extent Applicable Law requires that an Individual either consent to, approve, or provide an authorization for the Use or Disclosure of that Individual's information to Signatory, such as a more stringent state law relating to sensitive health information, then Signatory shall refrain from the Use or Disclosure of such information in connection with this Common Agreement unless such Individual's consent, approval, or authorization has been obtained consistent with the requirements of Applicable Law and Section 11 of this Common Agreement, including without limitation communicated pursuant to the process described in the QTF. Copies of such consent, approval, or authorization shall be maintained and transmitted pursuant to the process described in the QTF by whichever party is required to obtain it under Applicable Law, and Signatory may make such copies of the consent, approval, or authorization available electronically to any QHIN, Participant, or Subparticipant in accordance with the QTF and to the extent permitted by Applicable Law. Signatory shall maintain written policies and procedures to allow an Individual to revoke such consent, approval, or authorization on a prospective basis. If Signatory is an IAS Provider, the foregoing shall not be interpreted to modify, replace, or diminish the requirements set forth in Section 10 of this Common Agreement for obtaining an Individual's express written consent.

10. Individual Access Services (Required Flow-Downs, *if Offering Individual Access Services*)

Nothing in the Privacy and Security Notice or in the Individual's written consent collected by Signatory who is an IAS Provider pursuant to Section 10.2 and Section 10.3 may contradict or be inconsistent with any applicable provision of Sections 10 or 11.

10.1. Individual Access Services (IAS) Offering(s) **(Required Flow-Down).** Signatory may elect to offer Individual Access Services to any Individual in accordance with the requirements of this section and in accordance with all other provisions of this Common Agreement. Nothing in this Section 10 shall modify, terminate, or in any way affect an Individual's right of access under the HIPAA Privacy Rule at 45 CFR 164.524 with respect to any QHIN, Participant, or Subparticipant that is a Covered Entity or a Business Associate. Nothing in this Section 10 of this Common

Agreement shall be construed as an exception or excuse for any conduct by the Signatory that meets the definition of information blocking in 45 CFR 171.103.

10.2. Individual Consent **(Required Flow-Down).** The Individual requesting Individual Access Services shall be responsible for completing Signatory's own supplied form for obtaining Individual express consent in connection with the Individual Access Services, as set forth below. Signatory may implement secure electronic means (e.g., secure e-mail, secure web portal) by which an Individual may submit such written consent.

10.3. Written Privacy and Security Notice and Individual Consent **(Required Flow-Downs).**

10.3.1. If Signatory offers Individual Access Services, it must develop and make publicly available a written privacy and security notice (the "Privacy and Security Notice"). The Privacy and Security Notice must:

(i) Be publicly accessible and kept current at all times, including updated versions;

(ii) Be shared with an Individual prior to the Individual's use/receipt of services from Signatory;

(iii) Be written in plain language and in a manner calculated to inform the Individual of such privacy practices;

(iv) Include a statement regarding whether and how the Individual's TI may be accessed, exchanged, Used, and/or Disclosed by Signatory or by other persons or entities to whom/which Signatory Discloses or provides access to the information, including whether the Individual's TI may be sold at any time (including the future);

(v) Include a statement that Signatory is required to act in conformance with the Privacy and Security Notice and must protect the security of the information it holds in accordance with Section 10 of this Common Agreement;

(vi) Include information regarding whom the Individual may contact within Signatory for further information regarding the Privacy and Security Notice and/or with privacy-related complaints;

(vii) Include a requirement by Signatory to obtain express written consent to the terms of the Privacy and Security Notice from the Individual prior to the access, exchange, Use, or Disclosure (including sale) of the Individual's TI, other than Disclosures that are required by Applicable Law;

(viii) Include information on how the Individual may revoke consent;

(ix) Include an explanation of the Individual's rights, including, at a minimum, the rights set forth in Section 10.4, below;

(x) Include a disclosure of any applicable fees or costs related to IAS including the exercise of rights under Section 10.4 of this Common Agreement; and

(xi) Include an effective date.

The implementation of such Privacy and Security Notice requirements shall be set forth in the IAS SOP. If Signatory is a Covered Entity, then a Notice of Privacy Practices that meets the requirements of 45 CFR § 164.520 **and** meets the requirement of 10.3.1(iv) above can satisfy the Privacy and Security Notice requirements. Nothing in this Section 10.3 reduces a Covered Entity's obligations under the HIPAA Rules.

10.3.2. If Signatory is an IAS Provider, it must collect the Individual's written consent as required under Section 10.3.1(vii) of this Common Agreement at the outset of the Individual's first use of the Individual Access Services and with any material change in the applicable Privacy and Security Notice.

10.4. Individual Rights **(Required Flow-Down).** Individuals have, and must be clearly informed of, the following rights:

(i) The right to require that **all** of their Individually Identifiable information maintained by Signatory as an IAS Provider be deleted unless such deletion is prohibited by Applicable Law; provided, however, that the foregoing shall not apply to Individually Identifiable information contained in audit logs.

(ii) The right to an export of their Individually Identifiable information in a computable format, including the means to interpret such information.

The rights described in this Section 10.4 shall control over any inconsistent provisions in Section 11.

10.5. Additional Security Requirements for IAS Providers **(Required Flow-Downs).** In addition to meeting the applicable security requirements set forth in Section 12, if Signatory is an IAS Provider it must further satisfy the requirements of this subsection.

10.5.1. Scope of Security Requirements. If Signatory is an IAS Provider it must comply with the applicable security requirements set forth in this Common Agreement and the security SOPs for **all** Individually Identifiable information they hold, regardless of whether such information is TI.

10.5.2. Encryption. If Signatory is an IAS Provider it is required to encrypt **all** Individually Identifiable information held by Signatory, both in transit and at rest, regardless of whether such data are TI.

10.5.3. TEFCA Security Incident Notice to Affected Individuals. Each Signatory that is an IAS Provider must notify each Individual whose TI has been or is reasonably believed to have been affected by a TEFCA Security Incident involving the IAS Provider. Such notification must be made without unreasonable delay and in no case later than sixty (60) days following Discovery of the TEFCA Security Incident. The notification required under this section must be written in plain language and shall include, to the extent possible:

(i) A brief description of what happened, including the date of the TEFCA Security Incident and the date of its Discovery, if known;

(ii) A description of the type(s) of Unsecured TI involved in the TEFCA Security Incident (such as whether full name, Social Security number, date of birth, home address, account number, diagnosis, disability code, or other types of information were involved);

(iii) Any steps Individuals should take to protect themselves from potential harm resulting from the TEFCA Security Incident;

(iv) A brief description of what the Signatory involved is doing to investigate the TEFCA Security Incident, to mitigate harm to Individuals, and to protect against any further TEFCA Security Incidents; and

(v) Contact procedures for Individuals to ask questions or learn additional information related to the TEFCA Security Incident, which shall include a telephone number (toll-free), e-mail address, and website with contact information and/or a contact form for the IAS Provider.

To the extent Signatory is already required by Applicable Law to notify an Individual of an incident that would also be a TEFCA Security Incident, this section does not require duplicative notification to that Individual.

10.6. Survival for IAS Providers **(Required Flow-Down).** The following minimum provisions and their respective minimum time periods shall continue to apply to Signatory to the extent that it is an IAS Provider and survive expiration or termination of the applicable Framework Agreement under which Individual Access Services were provided for the time periods and to the extent described below.

10.6.1. The following Section 10 provisions shall survive the expiration or termination of the applicable Framework Agreement until expiration of the time period specified in the definition of PHI at 45 CFR § 160.103 under Subsection 2(iv) of such definition, i.e., fifty (50) years after the death of the Individual for whom Individual Access Services were provided, even if the information to which the provisions apply is not ePHI:

(i) The terms of the consent under Section 10.2, Individual Consent, and the terms of the Privacy and Security Notice under Section 10.3.1, which sets forth requirements that apply to the Privacy and Security Notice;

(ii) Section 10.3.2, which requires Signatory to collect the Individual's written consent with respect to any material change in the applicable Privacy and Security Notice;

(iii) Section 10.4, Individual Rights; and

(iv) Section 10.5, Additional Security Requirements for IAS Providers.

10.6.2. Section 10.5.3, TEFCA Security Incident Notice to Affected Individuals, shall survive for a period of six (6) years following the expiration or termination of the applicable Framework Agreement.

10.7. Provisions that Apply to Subcontractors and Agents of IAS Providers **(Required Flow-Down).** To the extent that Signatory is an IAS Provider and uses subcontractors or agents with respect to the provision of such Individual Access Services, it shall include in a written agreement with each such subcontractor or agent a requirement to comply with the following:

(i) To act in accordance with each of the applicable consents required of Signatory under Section 10.2;

(ii) To act in accordance with each of Signatory's applicable Written Privacy and Security Notices pursuant to Section 10.3;

(iii) To act in accordance with Section 10.4 when directed to do so by Signatory;

(iv) With respect to the information for which the subcontractor or agent provides services to Signatory in its role as an IAS Provider, the agent or subcontractor shall implement the applicable security requirements set forth in this Common Agreement (other than Sections 12.1.5, 12.1.6 and 12.3) and the security SOPs for **all** such Individually Identifiable information, regardless of whether such information is TI, to the same extent as they apply to Signatory; provided, however, that for purposes of the Flow-Down Provisions of this Section 10.7, if the IAS Provider is a Participant or Subparticipant, only Sections 12.1.4 and 12.2 shall apply;

(v) To encrypt **all** Individually Identifiable information both in transit and at rest, regardless of whether such data are TI pursuant to Section 10.5.2; and

(vi) To notify Signatory that is an IAS Provider for which it provides services with respect to each Individual whose TI has been or is reasonably believed to have been affected by a TEFCA Security Incident involving the subcontractor or agent in the manner and within the timeframe specified pursuant to Section 10.5.3.

Each agreement between Signatory and a subcontractor or agent with respect to the provision of Individual Access Services shall also provide that subsections (i) through (v) above shall continue in effect after termination or expiration of such agreement at least until expiration of the time period specified in the definition of PHI at 45 CFR § 160.103 under subsection 2(iv) of such definition, i.e., fifty (50) years after the death of the Individual to whom the information relates. Each

such agreement shall also provide that subsection (vi) above shall survive for at least six (6) years following the termination or expiration of such agreement.

11. Privacy

11.1. Compliance with the HIPAA Privacy Rule **(Required Flow-Down).** If Signatory is a NHE (but not to the extent that it is acting as an entity entitled to make a Government Benefits Determination under Applicable Law, a Public Health Authority, or a Government Health Care Entity), then it shall comply with the provisions of the HIPAA Privacy Rule listed below with respect to all Individually Identifiable information that Signatory reasonably believes is TI as if such information is Protected Health Information and Signatory is a Covered Entity. Such compliance shall be consistent with Section 13.2 (Compliance with Specific Obligations) and enforced as part of its obligations pursuant to this Common Agreement.

11.1.1. From 45 CFR § 164.502, General Rules **(Required Flow-Down):**

- Subsection (a)(1) – Dealing with permitted Uses and Disclosures**, but only to the extent Signatory is authorized to engage in the activities described in this subsection of the HIPAA Privacy Rule for the applicable Exchange Purpose.**
- Subsection (a)(2)(i) – Requiring Disclosures to Individuals
- Subsection (a)(3) – Business Associates
- Subsection (a)(5) – Dealing with prohibited Uses and Disclosures
- Subsection (b) – Dealing with the Minimum Necessary standard
- Subsection (c) – Dealing with agreed-upon restrictions
- Subsection (d) – Dealing with deidentification and re-identification of information
- Subsection (e) – Dealing with Business Associate contracts
- Subsection (f) – Dealing with deceased persons' information
- Subsection (g) – Dealing with personal representatives
- Subsection (h) – Dealing with confidential communications
- Subsection (i) – Dealing with Uses and Disclosures consistent with notice
- Subsection (j) – Dealing with Disclosures by whistleblowers

11.1.2. 45 CFR § 164.504, Organizational Requirements **(Required Flow-Down).**

11.1.3. 45 CFR § 164.508, Authorization Required **(Required Flow-Down).** Notwithstanding the foregoing, the provisions of Sections 10.2 and 10.3 shall control and this Section 11.1.3 shall not apply with respect to an IAS Provider that is a NHE.

11.1.4. 45 CFR § 164.510, Uses and Disclosures Requiring Opportunity to Agree or Object **(Required Flow-Down).** Notwithstanding the foregoing, an IAS Provider that is a NHE but is not a Health Care Provider shall not have the right to make the permissive Disclosures described in § 164.510(3) - Emergency circumstances; provided, however, that an IAS Provider is not prohibited from making such a Disclosure if the Individual has consented to the Disclosure pursuant to Section 10 of this Common Agreement.

11.1.5. 45 CFR § 164.512, Authorization or Opportunity to Object Not Required **(Required Flow-Down).** Notwithstanding the foregoing, an IAS Provider that is a NHE but is not a Health Care Provider shall not have the right to make the permissive Disclosures described in § 164.512(c) - Standard: Disclosures about victims of abuse, neglect or domestic violence; § 164.512 Subsection (d) - Standard: Uses and disclosures for health oversight activities; and § 164.512 Subsection (j) - Standard: Uses and disclosures to avert a serious threat to health or safety; provided, however, that an IAS Provider is not prohibited from making such a Disclosure(s) if the Individual has consented to the Disclosure(s) pursuant to Section 10 of this Common Agreement.

11.1.6. From 45 CFR § 164.514, Other Requirements Relating to Uses and Disclosures **(Required Flow-Down):**

- Subsections (a)-(c) – Dealing with de-identification requirements that render information **not** Individually Identifiable for purposes of this Section 11 and TEFCA Security Incidents
- Subsection (d) – Dealing with Minimum Necessary requirements
- Subsection (e) – Dealing with Limited Data Sets

11.1.7. 45 CFR § 164.522, Rights to Request Privacy Protections **(Required Flow-Down).**

11.1.8. 45 CFR § 164.524, Access of Individuals **(Required Flow-Down),** except that an IAS Provider that is a NHE shall be subject to the requirements of

Section 10 with respect to access by Individuals for purposes of Individual Access Services and not this Section 11.1.8.

11.1.9. 45 CFR § 164.528, Accounting of Disclosures **(Required Flow-Down).**

11.1.10. From 45 CFR § 164.530, Administrative Requirements **(Required Flow-Down):**

- Subsection (a) – Dealing with personnel designations
- Subsection (b) – Dealing with training
- Subsection (c) – Dealing with safeguards
- Subsection (d) – Dealing with complaints
- Subsection (e) – Dealing with sanctions
- Subsection (f) – Dealing with mitigation
- Subsection (g) – Dealing with refraining from intimidating or retaliatory acts
- Subsection (h) – Dealing with waiver of rights
- Subsection (i) – Dealing with policies and procedures
- Subsection (j) – Dealing with documentation

11.2. Written Privacy Policy **(Required Flow-Down).** Signatory must develop, implement, make publicly available, and act in accordance with a written privacy policy describing its privacy practices with respect to Individually Identifiable information that is Used or Disclosed pursuant to this Common Agreement. Signatory can satisfy the written privacy policy requirement by including applicable content consistent with the HIPAA Rules into its existing privacy policy, except as otherwise stated herein with respect to IAS Providers. This written privacy policy requirement does not supplant the HIPAA Privacy Rule obligations of a QHIN, Participant, or a Subparticipant that is a Covered Entity to post and distribute a Notice of Privacy Practices that meets the requirements of 45 CFR § 164.520. If Signatory is a Covered Entity, then this written privacy practices requirement can be satisfied by its Notice of Privacy Practices. If Signatory is an IAS Provider, then the written privacy practices requirement **must** be in the form of a Privacy and Security Notice that meets the requirements of Section 10.3 of this Common Agreement.

12. Security

12.1. General Security Requirements. Signatory shall comply with the HIPAA Security Rule as if the HIPAA Security Rule applied to Individually Identifiable information that is TI regardless of whether Signatory is a Covered Entity or a Business Associate. Signatory shall also comply with the security requirements stated in Section 12 of this Common Agreement and specific additional requirements as described in the QTF and applicable SOPs, to the extent that such requirements are not already included in the HIPAA Security Rule, with respect to all Individually Identifiable information that is TI as if such information were Protected Health Information and Signatory were a Covered Entity or Business Associate. Notwithstanding anything else in this Section 12, none of these requirements shall apply to any federal agency or Public Health Authority.

12.1.1. Cybersecurity Coverage. In accordance with the Cybersecurity Coverage SOP, Signatory shall maintain, throughout the term of this Common Agreement: (i) a policy or policies of insurance for cyber risk and technology errors and omissions; (ii) internal financial reserves to self-insure against a cyber-incident; or (iii) some combination of (i) and (ii).

12.1.2. Cybersecurity Certification. Signatory shall achieve and maintain third-party certification to an industry-recognized cybersecurity framework demonstrating compliance with all relevant security controls, as set forth in the applicable SOP.

12.1.3. Annual Security Assessments. Signatory must obtain a third-party security assessment and technical audit no less often than annually and as further described in the applicable SOP. Signatory must also provide evidence of compliance with this section and, if applicable, of appropriate mitigation efforts in response to the findings of the security assessment and/or technical audit within thirty (30) days to the RCE as specified in the SOP.

12.1.4. Participants and Subparticipants **(Required Flow-Down).** Signatory shall require in its Participant-QHIN Agreements that its Participants implement and maintain, and require their Subparticipants to implement and maintain, appropriate security controls for TI that are commensurate with risks to the confidentiality, integrity, and/or availability of the TI. If any Participant or Subparticipant is a NHE, it shall be required to comply with the HIPAA Security Rule provisions with respect to all Individually Identifiable information that the Participant or Subparticipant reasonably believes is TI as if such information were Protected Health Information and the Participant or Subparticipant were a Covered Entity or Business

Associate. Signatory shall further require that its Participants implement and maintain, and that its Participants require their Subparticipants to implement and maintain, any additional security requirements that may be set forth in an SOP applicable to Participants and Subparticipants. Such compliance shall be enforced as part of the Participants' and Subparticipants' obligations pursuant to the Framework Agreements.

12.1.5. Security Resource Support to Participants. Signatory shall make available to its Participants: (i) security resources and guidance regarding the protection of TI applicable to the Participants' participation in the QHIN under the applicable Framework Agreement; and (ii) information and resources that the RCE or Security Council makes available to Signatory related to promotion and enhancement of the security of TI under the Framework Agreements.

12.1.6. Chief Information Security Officer. The RCE shall designate a person to serve as the Chief Information Security Officer (CISO) for activities conducted under the Framework Agreements. This may be either an employee or independent contractor of the RCE. The RCE's CISO will be responsible for monitoring and maintaining the overall security posture of activities conducted under the Framework Agreements and making recommendations to all QHINs regarding changes to baseline security practices required to address changes to the threat landscape. Signatory agrees that it, and not the RCE, is ultimately responsible for the security posture of Signatory's network and the activities conducted by Signatory under the Participant-QHIN Agreements to which Signatory is a party, as well as the Participant-Subparticipant Agreements its Participants enter into and all Downstream Subparticipant Agreements that its Participants' Subparticipants enter into. Signatory shall also designate a person to serve as its CISO for purposes of Signatory's participation in QHIN-to-QHIN exchange. The RCE shall establish a Cybersecurity Council to enhance cybersecurity commensurate with the risks of the activities conducted under the Framework Agreements as more fully set forth in an SOP.

12.2. TI Outside the United States **(Required Flow-Down).** Signatory shall not Use TI outside the United States or Disclose TI to any person or entity outside the United States except to the extent such Use or Disclosure is permitted or required by Applicable Law and except to the extent the Use or Disclosure is conducted in conformance with the HIPAA Security Rule, regardless of whether Signatory is a Covered Entity or Business Associate. Signatory shall evaluate the risks of any extraterritorial Uses and/or Disclosures of TI, if applicable, as part of an annual

security assessment and prior to any new or substantially different type of non-U.S. Use(s) or Disclosure(s). Such security assessment shall include a risk assessment to evaluate whether the Uses or Disclosures of Individually Identifiable information that is reasonably believed to be TI by or to persons or entities outside the United States satisfies the requirements of the HIPAA Security Rule. The foregoing does not modify or eliminate any provision of Applicable Law that does not permit a Signatory to Disclose Individually Identifiable information to a person or entity outside the United States or that imposes conditions or limitations on such Disclosure.

12.3. TEFCA Security Incident Notification. As soon as reasonably practicable, but not more than five (5) calendar days after determining that an TEFCA Security Incident has occurred, Signatory shall provide notification to the RCE and to all QHINs that are likely impacted, whether directly or by nature of one of the other QHIN's Participants or Subparticipants, of the TEFCA Security Incident. Such notification must include sufficient information for the RCE and others affected to understand the nature and likely scope of the TEFCA Security Incident. Signatory shall supplement the information contained in the notification as it becomes available and cooperate with the RCE, and with other QHINs, Participants, and Subparticipants that are likely impacted by the TEFCA Security Incident.

12.3.1. Receiving TEFCA Security Incident Notification. Signatory shall implement a reporting protocol by which other QHINs can provide Signatory with notification of a TEFCA Security Incident. In the event that the TEFCA Security Incident involves TI that is de-identified in accordance with the de-identification standard provided at 45 CFR § 164.514(a), then no such reporting obligation shall exist.

12.3.2. Vertical Reporting of TEFCA Security Incident(s). Signatory shall require that each Participant with which it has entered into a Participant-QHIN Agreement:

(i) Notify Signatory and Participant's Subparticipants of any TEFCA Security Incident the Participant experiences in accordance with the timing and content requirements stated in Section 12.3;

(ii) Require that each Subparticipant with which the Participant enters into a Participant-Subparticipant Agreement report any TEFCA Security Incident experienced by or reported to the Subparticipant to the Participant and to the Subparticipant's Downstream Subparticipants in accordance with the timing and content requirements stated in Section 12.3;

(iii) Require that each Subparticipant with which the Participant enters into a Participant-Subparticipant Agreement require that its Downstream Subparticipants report any TEFCA Security Incident experienced by or reported to the Downstream Subparticipant to the Upstream Subparticipant and to its own Downstream Subparticipants, in accordance with the timing and content requirements stated in Section 12.3.

(iv) Notify Signatory of any TEFCA Security Incident reported to the Participant by one of its Subparticipants.

12.3.3. Compliance with Notification Under Applicable Law. Nothing in this Section 12.3 shall be deemed to modify or replace any breach notification requirements that Signatory may have under the HIPAA Rules, the FTC Rule, and/or other Applicable Law. To the extent Signatory is already required by Applicable Law to notify a Participant, Subparticipant, and/or another QHIN of an incident that would also be a TEFCA Security Incident, this section does not require duplicative notification.

13. General Obligations

13.1. Compliance with Applicable Law and the Framework Agreements **(Required Flow-Down).** Signatory shall comply with all Applicable Law and shall implement and act in accordance with any provision required by this Common Agreement, including all applicable SOPs and provisions of the QTF.

13.2. Compliance with Specific Obligations.

13.2.1 Responsibility of the RCE. The RCE shall be responsible for taking reasonable steps to confirm that Signatory is abiding by the obligations under this Common Agreement and all applicable SOPs. In the event that the RCE becomes aware of a material non-compliance with any of the obligations stated in the Common Agreement or any of the applicable SOPs by Signatory, then the RCE shall promptly notify Signatory in writing. Such notice shall inform Signatory that its failure to correct any such deficiencies within the timeframe established by the RCE shall constitute a material breach of this Common Agreement, which may result in termination of this Common Agreement.

13.2.2 Responsibility of Signatory **(Required Flow-Down)**. Signatory shall be responsible for taking reasonable steps to confirm that all of its Participants are abiding by the Required Flow-Downs and all applicable SOPs. In the event that Signatory becomes aware of a material non-compliance by one of its Participants, then Signatory shall promptly notify the Participant in writing. Such notice shall inform the Participant that its failure to correct any such deficiencies within the timeframe established by Signatory shall constitute a material breach of the Participant-QHIN Agreement, which may result in early termination of said agreement.

13.3. Flow-Down Rights to Suspend **(Required Flow-Downs).**

13.3.1. Suspension Rights Granted to RCE. Each Participant-QHIN Agreement, Participant-Subparticipant Agreement, and Downstream Subparticipant Agreement shall include a grant of authority to the RCE to suspend each party's right to engage in any QHIN-to-QHIN exchange activities if: (i) there is an alleged violation of such agreement or of Applicable Law by the party/parties; (ii) there is a cognizable threat to the security of the information that the RCE reasonably believes is TI transmitted pursuant to such agreement or to the infrastructure of the QHIN; or (iii) such suspension is in the interests of national security as directed by an agency of the United States government.

13.3.2. Suspension Rights Granted to Signatory. Each of the aforementioned Framework Agreements shall also grant Signatory the same authority as the RCE to suspend a party's right to engage in any activities under the Framework Agreement if any of the circumstances described in subsections 13.3.1 (i)-(iii) above occur with respect to any Participant and/or Subparticipant of Signatory.

(i) Signatory *may* exercise such right to suspend based on its own determination that any of the circumstances described in subsections 13.3.1 (i)-(iii) above occurred with respect to any Participant and/or Subparticipant of Signatory.

(ii) Signatory ***must*** exercise such right to suspend if directed to do so by the RCE based on the RCE's determination that suspension is warranted based on any of the circumstances described in subsections 13.3.1 (i)-(iii) above with respect to any Participant and/or Subparticipant of Signatory. If the suspension of any Participant and/or Subparticipant of Signatory is at the direction

of the RCE, Signatory must effectuate such suspension as soon as practicable and not longer than within twenty-four (24) hours of the RCE having directed the suspension, unless the RCE specifies a longer period of time is permitted to effectuate the suspension.

13.4. Survival for Participants and Subparticipants (**Required Flow-Downs**). The following are the minimum survival provisions and respective minimum time periods that shall be included in each of the Framework Agreements other than this Common Agreement. Signatory shall include at least the following survival provisions in all of its Participant-QHIN Agreements and shall require its Participants to include the following minimum survival provisions and minimum survival time periods in all their Participant-Subparticipant Agreements as Required Flow-Downs so that such provisions will also be included as minimum survival provisions and minimum survival time periods in all Downstream Subparticipant Agreements.

13.4.1. Section 7.1, Confidential Information, shall survive for a period of six (6) years following the expiration or termination of the applicable Framework Agreement.

13.4.2. Section 10.6, Survival for IAS Providers, to the extent that the Participant or Subparticipant is an IAS Provider, shall survive following the expiration or termination of the applicable Framework Agreement for the respective time periods set forth in Section 10.6.

13.4.3. Section 11, Privacy, to the extent that the Participant or Subparticipant is subject to Section 11, said Section shall survive the expiration or termination of the applicable Framework Agreement until the expiration of the time period specified in the definition of PHI at 45 CFR § 160.103 under Subsection 2(iv) of such definition, i.e., fifty (50) years after the death of the Individual to whom the information covered by Section 11 relates.

13.4.4. Section 12.1.4, Participants and Subparticipants, to the extent that the Participant or Subparticipant is subject to Section 12.1.4, said Section shall survive the expiration or termination of the applicable Framework Agreement until the expiration of the time period specified in the definition of PHI at 45 CFR § 160.103 under Subsection 2(iv) of such definition, i.e., fifty (50) years after the death of the Individual to whom the information covered by Section 12.1.4 relates.

13.4.5. The requirements of Section 12.3.2, Vertical Reporting of TEFCA Security Incident(s), shall survive for a period of six (6) years following the expiration or termination of the applicable Framework Agreement.

14. Specific QHIN Obligations

14.1. Transparency – Access to Participant-QHIN Information. If either ONC or the RCE has a reasonable basis to believe that one or more of the following situations exist with respect to Signatory, then Signatory shall make available, upon written request, copies of its Participant-QHIN Agreements and information relating to the exchange of TI and the circumstances giving rise to the basis for such request. The foregoing shall be subject to Signatory's right to restrict or condition its cooperation or disclosure of information in the interest of preserving privileges but only to the extent that such information is material to the defense of a substantiated claim asserted by a third party. Such situations include: (i) an alleged violation of this Common Agreement or Applicable Law; or (ii) a threat to the security of information that the RCE or ONC reasonably believes is TI transmitted pursuant to the Framework Agreements or to the infrastructure supporting QHIN-to-QHIN exchange. The right of Signatory to restrict or condition its cooperation or disclosure of its Participant-QHIN Agreement(s) and information relating to the exchange of TI in the interest of preserving privileges shall not apply to a disclosure that is requested in the interest of national security.

14.2. Compliance with Standard Operating Procedures. The RCE shall adopt Standard Operating Procedures (SOPs) to provide detailed guidance on specific aspects of the exchange activities under this Common Agreement that are binding on the RCE, Signatory and, as applicable, Participants and Subparticipants. The SOPs are incorporated by reference into this Common Agreement, and Signatory shall comply with all SOPs that are applicable to it and shall require that its Participants and their Subparticipants agree in writing to comply with all applicable SOPs. If Signatory or its Participants or Subparticipants fail to comply with any applicable SOP, the RCE may take corrective action, which will include requiring steps to bring the organization into compliance with the SOP and may include requiring Signatory to suspend the ability of a Participant or Subparticipant to exchange information under the Framework Agreement(s) until the non-compliance is corrected to the satisfaction of the RCE, suspending Signatory's right to exchange information under the Common Agreement or Signatory may have its right to exchange information under the Common Agreement terminated or be required to ensure the termination of its Participant's or a Subparticipant's right to exchange information under one of the other Framework Agreements. RCE shall adopt an SOP that provides detailed information about sanctions for non-compliance with an SOP. Nothing in this Section

14.2 of this Common Agreement limits the RCE's rights to terminate this Common Agreement under Section 16.3.2 or 16.3.3 of this Common Agreement.

14.3. Incorporation of Required Flow-Downs in Framework Agreements. In addition to the obligations of Signatory with respect to its Participants stated throughout in this Common Agreement:

(i) Signatory shall be responsible for incorporating the Required Flow-Downs into all Participant-QHIN Agreements.

(ii) Signatory shall require that each of its Participants be responsible for incorporating the Required Flow-Downs into all Participant-Subparticipant Agreements.

(iii) Signatory shall further require that each of its Participants be responsible for requiring that each of their Subparticipants incorporate the Required Flow-Downs into all Downstream Subparticipant Agreements, if any.

14.4. Compliance with the QHIN Technical Framework. Signatory shall meet the requirements of the then-applicable QTF. Signatory is required to comply with any updates to the QTF by the applicable date established by the RCE and approved by ONC.

15. Dispute Resolution

15.1. Acknowledgement and Consent to Dispute Resolution Process. Signatory acknowledges that it may be in its best interest to resolve Disputes related to the Common Agreement through a collaborative, collegial process rather than through civil litigation. Signatory has reached this conclusion based upon the fact that the legal and factual issues related to the exchange and related activities under the Common Agreement are unique, novel, and complex, and limited case law exists that addresses the legal issues that could arise in connection with this Common Agreement. Therefore, Signatory shall submit Disputes to the RCE to be addressed by the non-binding Dispute resolution process set forth in an SOP (the "Dispute Resolution Process"). Notwithstanding, Signatory understands that the Dispute Resolution Process does not supersede or replace any oversight, investigatory, enforcement, or other administrative actions or processes that may be taken by the relevant authority, whether or not arising out of or related to the circumstances giving rise to the Dispute. RCE and Signatory are committed to promptly and fairly resolving Disputes.

To that end, Signatory shall use its best efforts to resolve Disputes that may arise with other QHINs, their respective Participants, or the RCE through informal discussions before seeking to invoke the Dispute Resolution Process. If the Dispute cannot be resolved through cooperation between Signatory and the other QHIN(s), Signatory may, on its own behalf or on behalf of its Participant(s), choose to submit the Dispute to the Dispute Resolution Process. Likewise, Signatory, on its own behalf and on behalf of its Participant(s), will seek to resolve Disputes involving the RCE through good-faith informal discussions with the RCE prior to invoking the Dispute Resolution Process.

Under no circumstances will the Dispute Resolution Process give the RCE any power to assess monetary damages against any party to the Dispute Resolution Process including, without limitation, Signatory or its Participants or any other QHIN or its Participants. Except in accordance with Section 15.2, if Signatory refuses to participate in the Dispute Resolution Process, such refusal shall constitute a material breach of this Common Agreement and may be grounds for termination of Signatory's participation in QHIN-to-QHIN exchange.

15.2. Injunctive Relief.

15.2.1. Notwithstanding Section 15.1, Signatory shall be relieved of its obligation to participate in the Dispute Resolution Process if Signatory: (i) makes a good faith determination that is based upon available information or other evidence that another QHIN's or its Participants' acts or omissions will cause irreparable harm to Signatory or another organization or person (e.g., another QHIN or its Participant or an Individual); and (ii) pursues immediate injunctive relief against such QHIN or its Participant in a court of competent jurisdiction in accordance with Section 18.3. Signatory must inform RCE of such action within two (2) business days of filing for the injunctive relief and of the result of the action within twenty-four (24) hours of a court of competent jurisdiction granting or denying injunctive relief.

15.2.2. If the injunctive relief sought in Section 15.2.1 is not granted and Signatory chooses to pursue the Dispute, the Dispute must be submitted to the Dispute Resolution Process in accordance with Section 15.1.

15.3. Activities during Dispute Resolution Process. The pendency of a Dispute under this Common Agreement has no effect on either Party's obligations hereunder, unless Signatory terminates its rights in accordance with Section 16.2 or 16.3.1 or is suspended in accordance with Section 16.4.2.

15.4. Implementation of Agreed Upon Resolution. If, at any point during the Dispute Resolution Process, Signatory and all other parties to the Dispute accept a proposed resolution of the Dispute, Signatory and RCE each agree to implement the terms of the resolution within the agreed-upon timeframe to the extent applicable to each of them.

15.5. Reservation of Rights. If, following the completion of the Dispute Resolution Process, in the opinion of Signatory, the Dispute Resolution Process failed to adequately resolve the Dispute, Signatory may pursue any remedies available to it in a court of competent jurisdiction in accordance with Section 18.3.

15.6. Escalation and Reporting of Disputes to ONC.

15.6.1. Escalation of Certain Disputes to ONC. Except for RCE suspension or termination decisions subject to Section 16 of this Common Agreement, if Signatory has reason to believe that: (i) the RCE is acting in a discriminatory manner or in violation of the RCE's conflict of interest policies; or (ii) the RCE has not acted in accordance with its obligations stated in this Common Agreement, then Signatory shall have the right, on its own behalf and on behalf of its Participants, to make a complaint to ONC. The complaint shall identify the parties to the Dispute, a description of the Dispute, a summary of each party's position on the issues included in the Dispute, the final disposition of the Dispute, and the basis for the RCE's alleged misconduct. The RCE and Signatory shall each also promptly provide such additional information as may be reasonably requested by ONC in order to consider and resolve the issues raised for review. Since this complaint may include PHI and may include Confidential Information, the RCE will work with ONC to develop mechanisms to protect the confidentiality of this information. Such protective mechanisms and the process for escalating a complaint to ONC are set forth in an SOP.

15.6.2. Reporting of Anonymized Dispute Information to ONC. As part of the RCE's communications with ONC, within fifteen (15) business days after the end of each calendar quarter, the RCE reports the following information relating to each Dispute that has been submitted through the Dispute Resolution Process in an anonymized format to ONC: (i) identification of whether the parties to the Dispute are QHIN(s) only, or whether the Dispute also involves Participant(s); (ii) a description of the Dispute with reasonable specificity; and (iii) the final disposition of the Dispute.

16. Appeals to ONC

16.1. Signatory may appeal the following decisions of the RCE to ONC:

(i) Suspension of a Signatory or Suspension of a Signatory's Participant or Subparticipant; and

(ii) Termination of a Signatory's Common Agreement by the RCE.

16.2. ONC anticipates publishing regulations to address the appeals of any of the RCE's decisions listed in Section 16.1. ONC anticipates issuing sub-regulatory guidance to address those appeals while formulating regulations. Until ONC's regulations governing those appeals are finalized and effective, the sub-regulatory guidance ONC issues shall be binding under this Common Agreement.

17. Stability of the QHIN Network

17.1. Term. This Common Agreement shall commence on the Effective Date and shall remain in effect until it is terminated by either Party in accordance with the terms of this Common Agreement.

17.2. Withdrawal and Termination Prior to QHIN Designation.

17.2.1. By Signatory. Signatory may withdraw from Onboarding and terminate this Common Agreement at any time before it is Designated if it determines that it cannot meet the requirements of being a QHIN or if it chooses not to continue to seek status as a QHIN. Signatory must provide at least fifteen (15) calendar days' written notice to RCE of its intention to withdraw from Onboarding and terminate this Common Agreement.

17.2.2. By the RCE. If Signatory fails to complete the Onboarding requirements within the timeframe specified in the Onboarding & Designation SOP, the RCE may withdraw Signatory from Onboarding and terminate this Common Agreement upon fifteen (15) calendar days' written notice to Signatory that Signatory has failed to meet the Onboarding requirements and, therefore, cannot be Designated. The foregoing shall not be interpreted as precluding Signatory from reapplying for Designation at a future time.

17.3. Termination.

17.3.1. Termination by Signatory. Signatory may terminate this Common Agreement at any time without cause by providing ninety (90) days' prior written notice to RCE. Signatory may also terminate for cause if the RCE commits a material breach of the Common Agreement, and the RCE fails to cure its material breach within thirty (30) days of Signatory providing written notice to RCE of the material breach; provided, however, that if RCE is diligently working to cure its material breach at the end of this thirty-(30-) day period, then Signatory must provide the RCE with up to another thirty (30) days to complete its cure.

17.3.2. Termination by the RCE. RCE may not terminate this Common Agreement without cause as described in this Section 16.3.2 or Section 16.3.3 of this Common Agreement. RCE may terminate this Common Agreement with immediate effect by giving notice to Signatory if: (i) Signatory is in material breach of any of the terms and conditions of this Common Agreement and fails to remedy such breach within thirty (30) days after receiving notice of such breach; provided, however, that if Signatory is diligently working to cure its material breach at the end of this thirty- (30-) day period, then RCE must provide Signatory with up to another thirty (30) days to complete its cure; or (ii) Signatory breaches a material provision of this Common Agreement where such breach is not capable of remedy.

17.3.3. Termination by RCE if the RCE Ceases to be Funded. The Parties acknowledge that the RCE's activities under this Common Agreement are supported by ONC funding. If this funding ceases, there are no guarantees that the RCE will continue unless a financial sustainability model has been put in place. If federal funding ceases, or if the available funding is not sufficient to provide the necessary funding to support operation of the RCE and there is no successor RCE, then the RCE may terminate this Common Agreement by providing one hundred and eighty (180) days' prior written notice to Signatory.

17.3.4. Termination by Mutual Agreement. The Parties may terminate this Common Agreement at any time and for any reason by mutual, written agreement.

17.3.5. Effect of Termination of the Common Agreement.

(i) Upon termination of this Common Agreement for any reason, RCE shall promptly remove Signatory and its Participants and Subparticipants from

the RCE Directory Service and any other lists of QHINs that RCE maintains.

(ii) Upon termination of this Common Agreement for any reason, Signatory shall, without undue delay, (a) remove all references that identify it as a QHIN from all media, and (b) cease all use of any material, including but not limited to product manuals, marketing literature, and web content that identifies it as a QHIN. Within twenty (20) business days of termination of this Common Agreement, Signatory shall confirm to RCE, in writing, that it has complied with this Subsection.

(iii) To the extent Signatory stores TI, such TI may not be distinguishable from other information maintained by Signatory. When the TI is not distinguishable from other information, it is not possible for Signatory to return or destroy TI it maintains upon termination or expiration of this Common Agreement. Upon termination or expiration of this Common Agreement, if Signatory is subject to Section 11 of this Common Agreement, such sections shall continue to apply so long as the information would be ePHI if maintained by a Covered Entity or Business Associate. The protections required under the HIPAA Security Rule shall also continue to apply to all TI that is ePHI, regardless of whether Signatory is a Covered Entity or Business Associate.

(iv) In no event shall Signatory be entitled to any refund of any fees that it has paid the RCE prior to termination.

17.4. Suspension.

17.4.1. Suspension by RCE. RCE may suspend Signatory's ability to engage in exchange activities under the Common Agreement if RCE determines, following completion of a preliminary investigation, that Signatory is responsible for a Threat Condition. To the extent that RCE determines that one of Signatory's Participants or Subparticipants has done something or failed to do something that results in a Threat Condition, RCE may suspend, or the RCE may direct that Signatory suspend, that Participant's or Subparticipant's ability to engage in exchange activities under the Common Agreement. RCE will make a reasonable effort to notify Signatory in advance of RCE's intent to suspend Signatory or one of Signatory's Participants or Subparticipants, including notice of the Threat Condition giving rise to such suspension. If advance notice is not reasonably practicable under the circumstances, the RCE will notify Signatory of the

suspension, and the Threat Condition giving rise thereto, as soon as practicable following the suspension. Upon suspension of either Signatory or one of Signatory's Participants or Subparticipants, RCE will work collaboratively with Signatory to resolve the issue leading to the suspension. RCE shall adopt an SOP to address specific requirements and timelines related to suspension.

17.4.2. Selective Suspension by Signatory. Signatory may, in good faith and to the extent permitted by Applicable Law, determine that it must suspend exchanging with another QHIN with which it is otherwise required to exchange in accordance with an SOP because of reasonable and legitimate concerns related to the privacy and security of information that is exchanged. If Signatory makes this determination, it is required to promptly notify the RCE and the QHIN that Signatory is suspending of its decision and the reason(s) for making the decision. If Signatory makes the decision to suspend, it is required, within thirty (30) days, to initiate the Dispute Resolution Process in order to resolve whatever issues led to the decision to suspend, or end its suspension and resume exchanging with the other QHIN. Provided that Signatory selectively suspends exchanging with another QHIN in accordance with this Section and in accordance with Applicable Law, such selective suspension shall not be deemed a violation of Section 6.2.2.

17.4.3. Additional Suspension Rights of RCE. Notwithstanding anything to the contrary set forth herein, the RCE retains the right to suspend any exchange activity under the Common Agreement (i) upon ten (10) days' prior notice if the RCE determines that Signatory has created a situation in which the RCE may suffer material harm and suspension is the only reasonable step that the RCE can take to protect itself; or (ii) immediately if the RCE determines that the safety or security of any person or the privacy or security of TI and/or Confidential Information is threatened. In the case of an immediate suspension under this section, the RCE will provide notice as soon as practicable following the suspension.

17.4.4. Effect of Suspension. The suspension of Signatory's ability to participate in any activity under this Common Agreement pursuant to this section has no effect on Signatory's other obligations hereunder, including, without limitation, obligations with respect to privacy and security. During any suspension pursuant to this section, Signatory's inability to exchange information under this Common Agreement or comply with those terms of this Common Agreement that require information exchange shall not be

deemed a breach of this Common Agreement. In the event of suspension of Signatory's ability to participate in exchange activities under this Common Agreement, Signatory shall communicate to its Participants, and require that they communicate to their Subparticipants, that all QHIN-to-QHIN exchange on behalf of Signatory's Participants and Subparticipants will also be suspended during any period of Signatory's suspension.

17.5. Successor RCE and Transition.

17.5.1. Selection of RCE and Successor RCE(s) and Continuing Obligations. Signatory agrees that ONC had the right to select the initial RCE and that ONC shall have the right to select any successor RCE and/or to act as an interim RCE until such successor RCE has been selected. Signatory further agrees to work cooperatively with the RCE and any interim or successor RCE selected by ONC in accordance with this Common Agreement. Additionally, Signatory shall continue to abide by the provisions of this Common Agreement during the transition to any interim or successor RCE.

17.5.2. RCE Transition Services. In the event that ONC selects a successor RCE, the then-current RCE will be required to continue supporting functions throughout a ninety- (90-) day closeout period. If ONC acts as an interim RCE prior to the appointment of a successor RCE, the references to successor RCE shall apply to ONC as the interim RCE.

18. Fees

18.1. Fees Paid by QHINs to the RCE. Signatory shall pay the fees set forth on Schedule 1 attached hereto (the "QHIN Fees"). RCE shall invoice Signatory for all Fees in accordance with Schedule 1. Unless otherwise set forth in Schedule 1, invoices shall be due and payable by Signatory within sixty (60) days after receipt thereof unless Signatory notifies RCE in writing that it is contesting the accuracy of the invoice and identifies the specific inaccuracies that it asserts. QHIN Fees contested under this Section shall be resolved between Signatory and RCE as stated in the applicable SOP. Other than with regard to invoiced amounts that are contested in good faith, any collection costs, attorneys' fees or other expenses reasonably incurred by RCE in collecting amounts due under this Common Agreement are the responsibility of Signatory. If Signatory fails to pay any undisputed QHIN Fees when due hereunder, RCE has the right to suspend Signatory's ability to participate in any exchange activity under this Common Agreement. Prior to taking any action against Signatory for non-payment, including suspension, RCE shall provide Signatory ten (10) days' prior written notice. If Signatory makes payment within ten (10) days of receiving

written notice, RCE will not suspend Signatory's ability to participate in any exchange activity under this Common Agreement. If Signatory fails to make payment within ten (10) days of receiving notice, then the RCE may implement the suspension or may terminate Signatory's ability to participate in any exchange activity under this Common Agreement.

18.1.1. Changes to QHIN Fees. Schedule 1 may be updated by the RCE from time-to-time in relation to operational costs, availability of ONC funding, and other market factors in order to ensure the sustainability of the activities conducted under the Framework Agreements. In light of the foregoing, changes to Schedule 1 are not subject to the change management process set forth in Section 5. The RCE shall provide Signatory not less than ninety (90) days' advance written notice of any adjustments to the QHIN Fees set forth in Schedule 1.

18.2. Fees Paid by QHINs to Other QHINs. Signatory is prohibited from charging fees to other QHINs for any exchange of information using the Connectivity Services.

19. Contract Administration

19.1. Authority to Execute. Signatory warrants and represents that it has the full power and authority to execute this Common Agreement and that any representative of Signatory who executes this Common Agreement has full power and authority to do so on behalf of Signatory.

19.2. Notices. All notices to be made under this Common Agreement shall be given in writing to Signatory and RCE at the addresses set forth following each Party's signature, and shall be deemed given: (i) upon delivery, if personally delivered; (ii) upon delivery by overnight delivery service such as UPS or FEDEX or another recognized commercial carrier; (iii) upon the date indicated on the return receipt, when sent by the United States Postal Service Certified Mail, return receipt requested; and (iv) if by facsimile telecommunication or other form of electronic transmission, upon receipt when the sending facsimile machine or electronic mail address receives confirmation of receipt by the receiving facsimile machine or electronic mail address.

SIGNATORY: _____

NOTICE TO:

Name/Title: _____

Address: _____

_____

_____

Facsimile: _____

E-mail: _____

THE SEQUOIA PROJECT, INC.

NOTICE TO:

Name/Title: _____

Address: _____

_____

_____

Facsimile: _____

E-mail: _____

19.3. Governing Law, Forum, and Jurisdiction.

19.3.1. Conflicts of Law and Governing Law. In the event of a Dispute between Signatory and the RCE, the applicable federal and state conflicts of law provisions that govern the operations of the Parties shall determine governing law.

19.3.2. Jurisdiction and Venue. The RCE, currently a Virginia non-profit corporation, and Signatory each hereby submits to the exclusive jurisdiction of any state or federal court sitting in the Commonwealth of Virginia within twenty-five (25) miles of Alexandria, Virginia in any legal proceeding arising out of or relating to this Common Agreement unless

otherwise required by Applicable Law. The RCE and Signatory each agrees that all claims and matters arising out of this Common Agreement may be heard and determined in such court, and each Party hereby waives any right to object to such filing on grounds of improper venue, *forum non-conveniens*, or other venue-related grounds.

19.3.3. Participant and Subparticipant Agreements. For the avoidance of doubt, Signatory's Participant-QHIN Agreements, and the Participant's Participant-Subparticipant Agreements, as well as any Downstream Subparticipant Agreements, shall be subject to the governing law, forum, and jurisdiction provisions of those agreements.

19.3.4. Sovereign Immunity. No provision within this Common Agreement in any way constitutes a waiver by the United States Department of Health and Human Services or any other part of the federal government of sovereign immunity or any other applicable immunity from suit or from liability that the United States Department of Health and Human Services or other part of the federal government may have by operation of law.

19.4. Assignment. None of this Common Agreement, including but not limited to any of the rights created by this Common Agreement, can be transferred by either Party, whether by assignment, merger, other operation of law, change of control of the Party or otherwise, without the prior written approval of the other Party. Notwithstanding the foregoing, if ONC selects another organization to serve as the RCE, then RCE shall assign this Common Agreement to the successor RCE or an interim RCE as directed by ONC. Signatory understands and agrees that no interim or successor RCE shall have any obligation or liability for any act or omission of The Sequoia Project in connection with this Common Agreement or any of the other Framework Agreements prior to the termination of The Sequoia Project's status as the RCE.

19.5. Force Majeure. Neither Party shall be responsible for any delays or failures in performance caused by the occurrence of events or other circumstances that are beyond its reasonable control after the exercise of commercially reasonable efforts to either prevent or mitigate the effect of any such occurrence or event.

19.6. Severability. If any provision of this Common Agreement shall be adjudged by any court of competent jurisdiction to be unenforceable or invalid, that provision shall be modified to the minimum extent necessary to achieve the purpose originally intended, if possible, and the remaining provisions of this Common Agreement shall remain in full force and effect and enforceable. If such provision cannot be modified

to achieve the purpose originally intended, it shall be severed from the agreement and the remaining provisions of this Common Agreement shall remain in full force and effect and enforceable.

19.7. Counterparts. This Common Agreement may be executed in one or more counterparts, each of which shall be considered an original counterpart, and shall become a binding agreement when each Party shall have executed one counterpart.

19.8. Captions. Captions appearing in this Common Agreement are for convenience only and shall not be deemed to explain, limit, or amplify the provisions of this Common Agreement.

19.9. Independent Parties. Nothing contained in this Common Agreement shall be deemed or construed as creating a joint venture or partnership between Signatory and RCE.

19.10. Acts of Contractors and Agents. To the extent that the acts or omissions of a Party's agent(s) or contractor(s), or their subcontractor(s), result in that Party's breach of and liability under this Common Agreement, said breach shall be deemed to be a breach by that Party.

19.11. Entire Agreement; Waiver. This Common Agreement, together with the QTF, SOPs, and all other attachments, exhibits, and artifacts incorporated by reference, contains the entire understanding of the Parties with regard to the subject matter contained herein. The failure of either Party to enforce, at any time, any provision of this Common Agreement shall not be construed to be a waiver of such provision, nor shall it in any way affect the validity of this Common Agreement or any part hereof or the right of such Party thereafter to enforce each and every such provision. No waiver of any breach of this Common Agreement shall be held to constitute a waiver of any other or subsequent breach, nor shall any delay by either Party to exercise any right under this Common Agreement operate as a waiver of any such right.

19.12. Effect of Agreement. Except as provided in Sections 7.4 and Section 15, nothing in this Common Agreement shall be construed to restrict either Party's right to pursue all remedies available under law for damages or other relief arising from acts or omissions of RCE or other QHINs or their Participants or Subparticipants related to the Common Agreement, or to limit any rights, immunities, or defenses to which Signatory may be entitled under Applicable Law.

19.13. Priority. In the event of any conflict or inconsistency between Applicable Law, a provision of this Common Agreement, the QTF, an SOP, and/or any implementation

plans, guidance documents, or other materials or documentation the RCE makes available to QHINs, Participants, and/or Subparticipants regarding the operations or activities conducted under the Framework Agreements, the following shall be the order of precedence for this Common Agreement to the extent of such conflict or inconsistency: (1) Applicable Law; (2) this document, including Required Flow-Downs that are to be incorporated into Framework Agreements; (3) the QTF; (4) the Dispute Resolution Process, as set forth herein and further detailed in an SOP; (5) all other SOPs; (6) all other attachments, exhibits, and artifacts incorporated herein by reference, and (7) other RCE plans, documents, or materials made available regarding activities conducted under the Framework Agreements.

19.14. QHIN Time Periods. Any of the time periods relating to the Parties hereto that are specified in this Common Agreement may be changed on a case-by-case basis pursuant to the mutual written consent of the Parties, provided that these changes are not undertaken to adversely affect another QHIN and provided that these changes would not unfairly benefit either Party to the detriment of others participating in activities under the Framework Agreements. Time periods that pertain to ONC may **not** be changed, except by ONC, including the time periods for ONC review of proposed changes to the Common Agreement, the QTF, or SOPs that are set forth in Section 5.

19.15. Remedies Cumulative. The rights and remedies of the Parties provided in this Common Agreement are cumulative and are in addition to any other rights and remedies provided by Applicable Law.

19.16. Survival of Rights and Obligations. The respective rights, obligations, and liabilities of the Parties with respect to acts or omissions that occur by either Party prior to the date of expiration or termination of this Common Agreement shall survive such expiration or termination. Following any expiration or termination of this Common Agreement, the Parties shall thereafter cooperate fully and work diligently in good faith to achieve an orderly resolution of all matters resulting from such expiration or termination.

19.16.1. The following sections shall survive expiration or termination of this Common Agreement as more specifically provided below:

(i) The following sections shall survive in perpetuity following the expiration or termination of this Common Agreement: Sections 7.4 Limitation of Liability; 18.2 Notices; 18.3 Governing Law, Forum and Jurisdiction; 18.6 Severability; 18.9 Independent Parties; 18.10 Acts of

Contractors and Agents; 18.11 Entire Agreement; Waiver; 18.12 Effect of Agreement; 18.13 Priority; and 18.15 Remedies Cumulative.

(ii) The following sections shall survive for a period of six (6) years following the expiration or termination of this Common Agreement: Sections 7.1 Confidential Information; 7.2.1 Statement of General Principle; 12.3 TEFCA Security Incident Notification; and 14.1 Transparency - Access to Participant-QHIN Information.

(iii) The following section shall survive for the period specifically stated in such section following the expiration or termination of this Common Agreement: Section 16.3.5 Effect of Termination of Common Agreement.

(iv) To the extent that Signatory is an IAS Provider, the provisions set forth in Section 10.6 shall survive following the termination or expiration of this Common Agreement for the respective periods set forth therein.

IN WITNESS WHEREOF, the Parties hereto, intending legally to be bound hereby, have executed and delivered this Common Agreement as of the date first above written.

RCE: THE SEQUOIA PROJECT, INC.	**Signatory:** _____
_____	_____
Signature	Signature
By: _____	By: _____
Title: _____	Title: _____
Date: _____	Date: _____

Dated: October 24, 2023.

Suhas Tripathi,

National Coordinator for Health Information Technology, Office of the National Coordinator for Health Information Technology.

[FR Doc. 2023–24536 Filed 11–3–23; 8:45 am]

BILLING CODE 4150–45–C

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Notice of Interest Rate on Overdue Debts

Section 30.18 of the Department of Health and Human Services' claims collection regulations (45 CFR part 30) provides that the Secretary shall charge an annual rate of interest, which is determined and fixed by the Secretary of the Treasury after considering private consumer rates of interest on the date that the Department of Health and Human Services becomes entitled to recovery. The rate cannot be lower than the Department of Treasury's current value of funds rate or the applicable rate determined from the ''Schedule of Certified Interest Rates with Range of Maturities'' unless the Secretary waives interest in whole or part, or a different rate is prescribed by statute, contract, or repayment agreement. The Secretary of the Treasury may revise this rate quarterly. The Department of Health and Human Services publishes this rate in the **Federal Register**.

The current rate of 12 1/8%, as fixed by the Secretary of the Treasury, is certified for the quarter ended September 30, 2023. This rate is based on the Interest Rates for Specific Legislation, ''National Health Services Corps Scholarship Program (42 U.S.C. 254o(b)(1)(A))'' and ''National Research Service Award Program (42 U.S.C. 288(c)(4)(B)).'' This interest rate will be applied to overdue debt until the Department of Health and Human Services publishes a revision.

David C. Horn,

Director, Office of Financial Policy and Reporting.

[FR Doc. 2023–24568 Filed 11–6–23; 8:45 am]

BILLING CODE 4150–04–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the Center for Scientific Review Special Emphasis Panel RFA–OD–23–013 and RFA–OD–23–014—Understanding Chronic Conditions Understudied Among Women Special Emphasis Panel (SEP), November 20, 2023, 10:00 a.m. to November 21, 2023, 06:30 p.m., National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD, 20892 which was published in the **Federal Register** on October 27, 2023, 88 FR 73865 Doc 2023–23748

This meeting is being amended to change the Panel name to Center for Scientific Review Special Emphasis Panel RFA–OD–23–013 and RFA–OD–23–014—Understanding Chronic Conditions Understudied Among Women. The meeting is closed to the public.

Dated: November 2, 2023.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–24579 Filed 11–6–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Government-Owned Inventions; Availability for Licensing

AGENCY: National Institutes of Health, HHS.

ACTION: Notice.

SUMMARY: The invention listed below is owned by an agency of the U.S. Government and is available for licensing to achieve expeditious commercialization of results of federally-funded research and development. Foreign patent applications are filed on selected inventions to extend market coverage for companies and may also be available for licensing.

FOR FURTHER INFORMATION CONTACT: Amy F. Petrik, Ph.D. at 240–627–3721 or *amy.petrik@nih.gov.* Licensing information may be obtained by communicating with the indicated licensing contact at the Technology Transfer and Intellectual Property Office, National Institute of Allergy and Infectious Diseases, 5601 Fishers Lane, Rockville, MD, 20852; tel. 301–496–2644. A signed Confidential Disclosure Agreement will be required to receive copies of unpublished information related to the invention.

SUPPLEMENTARY INFORMATION: Technology description follows:

Base-Covered HIV–1 Envelope Ectodomains and Their Use

Description of Technology: Researchers at the Vaccine Research Center (''VRC'') of the National Institute of Allergy and Infectious Diseases (''NAID'') continue to pursue a safe and effective HIV–1 vaccine to combat the HIV–1/AIDS pandemic.

To this end, researchers have engineered the soluble HIV–1 ectodomain trimer so that it is stabilized in its prefusion conformation by artificial disulfides, helix-disrupting prolines, and other structure-based alterations. However, mice and non-human primates immunized with these engineered soluble HIV–1 trimers produced a significant (>90% in some cases) immune response to the exposed trimer base.

VRC researchers further modified the engineered prefusion soluble HIV–1 trimers by adding N-linked glycans to specific sites on the protein's base to block this immunodominant surface. They found that these N-linked glycans did reduce production of non-neutralizing antibodies directed to the trimer base. These soluble, glycan-masked prefusion HIV–1 trimers are envisioned as being a part of a heterologous prime-boost vaccine regimen.

This technology is available for licensing for commercial development in accordance with 35 U.S.C. 209 and 37 CFR part 404, as well as further development and evaluation under a research collaboration.

Potential Commercial Applications:

- Vaccine for prevention of HIV–1 infection
- Therapeutic vaccine for treatment of HIV–1 infection

Competitive Advantages:

- Currently, no licensed HIV vaccine exists

Development Stage:

- Animal studies

Inventors: Peter Kwong, John Mascola, Tongqing Zhou, Adam Olia, Reda Rawi, Yongping Yang, Cheng Cheng (all of NIAID).

Publications: Olia, et al. (2023) Soluble prefusion-closed HIV-envelope trimers with glycan-covered bases. iScience *26,* 107403, August 18, 2023. DOI: *https://doi.org/10.1016/j.sci.2023.107403.*

Intellectual Property: HHS Reference Number E–079–2022 includes PCT Patent Application No. PCT/US2023/065009 filed on March 27, 2023.

Licensing Contact: To license this technology, please contact Amy F. Petrik, Ph.D., 240–627–3721; *amy.petrik@nih.gov,* and reference E–079–2022.

Surekha Vathyam,

Deputy Director, Technology Transfer and Intellectual Property Office, National Institute of Allergy and Infectious Diseases.

[FR Doc. 2023–24551 Filed 11–6–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Notice of Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of a meeting of the National Cancer Advisory Board.

The meeting will be held as a virtual meeting and is open to the public as indicated below. Individuals who plan to view the virtual meeting and need special assistance or other reasonable accommodations to view the meeting should notify the Contact Person listed below in advance of the meeting. The meeting can be accessed from the NIH Videocast at the following link: *http://videocast.nih.gov/.*

A portion of the National Cancer Advisory Board meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Cancer Advisory Board.

Date: February 8, 2024.

Open: 11:00 a.m. to 1:05 p.m.

Agenda: NCAB Subcommittee Meetings.

Open: 1:15 p.m. to 3:30 p.m.

Agenda: Director's and Program reports and presentations; business of the Board.

Closed: 3:30 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute Shady Grove, 9609 Medical Center Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Paulette S. Gray, Ph.D., Director, Division of Extramural Activities, National Cancer Institute—Shady Grove, National Institutes of Health, 9609 Medical Center Drive, 7th Floor, Room 7W444, Bethesda, MD 20892, 240–276–6340, *grayp@mail.nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

Information is also available on the Institute's/Center's home page: NCAB: *https://deainfo.nci.nih.gov/advisory/ncab/ncabmeetings.htm,* where an agenda, instructions for accessing the virtual NCAB meetings, and any additional information for the meetings will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: November 2, 2023.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–24578 Filed 11–6–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Notice of Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of a meeting of the Frederick National Laboratory Advisory Committee to the National Cancer Institute.

The meeting will be held virtually and is open to the public. Individuals who plan to view the virtual meeting and need special assistance or other reasonable accommodations to view the meeting, should notify the Contact Person listed below in advance of the meeting. The meeting will be videocast and can be accessed from the NIH Videocasting and Podcasting website (*http://videocast.nih.gov*).

Name of Committee: Frederick National Laboratory Advisory Committee to the National Cancer Institute.

Date: February 29, 2024.

Time: 1:00 p.m. to 4:00 p.m.

Agenda: Ongoing and new activities at the Frederick National Laboratory for Cancer Research.

Place: National Cancer Institute Shady Grove, 9609 Medical Center Drive, Rockville, MD 20850 (Virtual Meeting).

Contact Person: Christopher D. Kane, Ph.D., Health Science Administrator and Program Officer, Office of Scientific Operations, NCI at Frederick, National Cancer Institute, National Institutes of Health, 1050 Boyles Street, Building 427, Room 4, Frederick, Maryland 21702, *christopher.kane@nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

Information is also available on the Institute's/Center's home page: FNLAC: *https://deainfo.nci.nih.gov/advisory/fac/fac.htm,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: November 2, 2023.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–24584 Filed 11–6–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Government-Owned Inventions; Availability for Licensing

AGENCY: National Institutes of Health, HHS.

ACTION: Notice.

SUMMARY: The invention listed below is owned by an agency of the U.S. Government and is available for licensing to achieve expeditious commercialization of results of federally-funded research and development. Foreign patent applications are filed on selected inventions to extend market coverage for companies and may also be available for licensing.

FOR FURTHER INFORMATION CONTACT: Peter Tung at 240–669–5483 or *peter.tung@nih.gov.* Licensing information and copies of the patent applications listed below may be obtained by communicating with the Technology Transfer and Intellectual Property Office, National Institute of Allergy and Infectious Diseases, 5601 Fishers Lane, Rockville, MD, 20852; tel. 301–496–2644. A signed Confidential Disclosure Agreement will be required to receive copies of unpublished patent applications related to the invention.

SUPPLEMENTARY INFORMATION: Technology description follows.

Beta Globin Mimetic Peptides and Their Use

Description of Technology: Feedback vasodilation by endothelium-derived nitric oxide (NO) is under the regulation of globins. Inventors discovered that not only the alpha globin but also the beta globin subunits of hemoglobin are expressed in the human artery wall, with beta globin interacting directly with endothelium-derived nitric oxide synthase (eNOS). This discovery of tetrameric hemoglobin binding to eNOS has led inventors to develop novel mimetic peptides that disrupt the binding of beta globin to eNOS, diminishing the ability of hemoglobin to restrict NO release and thereby enhancing NO-mediated feedback vasodilation. These agents can be used to increase NO signaling from endothelial cells and thus inhibit, prevent, or reverse vasoconstriction.

This technology is available for licensing for commercial development in accordance with 35 U.S.C. 209 and 37 CFR part 404, as well as for further development and evaluation under a research collaboration.

Potential Commercial Applications:

- Novel peptides to treat vascular diseases characterized by vasoconstriction, excess alpha adrenergic signaling, or insufficient nitric oxide signaling. Applications could range from cerebral vasospasm to pulmonary hypertension, to chronic kidney disease, to transfusion medicine, to erectile dysfunction, and to exercise physiology.

Competitive Advantages:

- New pathway for regulation of vasoconstriction/vasodilation that is separate from the pathways that current products available for treating nitric oxide deficiency target. Combination therapy with current vasoconstriction/vasodilation medications of different mechanisms may be possible.
- Enhancement of NO release at the junction between the endothelial cell and smooth muscle cell may provide greater potency and fewer off-target effects than other forms of NO delivery.

Development Stage:

- Peptides have been tested in human and canine arteries ex vivo.

Inventors: Drs. Hans Ackerman (NIAID), Steven Brooks (NIAID), Phillip Cruz (NIAID), Rolf Swenson (NHLBI).

Publications: Brooks, SD et al. ''Hemoglobin Interacts with Endothelial Nitric Oxide Synthase to Regulate Vasodilation in Human Resistance Arteries'' *https://doi.org/10.1101/2021.04.06.21255004* (This article is a preprint and has not been certified by peer review).

Intellectual Property: HHS Reference No. E–060–2022–0–US–01; U.S. Provisional Application No. 63/328,615, filed on April 7, 2022; HHS Reference No. E–060–2022–0–PCT–02; PCT Application No. PCT/US2023/065432, filed on April 6, 2023.

Licensing Contact: To license this technology, please contact Peter Tung at 240–669–5483 or *peter.tung@nih.gov,* and reference E–060–2022.

Collaborative Research Opportunity: The National Institute of Allergy and Infectious Diseases is seeking statements of capability or interest from parties interested in collaborative research to further develop, evaluate, or commercialize the invention. For collaboration opportunities, please contact Peter Tung at 240–669–5483, or *peter.tung@nih.gov.*

Dated: November 1, 2023.

Surekha Vathyam,

Deputy Director, Technology Transfer and Intellectual Property Office, National Institute of Allergy and Infectious Diseases.

[FR Doc. 2023–24550 Filed 11–6–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–7070–N–80]

30-Day Notice of Proposed Information Collection: Youth Homeless Systems Improvement (YHSI) Program; OMB Control No.: 2506–0219

AGENCY: Office of Policy Development and Research, Chief Data Officer, HUD.

ACTION: Notice.

SUMMARY: HUD is seeking approval from the Office of Management and Budget (OMB) for the information collection described below. In accordance with the Paperwork Reduction Act, HUD is requesting comment from all interested parties on the proposed collection of information. The purpose of this notice is to allow for an additional 30 days of public comment.

DATES: *Comments Due Date:* December 7, 2023.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. 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. Interested persons are also invited to submit comments regarding this proposal and comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Colette Pollard, Clearance Officer, REE, Department of Housing and Urban Development, 451 7th Street SW, Room 8210, Washington, DC 20410–5000; email *PaperworkReductionActOffice@hud.gov.*

FOR FURTHER INFORMATION CONTACT: Colette Pollard, Reports Management Officer, REE, Department of Housing and Urban Development, 451 7th Street SW, Washington, DC 20410; email *Colette.Pollard@hud.gov;* telephone number (202) 402–3400. This is not a toll-free number. HUD welcomes and is prepared to receive calls from individuals who are deaf or hard of hearing, as well as individuals with speech or communication disabilities. To learn more about how to make an accessible telephone call, please visit *https://www.fcc.gov/consumers/guides/telecommunications-relay-service-trs.*

Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD is seeking approval from OMB for the information collection described in Section A.

The **Federal Register** notice that solicited public comment on the information collection for a period of 60 days was published on March 20, 2023 at 88 FR 16648.

Overview of Information Collection

Title of Information Collection: Youth Homeless Systems Improvement (YHSI).

OMB Approval Number: 2506–0219.

Type of Request: Revision.

Form Number: HUD 2880, SF–LLL, SF–424, SF–424B, HUD–424–CBW

Description of the need for the information and proposed use: Congress appropriated funds to the Department of Housing and Urban Development in FY2022 and in FY2023 to competitively award funds to selected communities to develop projects that implement systems infrastructure to better address youth homelessness. The YHSI projects will focus on systems change to create and build capacity for Youth Action Boards; collect and use data from different systems to improve the youth homeless response system; develop strong leaders within a community; and improve the coordination, communication, operation, and administration of homeless assistance projects, including prevention and diversion strategies. This information collection revision is to competitively award YHSI funds to communities and monitor the progress of the funded project. This revision is to include two additional forms in the approved PRA for this program—the HUD–2880, Applicant/Recipient Disclosure/Update Report, and the 424–CBW Grant Application Detailed Budget Worksheet.

Respondents: Not-for-profit institutions; State, Local or Tribal Governments.

Estimated Number of Respondents: 150.

Estimated Number of Responses: 190.

Frequency of Response: Biannual.

Average Hours per Response: 27.

Total Estimated Burdens: 2,670.

Submission documents / Information Collection	Number of respondents	Responses frequency (average)	Total annual responses	Burden hours per response	Total hours	Hourly rate	Burden cost per instrument
Component 1. Project Selection:							
YHSI Project Selection Narratives	100	1	100	22	2,200	$53.67	$118,074.00
SF–424—Application for Federal Assistance	100	1	100	0	0	53.67	0.00
SF–424B Assurances for Non-Construction Programs	100	1	100	0	0	53.67	0.00
HUD–2880, Applicant/Recipient Disclosure/Update Report	100	1	100	0	0	53.67	0.00
HUD–424–CBW, Grant Application Detailed Budget Worksheet	100	1	100	0	0	53.67	0.00
OMB–SF–LLL—Disclosure of Lobbying Activities (where applicable)	100	1	100	0	0	53.67	0.00

Submission documents / Information Collection	Number of respondents	Responses frequency (average)	Total annual responses	Burden hours per response	Total hours	Hourly rate	Burden cost per instrument
Nonprofit Certification	50	1	50	0	0	53.67	0.00
Organizations Code of Conduct	100	1	100	0	0	53.67	0.00
Youth Action Board Letter of Support	100	1	100	1	100	53.67	5,367.00
Letter of Support-partner agency	100	1	100	1	100	53.67	5,367.00
Subtotal	100		100	24	2,400		128,808.00
Component 2. Milestone Reporting:							
Narrative update on project progress	40	2	80	2	160	53.67	8,587.20
Updated milestone chart	10	1	10	1	10	53.67	536.70
Subtotal	50		90	3	270		9,123.90
Total Application Collection	150		190	27	2,670		137,931.90

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) The accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

(5) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

HUD encourages interested parties to submit comment in response to these questions.

C. Authority

Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. chapter 35.

Colette Pollard,

Department Reports Management Officer, Office of Policy Development and Research, Chief Data Officer.

[FR Doc. 2023–24576 Filed 11–6–23; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–7070–N–84]

30-Day Notice of Proposed Information Collection: Eviction Counseling Survey; OMB Control No.: 2502–0625

AGENCY: Office of Policy Development and Research, Chief Data Officer, HUD.

ACTION: Notice.

SUMMARY: HUD is seeking approval from the Office of Management and Budget (OMB) for the information collection described below. In accordance with the Paperwork Reduction Act, HUD is requesting comment from all interested parties on the proposed collection of information. The purpose of this notice is to allow for an additional 30 days of public comment.

DATES: *Comments Due Date:* December 7, 2023.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. 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. Interested persons are also invited to submit comments regarding this proposal and comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Colette Pollard, Clearance Officer, REE, Department of Housing and Urban Development, 451 7th Street SW, Room 8210, Washington, DC 20410; email *PaperworkReductionActOffice@hud.gov.*

FOR FURTHER INFORMATION CONTACT: Colette Pollard, Reports Management Officer, REE, Department of Housing and Urban Development, 451 7th Street SW, Washington, DC 20410; email *Colette.Pollard@hud.gov;* telephone number (202) 402–3400. This is not a toll-free number. HUD welcomes and is prepared to receive calls from individuals who are deaf or hard of hearing, as well as individuals with speech or communication disabilities. To learn more about how to make an accessible telephone call, please visit: *https://www.fcc.gov/consumers/guides/telecommunications-relay-service-trs.*

Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD is seeking approval from OMB for the information collection described in Section A.

The **Federal Register** notice that solicited public comment on the information collection for a period of 60 days was published on August 30, 2023 at 88 FR 59936.

A. Overview of Information Collection

Title of Information Collection: Eviction Counseling Survey.

OMB Approval Number: 2502–0625.

OMB Expiration Date: November 30, 2023.

Type of Request: Extension of a currently approved collection.

Form Number: None.

Description of the need for the information and proposed use: The purpose of the survey is to collect information from HUD Participating Housing Counseling agencies that will be used to identify and develop innovative programming and best practices for the Department's Housing Counselling Program under Section 106 of the Housing and Community Development Act of 1974. The survey will gather critical data about how HUD-approved counseling agencies are providing services to households at risk of or facing eviction. HUD proposes to use the information to improve support to housing counseling agencies in providing effective and innovative

counseling services for households facing or at risk of eviction.

Respondents: Not-for-Profit Institutions.

Estimated Number of Respondents: 1,500.

Estimated Number of Responses: 1,500.

Frequency of Response: Once.

Average Hours per Response: 0.50 hours.

Total Estimated Burden Hours: 750 hours.

ESTIMATED ANNUALIZED BURDEN HOURS AND COSTS

Information collection/affected public	Form name/form number, collection tool	Number of respondents	Frequency of response	Responses per year	Average burden hours per response	Annual burden hours	Hourly cost per response (hourly wage rate)	Total annual respondent cost
Not for Profit Institutions.	Eviction Counseling Survey.	1,500	1	1,500	.50	750	$53.74	$40,305.00
Totals		1,500		1,500		750		40,305.00

Note: The ''Avg. Hourly Wage Rate'' for each respondent includes a 1.46 multiplier to reflect a fully-loaded wage rate.

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) The accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

(5) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

HUD encourages interested parties to submit comments in response to these questions.

C. Authority

Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. chapter 35.

Colette Pollard,

Department Reports Management Officer, Office of Policy Development and Research, Chief Data Officer.

[FR Doc. 2023–24601 Filed 11–6–23; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–7077–N–24]

Privacy Act of 1974; System of Records

AGENCY: Office of Chief Human Capital Officer, Office of Administration HUD.

ACTION: Notice of a new system of records.

SUMMARY: Pursuant to the provisions of the Privacy Act of 1974, as amended, the Department of the Housing and Urban Development (HUD), Office of the Chief Human Capital Officer (OCHCO) is issuing a public notice of its intent to establish a Privacy Act System of Records titled, Performance Review Board Tool (PRBT). The purpose of PRBT is to implement and improve HUD's system of collecting and maintaining records for employee's performance plans reviewed by the Performance Review Board(s), *i.e.,* rating recommendations and rating change comments and feedback in accordance with regulations and the agencies Senior Executive Service (SES) and Senior Level (SL) Performance Program Policy.

DATES: Comments will be accepted on or before December 7, 2023. This proposed action will be effective on the date following the end of the comment period unless comments are received which result in a contrary determination.

ADDRESSES: You may submit comments, identified by docket number or by one of the following methods:

Federal e-Rulemaking Portal: http://www.regulations.gov. Follow the instructions provided on that site to submit comments electronically.

Fax: 202–619–8365.

Email: www.privacy@hud.gov.

Mail: Attention: Privacy Office; LaDonne White, Chief Privacy Officer; Office of the Executive Secretariat; 451 Seventh Street SW, Room 10139; Washington, DC 20410–0001.

Instructions: All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change to *http://www.regulations.gov.* including any personal information provided.

Docket: For access to the docket to read background documents or comments received go to *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: LaDonne White; 451 Seventh Street SW, Room 10139, Washington, DC 20410–0001; telephone number (202) 708–3054 (this is not a toll-free number). HUD welcomes and is prepared to receive calls from individuals who are deaf or hard of hearing, as well as individuals with speech or communication disabilities. To learn more about how to make an accessible telephone call, please visit *https://www.fcc.gov/consumers/guides/telecommunications-relay-service-trs.*

SUPPLEMENTARY INFORMATION: The Performance Review Board Tool (PRBT) is used by HUD to effectively manage the executive performance program, ensure we are compliant with regulatory requirements, and to improve confidentiality. The Tool will improve the program and organizational requirement, provide the mechanism for compiling current and historical analytical data, and let the agency to efficiently conduct and manage the Performance Review Board's reviews and data, under the agency's Executive Performance Policies. The Tool will also allow for bi-annual mid-year performance reviews.

SYSTEM NAME AND NUMBER:

Performance Review Board Tool, HUD/OCHCO–05.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

Records are maintained at the following locations: U.S. Department of Housing and Urban Development Headquarters at 451 7th Street SW, Washington, DC 20410–0001.

SYSTEM MANAGER(S):

Bessie L. Williams, Office of Executive Resource, Office of the Chief Human Capital Officer (OCHCO), Office of 451 Seventh Street SW, Room 2184, Washington, DC 20410–0001. Phone: (202) 402–3036.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Title 5, Code of Federal Regulations, 430.313)—Training and valuation.

PURPOSES OF THE SYSTEM:

This system lets the Office of Executive Resources efficiently manage the Performance Review Board(s) (PRB) process. Another purpose for this system is to provide a mechanism for the recording and storing of annual performance plans, reviews, rating recommendations, and feedback in accordance with HUD Senior Executive Service (SES) and Senior Level (SL) Performance Program Policy.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

HUD Employees.

CATEGORIES OF RECORDS IN THE SYSTEM:

Employment Status, Name, Program Office, and Appointment Type.

RECORD SOURCE CATEGORIES:

Enterprise Talent Management System (InCompass).

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

1. To a congressional office from the record of an individual, in response to an inquiry at the request of that individual.

2. To contractors, grantees, experts, consultants, Federal agencies, and non-Federal entities, including, but not limited to, State and local governments and other parties, and entities and their agents with whom HUD has an agreement, service agreement, or grant for the purposes of historical analysis such as: other pertinent and relative information, in support of program operations, management, performance monitoring, evaluation, and policy development, or to otherwise support the Department's mission.

3. To contractors, grantees, experts, consultants and their agents, or others performing or working under a contract, service agreement, grant, cooperative agreement, or other agreement with HUD or under contract to another agency when necessary to accomplish an agency function related to a system of records. Disclosure requirements are limited to only those data elements considered relevant to accomplishing an agency function.

4. To appropriate agencies, entities, and persons when (1) HUD suspects or has confirmed that there has been a breach of the system of records,· (2) HUD has determined that as a result of the suspected or confirmed breach there is a risk of harm to individuals, [the agency] (including its information systems, programs, and operations), the Federal Government, or national security; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with HUD's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm.

5. To another Federal agency or Federal entity, when [the agency] determines that information from this system of records is reasonably necessary to assist the recipient agency or entity in (1) responding to a suspected or confirmed breach or (2) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, programs, and operations), the Federal Government, or national security, resulting from a suspected or confirmed breach.

6. To appropriate Federal, State, local, tribal, or other governmental agencies or multilateral governmental organizations responsible for investigating or prosecuting the violations of, or for enforcing or implementing, a statute, rule, regulation, order, or license, where HUD determines that the information would assist in the enforcement of civil or criminal laws and when such records, either alone or in conjunction with other information, indicate a violation or potential violation of law. Records may only be disclosed upon a showing by the requester that the information is pertinent to the investigation.

7. To any component of the Department of Justice or other Federal agency conducting litigation or in proceedings before any court, adjudicative, or administrative body, and to another party before such court, adjudicative, or administrative body; when HUD determines that the use of such records is relevant and necessary to the litigation and when any of the following is a party to the litigation or have an interest in such litigation: (1) HUD, or any component thereof; or (2) any HUD employee in his or her official capacity; or (3) any HUD employee in his or her individual capacity where the Department of Justice or agency conducting the litigation has agreed to represent the employee; or (4) the United States, or any agency thereof, where HUD determines that litigation is likely to affect HUD or any of its components.

8. To officials of labor organizations recognized under 5 U.S.C. chapter 71 when relevant and necessary to their duties of exclusive representation concerning personnel policies, practices, and matters affecting conditions of employment.

9. To the Office of Personnel Management (OPM), the Merit Systems Protection Board (and its office of the Special Counsel), the Federal Labor Relations Authority (and its General Counsel), or the Equal Employment Opportunity Commission when requested in performance of their authorized duties of exclusive representation concerning personnel policies, practices, and matters affecting work conditions.

10. To the National Archives and Records Administration, Office of Government Information Services (OGIS), to the extent necessary to fulfill its responsibilities in 5 U.S.C. 552(h), to review administrative agency policies, procedures and compliance with the Freedom of Information Act (FOIA), and to facilitate OGIS' offering of mediation services to resolve disputes between persons making FOIA requests and administrative agencies.

11. To a court, magistrate, administrative tribunal, or arbitrator in the course of presenting evidence, including disclosures to opposing counsel or witnesses in the course of civil discovery, litigation, mediation, or settlement negotiations, or in connection with criminal law proceedings; when HUD determines that use of such records is relevant and necessary to the litigation and when any of the following is a party to the litigation or have an interest in such litigation: (1) HUD, or any component thereof; or (2) any HUD employee in his or her official capacity; or (3) any HUD employee in his or her individual capacity where HUD has agreed to represent the employee; or (4) the United States, or any agency thereof, where HUD determines that litigation is likely to affect HUD or any of its components.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Electronic records.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Full Name.

POLICIES AND PRACTICIES FOR RETENTION AND DISPOSAL OF RECORDS:

General Records Schedule (GRS) 2.2 Employee Management Records, and GRS 070 & 071, Acceptable & Unacceptable records, Disposition authority Numbers: DAA–GRS2017–0007–0008 & DAA–GRS 2017–007–009. GRS 070—Temporary, destroy no sooner than 4 years after date of appraisal, but longer retention is authorized if required for business use. GRS 071 —Temporary, destroy after employee completes 1 year of acceptable performance from the date of written advance notice of proposed removal or reduction-in-grade notice. This disposition instruction is mandatory; deviations are not allowed.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

For Electronic Records: Records are maintained and stored on the SharePoint environment, which runs on HUD's network. These records can only be accessed based off the user's rights and privileges to the system. Records are on an encrypted database system. This environment complies with the security and privacy controls and procedures as described in the Federal Information Security Management Act (FISMA), National Institute of Standards and Technology (NIST) Special Publications, and Federal; Information Processing Standards (FIPS). A valid HSPD–12 ID Credential, access to HUD's Local Area Network (LAN), a valid User ID and Password and a Personalized Identification Number (PIN) is required to access the records. These records are restricted to only those people with a role in the PRB Process having a need to access them in the performance of their official duties.

For Electronic Records (cloud based): Records are secured and maintained on a cloud-based software server and operating system that resides in Federal Risk and Authorization Management Program (FedRAMP) and FISMA Moderate dedicated hosting environment. All data located in the cloud-based server is firewalled and encrypted at rest and in transit. The security mechanisms for handing data at rest and in transit are in accordance with HUD encryption standards.

RECORD ACCESS PROCEDURES:

Individuals requesting records of themselves should address written inquiries to the Department of Housing Urban and Development 451 7th Street SW, Washington, DC 20410–0001. For verification, individuals should provide their full name, current address, and telephone number. In addition, the requester must provide either a notarized statement or an unsworn declaration made under 24 CFR 16.4.

CONTESTING RECORD PROCEDURES:

The HUD rule for contesting the content of any record pertaining to the individual by the individual concerned is published in 24 CFR 16.8 or may be obtained from the system manager.

NOTIFICATION PROCEDURES:

Individuals requesting notification of records of themselves should address written inquiries to the Department of Housing Urban Development, 451 7th Street SW, Washington, DC 20410–0001. For verification purposes, individuals should provide their full name, office or organization where assigned, if applicable, and current address and telephone number. In addition, the requester must provide either a notarized statement or an unsworn declaration made under 24 CFR 16.4.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

N/A

HISTORY:

N/A.

LaDonne White,

Chief Privacy Officer, Office of Administration.

[FR Doc. 2023–24511 Filed 11–6–23; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–7070–N–81]

30-Day Notice of Proposed Information Collection: Youth Homelessness Demonstration Application; OMB Control No.: 2506–0210

AGENCY: Office of Policy Development and Research, Chief Data Officer, HUD.

ACTION: Notice of proposed information collection.

SUMMARY: HUD is seeking approval from the Office of Management and Budget (OMB) for the information collection described below. In accordance with the Paperwork Reduction Act, HUD is requesting comment from all interested parties on the proposed collection of information. The purpose of this notice is to allow for an additional 30 days of public comment.

DATES: *Comments Due Date:* December 7, 2023.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. 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. Interested persons are also invited to submit comments regarding this proposal and comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Colette Pollard, Clearance Officer, REE, Department of Housing and Urban Development, 451 7th Street SW, Room 8210, Washington, DC 20410; email *PaperworkReductionActOffice@hud.gov.*

FOR FURTHER INFORMATION CONTACT: Colette Pollard, Reports Management Officer, REE, Department of Housing and Urban Development, 451 7th Street SW, Washington, DC 20410; email *Colette.Pollard@hud.gov;* telephone number (202) 402–3400. This is not a toll-free number. HUD welcomes and is prepared to receive calls from individuals who are deaf or hard of hearing, as well as individuals with speech or communication disabilities. To learn more about how to make an accessible telephone call, please visit: *https://www.fcc.gov/consumers/guides/telecommunications-relay-service-trs.*

Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD is seeking approval from OMB for the information collection described in Section A.

The **Federal Register** notice that solicited public comment on the information collection for a period of 60 days was published on April 10, 2023 at 88 FR 21204.

A. Overview of Information Collection

Title of Information Collection: Youth Homelessness Demonstration Program.

OMB Approval Number: 2506–0210.

Type of Request: Revision of a currently approved collection.

Form Number: Youth Homelessness Demonstration Application (all parts), SF 424, SF 424–B, HUD–2993, HUD–2880, SF–LLL.

Description of the need for the information and proposed use: The information to be collected will be used to rate applications, to determine eligibility for the Youth Homelessness

Demonstration Program and establish grant amounts. Continuum of Care Collaborative Applicants will respond to narrative prompts to demonstrate their experience and expertise in providing housing and services to youth experiencing homelessness and to describe their intended program design, that will address the needs for housing and services that will result in housing placement and sufficient income to ensure housing is maintained once assistance discontinues.

Respondents: Continuum of Care collaborative applicants, which can be States, local governments, private nonprofit organizations, public housing authorities, and community mental health associations that are public nonprofit organizations.

Estimated Number of Respondents: 150 applicants, 125 organizations submitting project applications, 25 applicants submitting coordinated community plans.

Estimated Number of Responses: 150 community selection applications, 125 project applications, 25 coordinated community plans.

Frequency of Response: 1 community selection application per applicant, 5 project applications per community, 1 coordinated community plan per community.

Average Hours per Response: Each activity also has a unique associated number of hours of response, ranging from 15 minutes to 240 hours.

Total Estimated Burdens: The total number of hours needed for all reporting is 11,083.79 hours.

Submission documents, information collection	Number of respondents	Responses frequency (average)	Total annual responses	Burden hours per response	Total hours	Hourly rate	Burden cost per instrument
Component 1. Community Selection							
YHDP Community Selection Narratives	150	1	150	24	3,600.00	53.67	$193,212.00
SF–424—Application for Federal Assistance	150	1	150	0.5	75	53.67	4,025.25
HUD–424B—Applicant Assurances and Certifications	150	1	150	0	0	53.67	0
OMB–SF–LLL—Disclosure of Lobbying Activities (where applicable)	10	1	10	0.17	1.7	53.67	91.24
Nonprofit Certification	150	1	150	0	0	53.67	0.00
Organizations Code of Conduct	150	1	150	0	0	53.67	0.00
Youth Action Board Participation Letter	150	1	150	0.5	75	53.67	4,025.25
Public Child Welfare Agency Commitment Letter	150	1	150	0.5	75	53.67	4,025.25
Acknowledgement of Application Receipt (HUD–2993) (only applicants granted waiver to submit a paper application)	10	1	10	0.17	0.34	53.67	18.25
Subtotal	150		150		3,827.04		205,397.24
Component 2. Project Application							
YHDP Project Application Questions	125	1	125	8	1,000.00	53.67	53,670.00
SF–424—Application for Federal Assistance	125	1	125	0.08	10	53.67	536.70
HUD–2880—Applicant/Recipient Disclosure/Update Report (2501–0017)	125	1	125	0.17	21.25	53.67	1,140.49
OMB–SF–LLL—Disclosure of Lobbying Activities (where applicable)	125	1	125	0.17	21.25	53.67	1,140.49
Subtotal	125		125		1,052.50		56,487.68
Component 3. Coordinated Community Plan							
YHDP Plan Narrative	25	1	25	240	6,000.00	53.67	322,020.00
Logic Model	25	1	25	8	200	53.67	10,734.00
Certification of Consistency with the Consolidated Plan (HUD–2991) (2506–0112)	25	1	25	0.17	4.25	53.67	228.10
Subtotal	25	1	25	248.17	6,204.25		332,982.10
Total Application Collection	150		300		11,083.79		594,867.03

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) The accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

(5) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

HUD encourages interested parties to submit comment in response to these questions.

C. Authority

Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35.

Colette Pollard,

Department Reports Management Officer, Office of Policy Development and Research, Chief Data Officer.

[FR Doc. 2023–24577 Filed 11–6–23; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–7070–N–83]

30-Day Notice of Proposed Reinstatement of Expired Information Collection; Home Equity Conversion Mortgage (HECM) Counseling Standardization, Application for Certificate of HECM Counseling and HECM Counselor Roster; OMB Control No.: 2502–0586

AGENCY: Office of Policy Development and Research, Chief Data Officer, HUD.

ACTION: Notice.

SUMMARY: HUD is seeking approval from the Office of Management and Budget (OMB) for the information collection described below. In accordance with the Paperwork Reduction Act, HUD is requesting comment from all interested parties on the proposed collection of information. The purpose of this notice is to allow for an additional 30 days of public comment.

DATES: *Comments Due Date:* December 7, 2023.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. 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. Interested persons are also invited to submit comments regarding this proposal and comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Colette Pollard, Clearance Officer, REE, Department of Housing and Urban Development, 451 7th Street SW, Room 8210, Washington, DC 20410; email *PaperworkReductionActOffice@hud.gov.*

FOR FURTHER INFORMATION CONTACT: Colette Pollard, Reports Management Officer, REE, Department of Housing and Urban Development, 451 7th Street SW, Washington, DC 20410; email *Colette.Pollard@hud.gov;* telephone (202) 402–3400. This is not a toll-free number. HUD welcomes and is prepared to receive calls from individuals who are deaf or hard of hearing, as well as individuals with speech or communication disabilities. To learn more about how to make an accessible telephone call, please visit: *https://www.fcc.gov/consumers/guides/telecommunications-relay-service-trs.*

Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD is seeking approval from OMB for the information collection described in Section A.

The **Federal Register** notice that solicited public comment on the information collection for a period of 60 days was published on August 29, 2023 at 88 FR 59536.

A. Overview of Information Collection

Title of Information Collection: Home Equity Conversion Mortgage (HECM) Counseling Standardization, Application for HECM Counselor Roster, and Certificate of HECM Counseling.

OMB Approval Number: 2502–0586.

OMB Expiration Date: August 31, 2018.

Type of Request: Reinstatement, with change, of previously approved collection for which approval has expired.

Form Numbers: HUD–92902 and HUD–92904.

Description of the need for the information and proposed use: Reinstatement of previously approved collection to provide and maintain a current HUD approved HECM counselor roster. Counseling is required for all borrowers seeking to obtain an HUD insured HECM. The HECM Counselor examination and the HECM Roster application, HUD Form 92904, assist HUD in evaluating the knowledge and capacity of individuals interested in providing HECM counseling to potential HECM borrowers, thereby satisfying statutory requirements and reducing the risk to the insurance fund. The addition of the Certificate of HECM Counseling, HUD Form 92902, which is currently part of OMB Collection 2502–0524, to this collection is appropriate because the Office of Housing Counseling regulates all items pertinent to the roles of HUD-approved housing counselors, which includes HECM Roster Counselors. OMB Collection 2502–0524 was recently approved by OMB and has an expiration date of 4/30/2024. Revisions to HUD Form 92902 were necessary as per recommendations made by HUD OGC to ensure compliance with the Paperwork Reduction Act burden statement as required in 5 CFR 1320.8(b)(3) and the Privacy Act Notice requirements in 5 U.S.C. 552a (e)(3).

Respondents: Individuals or households; Not-for-profit institutions; State, Local or Tribal Government.

Estimated Number of Respondents: 28,459.

Estimated Number of Responses: 28,459.

Frequency of Response:

HECM Counseling Standardization—14,000

HUD–92902, Certification of HECM Counseling—14,000

HUD–92904, Application for HECM Roster Counselor—305

Reporting continuing education for HECM Roster counselor biennial recertification—152

Termination of an HECM Roster Counselor—Once

Average Hours per Response: 1 hour.

Total Estimated Burden: 45,943 hours.

Information collection 2502–0586/ type of respondent	Form name/form No., collection tool	Number of respondents	Frequency of response	Responses per year	Average burden hours per response	Annual burden hours	Hourly cost per response (hourly wage rate)	Total annual respondent cost
Non-profit (National and Regional Intermediaries, Multi-State Organizations, Local HUD-approved HCAs).	Counseling Standardization	13,125	1	13,125	1.25	16,406.25	53.74	881,671.88
State, Local, or Tribal Government HCAs.	Counseling Standardization	875	1	875	1.25	1,093.75	53.74	58,778.13
Non-profit (Intermediaries, Multi-State Organizations, Local HCAs).	''Certificate of HECM Counseling''/HUD–92902.	13,125	1	13,125	2	26,250	53.74	1,410,675.00
State, Local, or Tribal Govt.	''Certificate of HECM Counseling''/HUD–92902.	875	1	875	2	1,750	53.74	94,045.00

Information collection 2502–0586/ type of respondent	Form name/form No., collection tool	Number of respondents	Frequency of response	Responses per year	Average burden hours per response	Annual burden hours	Hourly cost per response (hourly wage rate)	Total annual respondent cost
Non-profit (Intermediaries, Multi-State Organizations, Local HCAs).	"Application for HECM Counselor Roster" HUD–92904 and establishing counseling ID in FHA Connection system.	244	1	244	1.30	317.20	53.74	17,046.33
State, Local, or Tribal Govt.	"Application for HECM Counselor Roster" HUD–92904 and establishing counselor ID in FHA Connection system.	61	1	61	1.30	79.30	53.74	4,261.58
Non-profit (Intermediaries, Multi-State Organizations, Local HCAs).	Reporting HECM Roster Counselor Continuing Education course for Biennial Recertification.	122	1	122	.30.	36.60	53.74	1,966.88
State, Local, or Tribal Govt.	Reporting HECM Roster Counselor Continuing Education course for Biennial Recertification.	30	1	30	.30	9	53.74	483.66
Non-profit (Intermediaries, Multi-State Organizations, Local HCAs).	Written request for Terminating a HECM Roster Counselor a HECM Roster Counselor.	1	1	1	.25	.25	53.74	13.44
State, Local, or Tribal Govt.	Written request for Terminating a HECM Roster Counselor.	1	1	1	.25	.25	53.74	13.44
Totals		28,459		28,459		45,943		2,468,955.34

*** Note:** The total annual burden hours has been rounded up to 45,943 hours to be consistent with OMB's system ROCIS.*

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) The accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

(5) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

HUD encourages interested parties to submit comment in response to these questions.

C. Authority

Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. chapter 35.

Colette Pollard,

Department Reports Management Officer, Office of Policy Development and Research, Chief Data Officer.

[FR Doc. 2023–24600 Filed 11–6–23; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

[245A2100DD/AAKC001030/ A0A501010.999900]

Indian Gaming; Extension of Tribal-State Class III Gaming Compact (Standing Rock Sioux Tribe of North and South Dakota & State of South Dakota)

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice.

SUMMARY: This notice announces the extension of the Class III gaming compact between the Standing Rock Sioux Tribe of North and South Dakota & State of South Dakota.

DATES: The extension takes effect on November 7, 2023.

FOR FURTHER INFORMATION CONTACT: Ms. Paula L. Hart, Director, Office of Indian Gaming, Office of the Assistant Secretary–Indian Affairs, Washington, DC 20240, *IndianGaming@bia.gov;* (202) 219–4066.

SUPPLEMENTARY INFORMATION: An extension to an existing Tribal-State Class III gaming compact does not require approval by the Secretary if the extension does not modify any other terms of the compact. 25 CFR 293.5. The Standing Rock Sioux Tribe of North and South Dakota and the State of South Dakota have reached an agreement to extend the expiration date of their existing Tribal-State Class III gaming compact to February 19, 2024. This publication provides notice of the new expiration date of the compact.

Wizipan Garriott,

Principal Deputy Assistant Secretary—Indian Affairs, Exercising by delegation the authority of the Assistant Secretary—Indian Affairs.

[FR Doc. 2023–24604 Filed 11–6–23; 8:45 am]

BILLING CODE 4337–15–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[BLM_ID_FRN_MO4500171485]

Notice To Establish a Recreation Fee Area and Collect Fees on Public Lands Managed by the Owyhee Field Office, Idaho

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of recreation fee.

SUMMARY: Pursuant to the Federal Lands Recreation Enhancement Act (FLREA), the Bureau of Land Management (BLM), Owyhee Field Office will establish a fee area and intends to collect fees at the Jump Creek Recreation Site in Owyhee County, Idaho.

DATES: Comments on the proposed fee area and fees must be received or postmarked by December 7, 2023 and must include the commenter's legible full name and address. Comments received after the close of the comment period or delivered to an address other than the one listed in this notice may not be considered or included in the administrative record for the proposal. Starting May 7, 2024, the BLM will have the option to initiate the proposed fees, unless the BLM publishes a **Federal Register** notice to the contrary.

ADDRESSES: Copies of relevant supporting documents for this action may be reviewed at the BLM Owyhee Field Office, 101 S. Bruneau Hwy., Marsing, ID 83639; or the BLM Boise District Office, 3948 Development Ave., Boise, ID 83705 and online at: *https://on.doi.gov/3qfe3I0.* Comments may be submitted either by email to *BLM_ID_OwyheeOffice@blm.gov;* or by U.S. Postal Mail to BLM Owyhee Field Office, 101 S Bruneau Hwy., Marsing, ID 83639.

FOR FURTHER INFORMATION CONTACT: Ryan Homan, outdoor recreation planner, BLM Owyhee Field Office, email: *BLM_ID_OwyheeOffice@blm.gov;* telephone: (208) 896–5912. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION: The BLM is committed to provide and receive fair value for the use of developed recreation facilities and services in a manner that meets public use demands, provides quality experiences, and protects important resources. The BLM's policy is to collect fees at specialized recreation sites, or where the BLM provides facilities, equipment, or services, at Federal expense, in connection with outdoor use. To meet increasing demands for services and maintenance at Jump Creek Recreation Site, the BLM will establish a fee program for recreation site use. This fee site proposal addresses facility maintenance and public safety needs due to increased use and costs of operation. The fees will also enable the BLM to improve services, add amenities desired by visitors, and help offset costs incurred by Owyhee County for increased law enforcement patrols and search and rescue efforts. The proposed fees are a $5 per vehicle day-use fee, or a $25 annual pass, which would begin no earlier than spring 2024.

People holding an America the Beautiful—The National Parks and Federal Recreational Lands pass are granted a 100 percent discount for standard amenity fees.

The FLREA directs the Secretary of the Interior and Secretary of Agriculture to publish an advance notice in the **Federal Register** whenever new recreation fee areas are established under their respective jurisdictions. In accordance with BLM policy, the Jump Creek Recreation Site Business Plan explains the fee collection process and how fees will be used at this site. The BLM Idaho Resource Advisory Council, functioning as a Recreation Resource Advisory Committee, reviewed the proposal to charge fees at Jump Creek Recreation Site in August 2021, following the FLREA guidelines. Fee amounts will be posted on-site and at the BLM Owyhee Field Office. Copies of the business plan will be available at the BLM Owyhee Field Office and BLM Boise District Office as listed in the **ADDRESSES** section. Any future adjustments in the fee amount will be made following the Jump Creek Recreation Site Business Plan and after consultation with the Idaho Resource Advisory Council and other public notice.

The Jump Creek Recreation Site is identified in the 1998 BLM Owyhee Resource Management Plan and was analyzed in the Environmental Impact Statement accompanying the plan (EIS ID–B030–1989–0001). Recreation use fees would be consistent with other established fee sites in the area managed by the BLM and other Federal and state land management agencies.

The BLM welcomes public comments on this proposal. Before including your address, phone number, email address, or other personal identifying information in your comment, be advised 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 from public review your personal identifying information, we cannot guarantee that we will be able to do so.

(Authority: 16 U.S.C. 6803(b))

Tanya M. Thrift,

BLM Boise District Manager.

[FR Doc. 2023–24516 Filed 11–6–23; 8:45 am]

BILLING CODE 4331–19–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLHQ310000.L13100000.PP0000; OMB Control No. 1004–0034]

Agency Information Collection Activities; Oil and Gas, or Geothermal Resources: Transfers and Assignments

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, the Bureau of Land Management (BLM) proposes to renew an information collection.

DATES: Interested persons are invited to submit comments on or before January 8, 2024.

ADDRESSES: Send your written comments on this information collection request (ICR) by mail to Darrin King, Information Collection Clearance Officer, U.S. Department of the Interior, Bureau of Land Management, Attention PRA Office, 440 W 200 S #500, Salt Lake City, UT 84101; or by email to *BLM_HQ_PRA_Comments@blm.gov.* Please reference Office of Management and Budget (OMB) Control Number 1004–0034 in the subject line of your comments. Please note that the electronic submission of comments is recommended.

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, contact Peter Cowan by email at *picowan@blm.gov,* or by telephone at 720–838–1641. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States. The ICR may also be viewed at *http://www.reginfo.gov/public/do/PRAMain.*

SUPPLEMENTARY INFORMATION: In accordance with the Paperwork Reduction Act of 1995 (PRA, 44 U.S.C.

3501 *et seq.*) and 5 CFR 1320.8(d)(1), all information collections require approval under the PRA. The BLM may not conduct or sponsor a collection of information and a response to a request for information is not required unless it displays a current valid OMB control number.

As part of our continuing effort to reduce paperwork and respondent burdens, we invite the public and other Federal agencies to comment on new, proposed, revised and continuing collections of information. This helps the BLM assess impacts of its information collection requirements and minimize the public's reporting burden. It also helps the public understand BLM information collection requirements and ensure requested data are provided in the desired format.

The BLM is especially interested in public comment addressing the following:

(1) whether collection of information is necessary for the proper performance of the functions of the agency, including if the information will have practical utility;

(2) determination of the accuracy of the BLM's estimate of the burden for collection of information, including validity of methodology and assumptions used;

(3) methods to enhance the quality, utility, and clarity of information to be collected; and

(4) how the agency can minimize the burden of information collection on those who respond, including use of appropriate automated, electronic, mechanical or other technological collection techniques or other forms of information technology.

Comments submitted in response to this notice are a matter of public record. The BLM will include or summarize each comment in its request to OMB to approve this ICR. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Abstract: This collection of information enables the BLM to process assignments of record title interest and transfers of operating rights in a lease for oil and gas or geothermal resources. Each assignment or transfer is a contract between private parties but, by law, must be approved by the Secretary. The BLM uses information about assignments and transfers to prevent unlawful extraction of mineral resources, to ensure prompt payment of rentals and royalties for the rights obtained under a Federal lease, and to ensure that leases are not encumbered with agreements that cause the minerals to be uneconomical to produce, resulting in lost revenues to the Federal Government. The information also enables the BLM to ensure the assignee or transferee is in compliance with the bonding requirements, when necessary, before approval of the transfer or assignment. OMB control number 1004–0034 is currently scheduled to expire on September 30, 2024. The BLM plans to request that OMB renew this OMB control number for an additional thee (3) years.

Title of Collection: Oil and Gas, or Geothermal Resources: Transfers and Assignments (43 CFR Subparts 3106, 3135, and 3216).

OMB Control Number: 1004–0034.

Form Number: 3000–003; 3000–003a.

Type of Review: Extension of a currently approved collection.

Respondents/Affected Public: Assignors and assignees of record title interest in a lease for oil and gas or geothermal resources; and transferors and transferees of operating rights (sublease) in a lease for oil and gas or geothermal resources.

Total Estimated Number of Annual Respondents: 8,818.

Total Estimated Number of Annual Responses: 8,818.

Estimated Completion Time per Response: 30 minutes.

Total Estimated Number of Annual Burden Hours: 4,410.

Respondent's Obligation: Required to obtain or retain a benefit.

Frequency of Collection: On occasion.

Total Estimated Annual Nonhour Burden Cost: $881,800.

An agency may not conduct or sponsor and, notwithstanding any other provision of law, a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

The authority for this action is the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Darrin A. King,

Information Collection Clearance Officer.

[FR Doc. 2023–24553 Filed 11–6–23; 8:45 am]

BILLING CODE 4310–84–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–NPS0036872; PPWOCRADN0–PCU00RP14.R50000]

Notice of Inventory Completion: Nevada Historical Society, Reno, NV

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), the Nevada Historical Society has completed an inventory of human remains and has determined that there is no cultural affiliation between the human remains and any Indian Tribe. The human remains were removed from Churchill County, NV.

DATES: Disposition of the human remains in this notice may occur on or after December 7, 2023.

ADDRESSES: Anna J. Camp, Nevada State Museum, Carson City, 600 North Carson Street, Carson City, NV 89701, telephone (775) 687–4810, email *acamp@nevadaculture.org.*

SUPPLEMENTARY INFORMATION: This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of the Nevada Historical Society. The National Park Service is not responsible for the determinations in this notice. Additional information on the determinations in this notice, including the results of consultation, can be found in the inventory or related records held by the Nevada State Museum, Carson City.

Description

Human remains representing, at minimum, 10 individuals were removed from Churchill County, NV. The ancestral remains were removed from two surface locations—Sites 8 and 13—in the Humboldt Sink (an intermittent dry lakebed) by L.L. Loud, who conducted research for the University of California, Berkeley between April 1 and August 1, 1912. Site 8 was located at the end of a ridge near Humboldt Lake and Site 13 was uncovered by drifting sands and/or a rise in lake water. The Nevada Historical Society (NHS) received approval to purchase part of the objects collected by Loud in 1912. The collection arrived in Reno in the summer of 1918. Institutional history and documentation indicate that one third of the collection was purchased by the Nevada Historical

Society and there is some information showing that one third was retained by the University of California, Berkeley (UCB). The remaining third purportedly was retained by the Heye Museum of the American Indian, but according to Loud and Harrington (1924), ''[t]he collection was divided between the University of California and the Nevada Historical Society.'' Consequently, we believe that the collection was split in half between UCB and NHS. No associated funerary objects are present.

Aboriginal Land

The human remains in this notice were removed from known geographic locations. These locations are the aboriginal lands of one or more Indian Tribes. The following information was used to identify aboriginal land: a final judgment of the Indian Claims Commission or the United States Court of Claims.

Determinations

Pursuant to NAGPRA and its implementing regulations, and after consultation with the appropriate Indian Tribes, the Nevada Historical Society has determined that:

- The human remains described in this notice represent the physical remains of 10 individuals of Native American ancestry.
- No relationship of shared group identity can be reasonably traced between the human remains and any Indian Tribe.
- The human remains described in this notice were removed from the aboriginal land of the Lovelock Paiute Tribe of the Lovelock Indian Colony, Nevada.

Requests for Disposition

Written requests for disposition of the human remains in this notice must be sent to the Responsible Official identified in **ADDRESSES**. Requests for disposition may be submitted by:

1. Any one or more of the Indian Tribes identified in this notice.
2. Any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or a culturally affiliated Indian Tribe or Native Hawaiian organization, or who shows that the requestor is an aboriginal land Indian Tribe.

Disposition of the human remains described in this notice to a requestor may occur on or after December 7, 2023. If competing requests for disposition are received, the Nevada Historical Society must determine the most appropriate requestor prior to disposition. Requests for joint disposition of the human remains are considered a single request and not competing requests. The Nevada State Museum, Carson City is responsible for sending a copy of this notice to the Indian Tribe identified in this notice.

Authority: Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003, and the implementing regulations, 43 CFR 10.9 and § 10.11.

Dated: October 27, 2023.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2023–24530 Filed 11–6–23; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–NPS0036873; PPWOCRADN0–PCU00RP14.R50000]

Notice of Inventory Completion: Peabody Museum of Archaeology and Ethnology, Harvard University, Cambridge, MA

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), the Peabody Museum of Archaeology and Ethnology, Harvard University (PMAE) has completed an inventory of human remains and associated funerary objects and has determined that there is a cultural affiliation between the human remains and associated funerary objects and Indian Tribes or Native Hawaiian organizations in this notice. The human remains and associated funerary objects were removed from Coahoma County, MS.

DATES: Repatriation of the human remains and associated funerary objects in this notice may occur on or after December 7, 2023.

ADDRESSES: Patricia Capone, PMAE, Harvard University, 11 Divinity Avenue, Cambridge, MA 02138, telephone (617) 496–3702, email *pcapone@fas.harvard.edu.*

SUPPLEMENTARY INFORMATION: This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of the PMAE. The National Park Service is not responsible for the determinations in this notice. Additional information on the determinations in this notice, including the results of consultation, can be found in the inventory or related records held by the PMAE.

Description

Human remains representing, at minimum, 30 individuals were removed from the Oliver site (state site number 22Co503) in Coahoma County, MS, in 1901, as part of a Peabody Museum of Archaeology and Ethnology expedition to Mississippi led by Charles Peabody and William C. Farabee. The 68 associated funerary objects include 66 objects that are present at the PMAE and two objects that are not currently located. The 66 present associated funerary objects are one bone tool, one brass bell, two lots consisting of ceramic sherds, eight ceramic vessels or vessel fragments, one bag of charcoal fragments, two faunal bones, 39 glass beads, 10 shell beads, one lot consisting of shells, and one lot consisting of wood fragments. The two associated funerary objects that are not currently located are one lot consisting of a bone tool and one lot consisting of a brass point.

Human remains representing, at minimum, 15 individuals were removed from the Oliver Site (state site number 22Co503) in Coahoma County, MS, in 1902, as part of a Peabody Museum of Archaeology and Ethnology expedition to Mississippi led by Charles Peabody and William C. Farabee. The 10 associated funerary objects include nine objects that are present at the PMAE and one object that is not currently located. The nine associated funerary objects present at the PMAE are two ceramic vessels, five glass beads, and two shell beads. The one associated funerary object not present is one lot consisting of a ceramic vessel.

Cultural Affiliation

The human remains and associated funerary objects in this notice are connected to one or more identifiable earlier groups, tribes, peoples, or cultures. There is a relationship of shared group identity between the identifiable earlier groups, tribes, peoples, or cultures and one or more Indian Tribes or Native Hawaiian organizations. The following types of information were used to reasonably trace the relationship: anthropological information, archeological information, biological information, folklore, geographical information, historical information, kinship, linguistics, oral tradition, other relevant information, or expert opinion.

Determinations

Pursuant to NAGPRA and its implementing regulations, and after consultation with the appropriate

Indian Tribes and Native Hawaiian organizations, the PMAE has determined that:

- The human remains described in this notice represent the physical remains of 45 individuals of Native American ancestry.
- The 78 objects described in this notice are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony.
- There is a relationship of shared group identity that can be reasonably traced between the human remains and associated funerary objects described in this notice and the Quapaw Nation.

Requests for Repatriation

Written requests for repatriation of the human remains and associated funerary objects in this notice must be sent to the Responsible Official identified in **ADDRESSES**. Requests for repatriation may be submitted by:

1. Any one or more of the Indian Tribes or Native Hawaiian organizations identified in this notice.

2. Any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or a culturally affiliated Indian Tribe or Native Hawaiian organization.

Repatriation of the human remains and associated funerary objects in this notice to a requestor may occur on or after December 7, 2023. If competing requests for repatriation are received, the PMAE must determine the most appropriate requestor prior to repatriation. Requests for joint repatriation of the human remains and associated funerary objects are considered a single request and not competing requests. The PMAE is responsible for sending a copy of this notice to the Indian Tribes and Native Hawaiian organizations identified in this notice.

Authority: Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003, and the implementing regulations, 43 CFR 10.9, § 10.10, and § 10.14.

Dated: October 27, 2023.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2023–24531 Filed 11–6–23; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–NPS0036871; PPWOCRADN0–PCU00RP14.R50000]

Notice of Intent To Repatriate Cultural Items: University of Denver Museum of Anthropology, Denver, CO

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), the University of Denver Museum of Anthropology intends to repatriate certain cultural items that meet the definition of unassociated funerary objects and one cultural item that meets the definition of a sacred object and that have a cultural affiliation with the Indian Tribes or Native Hawaiian organizations in this notice. The cultural items were removed from Cheyenne County, NE, Phillips County, KS, an unknown county in KS, and an unknown county and state.

DATES: Repatriation of the cultural items in this notice may occur on or after December 7, 2023.

ADDRESSES: Anne Amati, University of Denver Museum of Anthropology, 2000 E Asbury Ave, Sturm Hall 146, Denver, CO 80210, telephone (303) 871–2687, email *anne.amati@du.edu.*

SUPPLEMENTARY INFORMATION: This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of the University of Denver Museum of Anthropology. The National Park Service is not responsible for the determinations in this notice. Additional information on the determinations in this notice, including the results of consultation, can be found in the summary or related records held by the University of Denver Museum of Anthropology.

Description

One cultural item was removed from an unknown location. It was donated to the museum by an unknown person in March of 1972. The one sacred object is a black elbow pipe (DU ID# 5743).

One cultural item was removed from the Republican River area, KS. At an unknown date, the item came into the possession of George E. Cuneo and was subsequently transferred to Fallis F. Rees. In 1967, Mr. Rees donated the item to the University of Denver Museum of Anthropology. The one unassociated funerary object is a stone pipe (DU ID#4120).

Forty-seven cultural items were removed from Phillips County, KS. Museum records indicate that the cultural items were collected from a site identified as a possible cemetery in 1965 by Mary Webster. The 47 unassociated funerary objects are one lot of charcoal pieces (DU ID# KS-Temp 1), 15 shells (DU ID# KS-Temp 2), one lot of fragments of non-human bones (DU ID# KS-Temp 3), six ceramic sherds (DU ID# KS-Temp 4), 20 stone flakes (DU ID# KS-Temp 5), one projectile point fragment (DU ID# KS-Temp 6), one projectile point (DU ID# KS-Temp 7), one stone knife (DU ID# KS-Temp 8), and one unmodified piece of wood (DU ID# KS-Temp 9).

Fifty-eight cultural items were removed from Cheyenne County, NE. Museum records indicate the items were removed from a rock shelter site by R.E. Cape of Dalton, NE, and that human remains were present. At an unknown date, the cultural items were transferred to E.B. Renaud, founder of the museum. The 58 unassociated funerary objects are 11 ceramic sherds (DU ID# NE I:12:4.1), 38 stone flakes (DU ID# NE I:12:4.2), seven pieces of ground stone (DU ID# NE I:12:4.3), one stone needle fragment (DU ID# NE I:12:4.4), and one polishing stone (DU ID# NE I:12:4.5).

Cultural Affiliation

The cultural items in this notice are connected to one or more identifiable earlier groups, tribes, peoples, or cultures. There is a relationship of shared group identity between the identifiable earlier groups, tribes, peoples, or cultures and one or more Indian Tribes or Native Hawaiian organizations. The following types of information were used to reasonably trace the relationship: geographical information and oral tradition.

Determinations

Pursuant to NAGPRA and its implementing regulations, and after consultation with the appropriate Indian Tribes and Native Hawaiian organizations, the University of Denver Museum of Anthropology has determined that:

- The 106 cultural items described above are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony and are believed, by a preponderance of the evidence, to have been removed from a specific burial site of a Native American individual.
- The one cultural item described above is a specific ceremonial object needed by traditional Native American religious leaders for the practice of

traditional Native American religions by their present-day adherents.

• There is a relationship of shared group identity that can be reasonably traced between the cultural items and the Cheyenne and Arapaho Tribes, Oklahoma.

Requests for Repatriation

Additional, written requests for repatriation of the cultural items in this notice must be sent to the Responsible Official identified in **ADDRESSES**. Requests for repatriation may be submitted by any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or a culturally affiliated Indian Tribe or Native Hawaiian organization.

Repatriation of the cultural items in this notice to a requestor may occur on or after December 7, 2023. If competing requests for repatriation are received, the University of Denver Museum of Anthropology must determine the most appropriate requestor prior to repatriation. Requests for joint repatriation of the cultural items are considered a single request and not competing requests. The University of Denver Museum of Anthropology is responsible for sending a copy of this notice to the Indian Tribes and Native Hawaiian organizations identified in this notice.

Authority: Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003, and the implementing regulations, 43 CFR 10.8, § 10.10, and § 10.14.

Dated: October 27, 2023.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2023–24529 Filed 11–6–23; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–CR–HPS–NPS0036623; PPWOCRADP1, PRN00HP12.CS0000, XXXP104214; OMB Control Number 1024–0009]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Historic Preservation Certification Application

AGENCY: National Park Service, Interior.

ACTION: Notice of Information Collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 we, the National Park Service are proposing to renew an information collection.

DATES: Interested persons are invited to submit comments on or before December 7, 2023.

ADDRESSES: Written comments and suggestions on the information collection requirements should be submitted by the date specified above in **DATES** to *https://www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under Review—Open for Public Comments'' or by using the search function. Please provide a copy of your comments to the NPS Information Collection Clearance Officer (ADIR–ICCO), 13461 Sunrise Valley Drive, Mail Stop 244 Reston, VA 20192, VA 20191 (mail); or *phadrea_ponds@nps.gov* (email). Please reference OMB Control Number 1024–0009 in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, contact Brian Goeken, Chief, Technical Preservation Services, 1849 C St. NW Room 2255, Washington, DC 20240, or at *brian_goeken@nps.gov* (email), or 202–354–2033 (telephone). Please reference OMB Control Number 1024–0009 in the subject line of your comments. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point of contact in the United States. You may also view the ICR at *http://www.reginfo.gov/public/do/PRAMain.*

SUPPLEMENTARY INFORMATION: In accordance with the Paperwork Reduction Act of 1995 (PRA, 44 U.S.C. 3501 *et seq.*) and 5 CFR 1320.8(d)(1), we provide the general public and other Federal agencies with an opportunity to comment on new, proposed, revised, and continuing collections of information. This helps us assess the impact of our information collection requirements and minimize the public's reporting burden. It also helps the public understand our information collection requirements and provide the requested data in the desired format.

A **Federal Register** notice with a 60-day public comment period soliciting comments on this collection of information was published on October 28, 2022 (87 FR 65242). No comments were received.

As part of our continuing effort to reduce paperwork and respondent burdens, we are again soliciting comments from the public and other Federal agencies on the proposed ICR that is described below. We are especially interested in public comment addressing the following:

(1) Whether or not the collection of information is necessary for the proper performance of the functions of the agency, including whether or not the information will have practical utility.

(2) The accuracy of our estimate of the burden for this collection of information, including the validity of the methodology and assumptions used.

(3) Ways to enhance the quality, utility, and clarity of the information to be collected.

(4) How might the agency minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of response.

Comments that you submit in response to this notice are a matter of public record. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Abstract: The Federal Historic Preservation Tax Incentives Program encourages private-sector investment in the rehabilitation and re-use of historic buildings. Through this program, underutilized or vacant buildings throughout the country of every period, size, style, and type have been rehabilitated and reused in a manner that maintains their historic character. To be eligible for tax incentives for historic buildings, a building must be listed individually on the National Register of Historic Places (NRHP); or located in a registered historic district and certified by the NPS as contributing to the historic significance of that district. A registered historic district is any district listed on the NRHP; or a state or local district if the district and the enabling statute have also been certified by the NPS. The NRHP is the official list of the Nation's historic places worthy of preservation.

Section 47 of the Internal Revenue Code requires that the Secretary of the Interior certify to the Secretary of the Treasury upon application by owners of historic properties for Federal tax benefits: (a) the historic significance of the property and (b) that the rehabilitation work is consistent with its historic character. The NPS administers the program with the Internal Revenue Service in partnership with the State Historic Preservation Offices (SHPOs). The NPS uses the information collected in the Historic Preservation Certification Application (Forms 10–168, 10–168a, 10–168b, and 10–168c) to evaluate the condition and historic significance of buildings undergoing rehabilitation and to evaluate whether or not the rehabilitation work meets the Secretary of the Interior's Standards for Rehabilitation.

Regulations codified in 36 CFR part 67 contain a requirement for completion of an application form. The NPS uses the information collected on the application form to allow the authorized officer to determine if the project is qualified to obtain historic preservation certifications from the Secretary of the Interior. These certifications are necessary for an applicant to receive substantial federal tax incentives authorized by Section 47 of the Internal Revenue Code. These incentives include a 20% federal income tax credit for the rehabilitation of income-producing historic buildings and an income tax deduction for the charitable donation of easements on historic properties. The Internal Revenue Code also provides a 10% federal income tax credit for the rehabilitation of non-historic, nonresidential buildings built before 1936. An owner of a non-historic building in a historic district must also use the application to obtain a certification from the Secretary of the Interior that his or her building does not contribute to the significance of the historic district before claiming this lesser tax credit for rehabilitation. The 10% credit was repealed as part of the 2017 tax reform legislation but remains in effect under certain transition rules.

SHPOs are the first point of contact for property owners wishing to use the rehabilitation tax credits. They help applicants determine if a historic building is eligible for Federal or State historic preservation tax incentives, provide guidance on an application before or after the project begins, and provide advice on appropriate preservation work. SHPOs use Forms 10–168d and 10–168e to make recommendations to NPS. In accordance with 36 CFR 67, we also collect information for: (1) certifications of state and local statutes (§ 67.8), (2) certifications of state or local historic districts (§ 67.9), and (3) appeals (§ 67.10).

Title of Collection: Historic Preservation Certification Application.

OMB Control Number: 1024–0009.

Form Number: NPS Forms 10–168, 10–168a, 10–168b, 10–168c, 10–168d, 10–168e.

Type of Review: Extension of a currently approved collection.

Respondents/Affected Public: Individuals, organizations, companies and businesses, and State or tribal governments.

Total Estimated Number of Annual Respondents: 12,208.

Total Estimated Number of Annual Responses: 12,208.

Estimated Completion Time per Response: Varies from 2.5 hours to 40 hours.

Total Estimated Number of Annual Burden Hours: 150,045.

Respondent's Obligation: Required to obtain or retain a benefit.

Frequency of Collection: On occasion.

Total Estimated Annual Nonhour Burden Cost: $4,440,135 based primarily on application fees and other 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 authority for this action is the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Phadrea Ponds,

Information Collection Clearance Officer, National Park Service.

[FR Doc. 2023–24574 Filed 11–6–23; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–NPS0036874; PPWOCRADN0–PCU00RP14.R50000]

Notice of Intent To Repatriate Cultural Items: Peabody Museum of Archaeology and Ethnology, Harvard University, Cambridge, MA

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), the Peabody Museum of Archaeology and Ethnology (PMAE) intends to repatriate certain cultural items that meet the definition of unassociated funerary objects and that have a cultural affiliation with the Indian Tribes or Native Hawaiian organizations in this notice. The cultural items were removed from were removed from Coahoma County, MS.

DATES: Repatriation of the cultural items in this notice may occur on or after December 7, 2023.

ADDRESSES: Patricia Capone, PMAE, Harvard University, 11 Divinity Avenue, Cambridge, MA 02138, telephone (617) 496–3702, email *pcapone@fas.harvard.edu.*

SUPPLEMENTARY INFORMATION: This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of the PMAE. The National Park Service is not responsible for the determinations in this notice. Additional information on the determinations in this notice, including the results of consultation, can be found in the summary or related records held by the PMAE.

Description

The 109 cultural items were removed from the Oliver Site (Mississippi State Site number 22Co503) in Coahoma County, MS, in 1901 and 1902 as part of a Peabody Museum of Archaeology and Ethnology expedition to Mississippi led by Charles Peabody and William C. Farabee. The 109 unassociated funerary objects include 105 objects that are present at the PMAE and four objects that are not currently located. The 105 present unassociated funerary objects are four brass beads, two glass beads, two quartz beads, 14 shell beads, one lot consisting of turquoise beads, two bone tools, one brass Clarksdale bell, four ceramic sherds, one lot consisting of ceramic sherds, 58 ceramic vessels or vessel fragments, 12 lots consisting of ceramic vessels or vessel fragments, two faunal bones, one mica fragment, and one perforated stone. The four objects not currently located are one lot consisting of shell beads, one lot consisting of ceramic vessels or vessel fragments, one lot consisting of lithic points, and one lot consisting of a perforated shell.

Cultural Affiliation

The cultural items in this notice are connected to one or more identifiable earlier groups, tribes, peoples, or cultures. There is a relationship of shared group identity between the identifiable earlier groups, tribes, peoples, or cultures and one or more Indian Tribes or Native Hawaiian organizations. The following types of information were used to reasonably

trace the relationship: anthropological information, archeological information, biological information, folklore, geographical information, historical information, kinship, linguistics, oral tradition, other relevant information, or expert opinion.

Determinations

Pursuant to NAGPRA and its implementing regulations, and after consultation with the appropriate Indian Tribes and Native Hawaiian organizations, the PMAE has determined that:

- The 109 cultural items described above are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony and are believed, by a preponderance of the evidence, to have been removed from a specific burial site of a Native American individual.
- There is a relationship of shared group identity that can be reasonably traced between the cultural items and the Quapaw Nation.

Requests for Repatriation

Additional, written requests for repatriation of the cultural items in this notice must be sent to the Responsible Official identified in **ADDRESSES**. Requests for repatriation may be submitted by any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or a culturally affiliated Indian Tribe or Native Hawaiian organization.

Repatriation of the cultural items in this notice to a requestor may occur on or after December 7, 2023. If competing requests for repatriation are received, the PMAE must determine the most appropriate requestor prior to repatriation. Requests for joint repatriation of the cultural items are considered a single request and not competing requests. The PMAE is responsible for sending a copy of this notice to the Indian Tribes and Native Hawaiian organizations identified in this notice.

Authority: Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003, and the implementing regulations, 43 CFR 10.8, § 10.10, and § 10.14.

Dated: October 27, 2023.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2023–24532 Filed 11–6–23; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

Bureau of Ocean Energy Management

[Docket No. BOEM–2023–062]

Notice of Intent To Prepare an Environmental Assessment for Additional Site Assessment Activities on Beacon Wind, LLC's Renewable Energy Lease OCS–A 0520

AGENCY: Bureau of Ocean Energy Management, Interior.

ACTION: Notice of intent; request for comments.

SUMMARY: The Bureau of Ocean Energy Management (BOEM) intends to prepare an environmental assessment (EA) to analyze the reasonably foreseeable impacts from additional site assessment activities in Lease Area OCS–A 0520 offshore Massachusetts. Beacon Wind, LLC, (Beacon Wind), the leaseholder, requests to conduct additional site assessment activities in the lease area that were not analyzed in the initial EA. Those activities comprise temporarily installing and subsequently removing representative components of offshore wind turbine and substation foundations using a single suction bucket at locations where turbines and substations may be installed. BOEM is seeking public input regarding important environmental issues and the identification of reasonable alternatives that should be considered in the EA. This EA is limited to site assessment activities and will be completed consistent with the National Environmental Policy Act (NEPA) and implementing regulations of the Department of the Interior and the Council on Environmental Quality (CEQ). BOEM will assess the impacts of constructing and operating any wind energy project proposed by Beacon Wind in Lease Area OCS–A 0520 in an environmental impact statement before deciding whether to approve that proposed project.

DATES: BOEM must receive your comments no later than December 7, 2023.

ADDRESSES: You may submit comments by either of the following methods:

- *Through the regulations.gov web portal:* Navigate to *https://www.regulations.gov* and search for Docket No. BOEM–2023–062 to submit public comments and view supporting and related materials available for this notice. Click on the ''Comment'' button below the document link. Enter your information and comment, then click ''Submit Comment;'' or
- *By U.S. Postal Service or other delivery service:* Send your comments and information to the following address: Bureau of Ocean Energy Management, Office of Renewable Energy Programs, 45600 Woodland Road, Mail Stop VAM–OREP, Sterling, VA 20166.

For additional information about submitting your comments, please see the discussion under the heading ''Public Participation'' in the **SUPPLEMENTARY INFORMATION** section of this notice.

FOR FURTHER INFORMATION CONTACT: Jessica Stromberg, BOEM, Environment Branch for Renewable Energy, 45600 Woodland Road, Mail Stop VAM–OREP, Sterling, VA 20166, (703) 787–1722 or *jessica.stromberg@boem.gov.*

SUPPLEMENTARY INFORMATION:

Background: On December 8, 2020, Beacon Wind submitted a site assessment plan (SAP) to install and operate one floating light detection and ranging buoy, two current meter moorings, and two meteorological and oceanographic (metocean) buoys. Beacon Wind updated this SAP on June 28, 2021, and BOEM approved it on September 24, 2021.

On June 3, 2014, BOEM issued a Finding of No Significant Impact (FONSI) based on a comprehensive revised Environmental Assessment titled ''Commercial Wind Lease Issuance and Site Assessment Activities on the Atlantic Outer Continental Shelf Offshore Massachusetts (2014 EA).'' [1] The 2014 EA included analysis of leasing and site assessment impacts in Lease Area OCS–A 0520. However, the suction bucket technique was not included in the analyzed site assessment activities.

Proposed Action and Scope of Analysis

The proposed action is approval of Beacon Wind's amended SAP to conduct additional site assessment activities in the Lease Area. If approved, those activities will comprise foundation testing by installing and removing representative components for offshore wind turbine and substation foundations. This testing will include repeated use of a single suction bucket within the lease area at locations where wind turbines and substations may be installed. The equipment used for testing will be the same as described in Beacon Wind's construction and operations plan [2] for suction bucket jacket foundations, which may be used to install offshore turbines and

[1] *https://www.boem.gov/renewable-energy/revised-ma-ea-2014.*

[2] *https://www.boem.gov/renewable-energy/state-activities/beacon-wind-farm-construction-and-operations-plan.*

substations. The proposed additional testing will further assess the site conditions and gather information necessary for the engineering design of turbine and substation foundations well-suited for the lease area if BOEM approves the project.

BOEM decided to prepare an EA for this proposed action regarding Beacon Wind's amended SAP to support and inform agency decision-making (40 CFR 1501.3). This notice starts the scoping process for the EA and solicits information regarding additional important environmental issues and alternatives that should be considered in the EA (43 CFR 46.305). Additionally, BOEM will use the scoping process to identify and eliminate from detailed analysis issues that are not significant or that have been analyzed by prior environmental reviews (40 CFR 1501.9(f)(1)).

BOEM will use responses to this notice and the EA public input process to satisfy the public involvement requirements of the National Historic Preservation Act (see 36 CFR 800.2(d)(3)). Consequently, BOEM is seeking information from the public on the identification and, if applicable, the assessment, of potential impacts to cultural resources and historic properties that might be impacted by the proposed site assessment activities and foundation testing. The EA analyses will also support compliance with other environmental laws and statutes (*e.g.,* Coastal Zone Management Act, Endangered Species Act, Magnuson-Stevens Fishery Conservation and Management Act, and Marine Mammal Protection Act).

Cooperating Agencies: BOEM invites Tribal Nations and Federal, State, and local government agencies to consider becoming cooperating agencies in the preparation of this EA. CEQ regulations for implementing NEPA define cooperating agencies as those with ''jurisdiction by law or special expertise with respect to any environmental impact involved in a proposal (or a reasonable alternative)'' (40 CFR 1508.1(e)). Potential cooperating agencies should consider their authority and capacity to assume the responsibilities of a cooperating agency.

Upon request, BOEM will provide potential cooperating agencies with a draft memorandum of agreement that includes a schedule with critical action dates and milestones, mutual responsibilities, designated points of contact, and expectations for handling pre-decisional information. Agencies should also consider the ''Factors for Determining Whether to Invite, Decline or End Cooperating Agency Status'' in CEQ's memo, ''Cooperating Agencies in Implementing the Procedural Requirements of the [NEPA],'' dated January 30, 2002. A copy of this document is available at: *https://www.energy.gov/sites/prod/files/nepapub/nepa_documents/RedDont/G-CEQ-CoopAgenciesImplem.pdf.*

As the lead agency, BOEM will not provide financial assistance to cooperating agencies. Even if an organization is not a cooperating agency, opportunities will exist to provide information and comments to BOEM during the normal public input phases of the NEPA process.

Public Participation

A. Comments

Tribal Nations, Federal and State agencies, local governments, and other interested parties are requested to comment on important issues to be considered in the EA. For information on how to submit comments and deadline, see the **DATES** and **ADDRESSES** sections above.

B. Privileged and Confidential Information

BOEM will protect privileged and confidential information submitted in comments when required by the Freedom of Information Act (FOIA). Exemption 4 of FOIA applies to trade secrets and commercial and financial information that is privileged or confidential. If you wish to protect the confidentiality of such information, clearly label it ''Contains Confidential Information'' and request that BOEM treat it as confidential. BOEM will not disclose such information if BOEM determines under 30 CFR 585.114(b) that it qualifies for a FOIA exemption. Consider submitting such information as a separate attachment.

BOEM will not treat as confidential any aggregate summaries of such information or comments not containing such privileged or confidential information. Information that is not labeled as privileged or confidential may be regarded by BOEM as suitable for public release.

C. Personally Identifiable Information

BOEM does not consider anonymous comments. Please include your name and address as part of your comment. BOEM makes all comments, including names, addresses, and other personally identifiable information included in the comment, available for public review online. Individuals may request that BOEM withhold their names, addresses, or other personally identifiable information included in their comment from the public record; however, BOEM cannot guarantee that it will be able to do so because comment submissions are subject to FOIA. If your submission is requested under FOIA, your information will only be withheld if a determination is made that one of the FOIA exemptions to disclosure applies. Such a determination will be made in accordance with the Department's FOIA regulations and applicable law.

In order for BOEM to withhold from disclosure your personally identifiable information, you must identify any information contained in your comments that, if released, would constitute a clearly unwarranted invasion of your privacy. You also must briefly describe any possible harmful consequences of the disclosure of information, such as embarrassment, injury, or other harm. All submissions from organizations or businesses and from individuals identifying themselves as representatives or officials of organizations or businesses will be made available for public inspection in their entirety.

D. Section 304 of the National Historic Preservation Act (54 U.S.C. 307103(a))

After consultation with the Secretary of the Interior, BOEM is required to withhold the location, character, or ownership of historic resources if it determines that disclosure may, among other things, cause a significant invasion of privacy, risk harm to the historic resources, or impede the use of a traditional religious site by practitioners. Tribal entities and other parties providing information on historic resources should designate information that they wish to be held as confidential and provide the reasons why BOEM should do so.

Authority: NEPA (42 U.S.C. 4332); 40 CFR 1501.5; 43 CFR 46.305.

Karen Baker,

Chief, Office of Renewable Energy Programs, Bureau of Ocean Energy Management.

[FR Doc. 2023–24610 Filed 11–6–23; 8:45 am]

BILLING CODE 4340–98–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701–TA–655 and 731–TA–1531 (Final) (Remand)]

Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe From Russia

AGENCY: United States International Trade Commission.

ACTION: Notice of remand proceedings.

SUMMARY: The U.S. International Trade Commission (''Commission'') hereby gives notice of the procedures it intends to follow to comply with the court-ordered remand of its final determinations in the antidumping and countervailing duty investigations of seamless carbon and alloy steel standard, line, and pressure pipe (''SSLPP'') from Russia. For further information concerning the conduct of these remand proceedings and rules of general application, consult the Commission's Rules of Practice and Procedure.

DATES: November 1, 2023.

FOR FURTHER INFORMATION CONTACT: Lawrence Jones ((202) 205–3358), Office of Investigations, or Madeline Heeren ((202) 708–1529), Office of General Counsel, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000.

General information concerning the Commission may also be obtained by accessing its internet server (*https://www.usitc.gov*). The public record for Investigation Nos. 701–TA–655 and 731–TA–1531 (Final) may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.*

SUPPLEMENTARY INFORMATION:

Background.—In April 2021, the Commission determined that an industry in the United States was materially by reason of imports of SSLPP from Czechia that were sold in the United States at less than fair value. *Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from Czech Republic (Czechia),* Inv. No. 731–TA–1529 (Final), USITC Pub. No. 5183 (April 2021). In August 2021, the Commission determined that an industry in the United States was materially injured by reason of imports of SSLPP from Korea, Russia, and Ukraine that were sold in the United States at less than fair value and subsidized by the governments of Russia and Ukraine. *Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from Korea, Russia, and Ukraine,* Inv. Nos. 701–TA–654–655 and 731–TA–1530–1532 (Final), USITC Pub. No. 5222 (August 2021). Respondent, PAO TMK, contested the Commission's determination regarding Russia before the U.S. Court of International Trade (''CIT''). The CIT remanded the Commission's determination for the agency to reconsider its calculation of in-scope imports from Germany and Mexico by addressing (1) the Customs data for Germany and Mexico in light of the Commission's determination that only Company A imported in-scope imports from Germany and only Company B imported in-scope imports from Mexico, and (2) evidence proffered by TMK that claims Company C imported in-scope imports from Germany, contrary to the Commission's decision that Company A was the only importer of in-scope imports from Germany. *PAO TMK* v. *United States,* Slip Op. 23–150 (Ct. Int'l Trade, Oct. 12, 2023).

Participation in the remand proceedings.—Only those persons who were interested parties that participated in the investigations (*i.e.,* persons listed on the Commission Secretary's service list) and also parties to the appeal may participate in the remand proceedings. Such persons need not file any additional appearances with the Commission to participate in the remand proceedings, unless they are adding new individuals to the list of persons entitled to receive business proprietary information (''BPI'') under administrative protective order. BPI referred to during the remand proceedings will be governed, as appropriate, by the administrative protective order issued in the investigations. The Secretary will maintain a service list containing the names and addresses of all persons or their representatives who are parties to the remand proceedings, and the Secretary will maintain a separate list of those authorized to receive BPI under the administrative protective order during the remand proceedings.

Written submissions.—The Commission is not reopening the record and will not accept the submission of new factual information for the record. The Commission will permit the parties to file comments concerning how the Commission could best comply with the court's remand instructions.

The comments must be based solely on the information in the Commission's record. The Commission will reject submissions containing additional factual information or arguments pertaining to issues other than those on which the court has remanded this matter. The deadline for filing comments is December 1, 2023. Comments must be limited to no more than fifteen (15) double-spaced and single-sided pages of textual material, inclusive of attachments and exhibits.

Parties are advised to consult with the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subpart A (19 CFR part 207) for provisions of general applicability concerning written submissions to the Commission. All written submissions must conform to the provisions of section 201.8 of the Commission's rules; any submissions that contain BPI must also conform with the requirements of sections 201.6, 207.3, and 207.7 of the Commission's rules. Please note the Secretary's Office will accept only electronic filings at this time. Filings must be made through the Commission's Electronic Document Information System (EDIS, *https://edis.usitc.gov*). No in-person paper-based filings or paper copies of any electronic filings will be accepted until further notice. The Commission's *Handbook on E-Filing,* available on the Commission's website at *http://edis.usitc.gov,* elaborates upon the Commission's rules with respect to electronic filing.

Additional written submissions to the Commission, including requests pursuant to section 201.12 of the Commission's rules, will not be accepted unless good cause is shown for accepting such submissions or unless the submission is pursuant to a specific request by a Commissioner or Commission staff.

In accordance with sections 201.16(c) and 207.3 of the Commission's rules, each document filed by a party to the investigation must be served on all other parties to the investigation (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

By order of the Commission.

Issued: November 2, 2023.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2023–24605 Filed 11–6–23; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 332–598]

Greenhouse Gas Emissions Intensities of the U.S. Steel and Aluminum Industries at the Product Level; Proposed Information Collection; Comment Request; Greenhouse Gas (GHG) Emissions Intensity Questionnaire

AGENCY: United States International Trade Commission

ACTION: Notice of request for public comments.

SUMMARY: In accordance with the provisions of the Paperwork Reduction Act of 1995, the U.S. International Trade Commission (Commission or USITC) hereby gives notice that it plans to submit a request for approval of a questionnaire to the Office of Management and Budget (OMB) for review and requests public comment on its draft proposed collection.

DATES: To ensure that the Commission will consider your comments, it must receive them no later than 60 days after publication of this notice in the **Federal Register**.

ADDRESSES: All Commission offices are in the U.S. International Trade Commission Building, 500 E Street SW, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Please direct all questions to the project team via email at *sa.emissions@usitc.gov* or via phone to Shova KC at 202–205–2234.

The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.* General information concerning the Commission may be obtained by accessing its internet address (*https://www.usitc.gov*). Hearing-impaired individuals are advised that information on this matter can be obtained by contacting the TDD terminal on 202–205–1810.

SUPPLEMENTARY INFORMATION:

The information requested by the questionnaire is for use by the Commission in connection with Investigation No. 332–598, *Greenhouse Gas Emissions Intensities of the U.S. Steel and Aluminum Industries at the Product Level,* instituted under the authority of section 332(g) of the Tariff Act of 1930 (19 U.S.C. 1332(g)). This investigation and report were requested by the United States Trade Representative (USTR) on June 5, 2023. This investigation was initiated on July 5, 2023, and the notice of investigation was published in the **Federal Register** on July 10, 2023 (88 FR 43633). The Commission will deliver its report to USTR by January 28, 2025.

As stated in the notice of investigation, the USTR requested that the Commission's report include greenhouse gas (GHG) emissions intensities of covered steel and aluminum products produced in the United States. Such information is not available in the requested specificity from governmental or other public sources. The Commission indicated in its notice of investigation that it will need to obtain much of such data and information through a survey. The survey will assist the Commission in developing, as requested, GHG emissions intensities which reflect scope 1 and scope 2 GHG emissions associated with production of covered steel and aluminum products produced at facilities in the United States, as well as certain scope 3 GHG emissions associated with the upstream intermediate inputs into these products.

Summary of Proposal: The Commission intends to submit the following draft information collection plan to OMB and invites public comment.

(1) *Number of forms submitted:* 2.

(2) *Title of forms:* Greenhouse Gas (GHG) Emissions Intensity Questionnaire, Company-level and Facility-level.

(3) *Type of request:* New.

(4) *Frequency of use:* Industry questionnaire, single data gathering in two-step collection, scheduled for 2024.

(5) *Description of respondents:* U.S. companies and facilities that produce covered steel and aluminum products.

(6) *Estimated number of respondents:* 1,000 companies and 2,500 facilities.

(7) *Estimated total number of hours to complete the questionnaire per respondent:* 1 hour per company, 25 hours per facility.

(8) Information obtained from the questionnaire will be treated as confidential business information by the Commission and not disclosed in a manner that would reveal the individual operations of a business.

Method of Collection: The proposed collection is a two-step data collection. First, identified steel and aluminum companies will be sent a letter and/or email with a link and individual questionnaire token for accessing the online questionnaire's section 1.1. This step involves the company providing information (including contact information) on the facilities it owns that produce covered steel and/or aluminum products. Once submitted by the company, each facility identified will receive a questionnaire token and link to complete the remainder of the questionnaire applicable to that facility. Respondents will be able to download a PDF version of the questionnaire to see all questions in their entirety, but this PDF will not be accepted as a submission.

Request for Comments: Comments are invited on (1) the elements of the draft questionnaire; (2) whether the proposed collection of information is necessary; (3) the accuracy of the agency's estimate of the burden of the proposed information collection (4) ways to enhance the quality, utility, and clarity of the information to be collected; and (5) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

The draft questionnaire and other supplementary documents may be downloaded from the USITC website at *https://www.usitc.gov/saemissions.*

Any comments on the draft questionnaire should be sent via email at *sa.emissions@usitc.gov.* Comments submitted in response to this notice will be summarized and included in the request for OMB approval of this information collection; they will also become a matter of public record. As such, proprietary or confidential business information should not be submitted as part of comments on the draft questionnaire.

By order of the Commission.

Issued: November 2, 2023.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2023–24572 Filed 11–6–23; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. DEA–1289]

Importer of Controlled Substances Application: Groff NA Hemplex LLC

AGENCY: Drug Enforcement Administration, Justice.

ACTION: Notice of application.

SUMMARY: Groff NA Hemplex LLC has applied to be registered as an importer of basic class(es) of controlled substance(s). Refer to **SUPPLEMENTARY INFORMATION** listed below for further drug information.

DATES: Registered bulk manufacturers of the affected basic class(es), and applicants therefore, may submit electronic comments on or objections to the issuance of the proposed registration on or before December 7, 2023. Such persons may also file a written request for a hearing on the application on or before December 7, 2023.

ADDRESSES: The Drug Enforcement Administration requires that all comments be submitted electronically through the Federal eRulemaking Portal, which provides the ability to type short comments directly into the comment field on the web page or attach a file for lengthier comments. Please go to *https://www.regulations.gov* and follow the online instructions at that site for

submitting comments. Upon submission of your comment, you will receive a Comment Tracking Number. Please be aware that submitted comments are not instantaneously available for public view on *https://www.regulations.gov.* If you have received a Comment Tracking Number, your comment has been successfully submitted and there is no need to resubmit the same comment. All requests for a hearing must be sent to: (1) Drug Enforcement Administration, Attn: Hearing Clerk/OALJ, 8701 Morrissette Drive, Springfield, Virginia 22152; and (2) Drug Enforcement Administration, Attn: DEA **Federal Register** Representative/DPW, 8701 Morrissette Drive, Springfield, Virginia 22152. All requests for a hearing should also be sent to: Drug Enforcement Administration, Attn: Administrator, 8701 Morrissette Drive, Springfield, Virginia 22152.

SUPPLEMENTARY INFORMATION: In accordance with 21 CFR 1301.34(a), this is notice that on September 19, 2023, Groff NA Hemplex LLC, 100 Redco Avenue, Suite A, Red Lion, Pennsylvania 17356–1436, applied to be registered as an importer of the following basic class(es) of controlled substance(s):

Controlled substance	Drug code	Schedule
Marihuana Extract	7350	I
Marihuana	7360	I
Tetrahydrocannabinols	7370	I

The company plans to import the listed controlled substances in bulk form to manufacture research grade material for clinical trial studies. Several types of Marihuana Extract compounds are listed under drug code 7350. No other activities for these drug codes are authorized for this registration.

Approval of permit applications will occur only when the registrant's business activity is consistent with what is authorized under 21 U.S.C. 952(a)(2). Authorization will not extend to the import of Food and Drug Administration-approved or non-approved finished dosage forms for commercial sale.

Claude Redd,

Acting Deputy Assistant Administrator.

[FR Doc. 2023–24575 Filed 11–6–23; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Jagjit Kaleka, D.V.M.; Decision and Order

On February 25, 2022, the Drug Enforcement Administration (DEA or Government) issued an Order to Show Cause (OSC) to Jagjit Kaleka, D.V.M. (Respondent), of Mauston, Wisconsin. Request for Final Agency Action (RFAA), Government Exhibit (RFAAX) 13, at 1, 5. The OSC proposed the revocation of Respondent's DEA Certificate of Registration (registration), Control No. AK7830640, alleging that Respondent has ''committed such acts as would render [his] registration inconsistent with the public interest.'' *Id.* at 1, 2 (citing 21 U.S.C. 824(a)(4), 823(g)(1) [1]).

The Agency makes the following findings of fact based on the uncontroverted evidence submitted by the Government in its RFAA dated April 6, 2023.[2]

I. Findings of Fact

According to the Declaration of a DEA Diversion Investigator (the DI), Respondent was the owner of and a veterinarian at Mauston Pet Hospital (the Pet Hospital). RFAA, Declaration of Diversion Investigator (Declaration), at 2. From June 21, 2019, through February 22, 2021, the Pet Hospital purchased 500 tablets of 10 mg oxycodone (Schedule II), 1000 tablets of 2 mg alprazolam (Schedule IV), and 100 tablets of 5 mg zolpidem (Schedule IV). *Id.; see also* RFAAX 2; RFAAX 9. On June 8, 2021, the DI served a Notice of Inspection at the Pet Hospital, and Respondent consented to an inspection of the premises. Declaration, at 2; *see also* RFAAX 7. Prior to the inspection, the DI asked Respondent to take an inventory of all controlled substances at the Pet Hospital,[3] and on the day of the inspection, the DI asked Respondent to produce a biennial inventory, which Respondent was unable to produce. Declaration, at 2, 4.

During the inspection, Respondent denied personally ordering the controlled substances in question, namely, oxycodone, alprazolam, and zolpidem. Declaration, at 2.[4] The DI explained that despite the Pet Hospital's purchases, ''[n]one of these drugs could be located on the premises and there were no records showing that the drugs had been dispensed, lost, stolen, or otherwise disposed of.'' *Id.* at 2, 3.[5] Further, ''[t]hough Respondent denied knowledge that [G.K., another practitioner at the Pet Hospital,] had been using the Pet Hospital's account to purchase and obtain controlled substances for other than a legitimate medical purpose in the usual course of veterinary practice, Respondent [admitted that he] was aware of at least one incident during which [G.K.] purchased and received alprazolam.'' *Id.*[6] Notably, Respondent admitted that

[1] Effective December 2, 2022, the Medical Marijuana and Cannabidiol Research Expansion Act, Pub. L. 117–215, 136 Stat. 2257 (2022) (Marijuana Research Amendments or MRA), amended the Controlled Substances Act (CSA) and other statutes. Relevant to this matter, the MRA redesignated 21 U.S.C. 823(f), cited in the OSC, as 21 U.S.C. 823(g)(1). Accordingly, this Decision cites to the current designation, 21 U.S.C. 823(g)(1), and to the MRA-amended CSA throughout.

[2] By letter dated March 14, 2022, Respondent requested a hearing. RFAAX 15, at 1. On May 16, 2022, Respondent withdrew his hearing request and Chief Administrative Law Judge John J. Mulrooney, II, issued an Order Terminating Proceedings. RFAAX 16; RFAAX 17.

[3] On June 6, 2021, Respondent emailed the DI a document titled ''Controlled Drug Inventory 5–25–2021.'' Declaration, at 4; *see also* RFAAX 6.

[4] As noted by the DI, the most recent invoice indicated that Respondent himself purchased 100 tablets of 2 mg alprazolam under his own DEA registration; all of the other invoices for the controlled substance purchases in question showed that the controlled substances were shipped to another practitioner at the Pet Hospital, G.K. *Id.* at 2–3; *see also* RFAAX 2, at 66; RFAAX 8, at 1; RFAAX 9, at 3. Respondent also admitted that his wife paid for all of the controlled substances ordered for the Pet Hospital. Declaration, at 3.

[5] Though unable to produce dispensing records for the controlled substances in question, Respondent was able to produce dispensing records for other controlled substances. *Id.* at 3; *see also* RFAAX 4. According to the DI, these other dispensing records were commingled with records of other practitioners, including G.K., and because the records lacked detail, the DI was unable to determine which controlled substances had been dispensed by Respondent. *Id.* Because there were no records showing the disposition of the oxycodone, alprazolam, or zolpidem in question, the DI was unable to confirm whether the drugs had been purchased for a legitimate medical purpose; moreover, there was no evidence that Respondent had contacted any law enforcement agency to report the diversion of any oxycodone, alprazolam, or zolpidem. Declaration, at 3.

[6] Respondent admitted to DI that he observed G.K. receiving a shipment of alprazolam in 2019; specifically, Respondent observed G.K. meet a delivery driver outside the Pet Hospital who gave G.K. several boxes that G.K. then placed in his personal vehicle. *Id.* Respondent stated that he then

neither alprazolam nor zolpidem have ever been used at the Pet Hospital for veterinary purposes. Declaration, at 3.

Although Respondent denied that he had any expired controlled substances, the DI found expired controlled substances in an unsecured area in the Pet Hospital's basement. *Id.* at 4; *see also* RFAAX 12. Respondent had no records of any disposal of expired or unwanted controlled substances, but Respondent told the DI that he disposed of expired or unwanted controlled substances by giving them to the police or placing them in the garbage, which the DI noted was an unacceptable method that does not render the controlled substances '' 'non-retrievable' '' pursuant to Federal regulations. Declaration, at 2, 4 (citing 21 CFR 1317.90(a)).[7] [8]

II. Discussion

A. The Five Public Interest Factors

Under the CSA, ''[a] registration . . . to . . . dispense a controlled substance . . . may be suspended or revoked by the Attorney General upon a finding that the registrant . . . has committed such acts as would render his registration under section 823 of this title inconsistent with the public interest as determined under such section.'' 21 U.S.C. 824(a). In making the public interest determination, the CSA requires consideration of the following factors:

(A) The recommendation of the appropriate State licensing board or professional disciplinary authority.

(B) The [registrant]'s experience in dispensing, or conducting research with respect to controlled substances.

(C) The [registrant]'s conviction record under Federal or State laws relating to the manufacture, distribution, or dispensing of controlled substances.

(D) Compliance with applicable State, Federal, or local laws relating to controlled substances.

(E) Such other conduct which may threaten the public health and safety.

21 U.S.C. 823(g)(1).

The DEA considers these public interest factors in the disjunctive. *Robert A. Leslie, M.D.,* 68 FR 15,227, 15,230 (2003). Each factor is weighed on a case-by-case basis. *Morall* v. *Drug Enf't Admin.,* 412 F.3d 165, 173–74 (D.C. Cir. 2005). Any one factor, or combination of factors, may be decisive. *David H. Gillis, M.D.,* 58 FR 37507, 37508 (1993).

While the Agency has considered all of the public interest factors in 21 U.S.C. 823(g)(1),[9] the Government's evidence in support of its *prima facie* case for revocation of Respondent's registration is confined to Factors B and D. *See* RFAA, at 6–10.[10] Moreover, the Government has the burden of proof in this proceeding. 21 CFR 1301.44.

Here, the Agency finds that the Government's evidence satisfies its *prima facie* burden of showing that Respondent's continued registration would be ''inconsistent with the public interest.'' 21 U.S.C. 824(a)(4).

B. Factors B and D

Evidence is considered under Public Interest Factors B and D when it reflects compliance (or non-compliance) with laws related to controlled substances and experience dispensing controlled substances. *See Sualeh Ashraf, M.D.,* 88 FR 1095, 1097 (2023); *Kareem Hubbard, M.D.,* 87 FR 21156, 21162 (2022). In the current matter, the Government has alleged that Respondent violated numerous Federal laws regulating controlled substances. RFAAX 14, at 2–3. Specifically, Federal law requires that registrants (1) keep a biennial inventory of any controlled substances on hand; (2) keep controlled substances in a ''securely locked, substantially constructed cabinet''; (3) dispose of controlled substances properly so as to comply with applicable regulations and render the controlled substances non-retrievable; (4) keep records of the disposal of controlled substances; and (5) timely report any loss of controlled substances. 21 U.S.C. 827(a)–(b); 21 CFR 1301.75(b), 1301.76(b), 1304.11(a), 1304.11(c), 1304.21(e), 1317.90, and 1317.95.[11]

Here, the record demonstrates that Respondent, among other things, failed to conduct a biennial inventory of controlled substances, failed to properly store controlled substances in a securely locked, substantially constructed cabinet, failed to dispose of controlled substances properly so as to comply with applicable regulations and render the controlled substances non-retrievable, failed to keep records of the disposal of controlled substances, and failed to timely report the loss of controlled substances. As Respondent's conduct displays clear violations of the various Federal regulations described above, the Agency hereby sustains the Government's allegations that Respondent repeatedly violated Federal law relating to controlled substances.

Accordingly, the Agency finds that Factors B and D weigh in favor of revocation of Respondent's registration and thus finds Respondent's continued registration to be inconsistent with the public interest in balancing the factors of 21 U.S.C. 823(g)(1). The Agency further finds that Respondent failed to provide sufficient evidence to rebut the Government's *prima facie* case.

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instructed an employee, S.T., to retrieve the boxes and bring them inside Pet Hospital where Respondent confirmed that they contained alprazolam. *Id.* In addition, S.T. admitted to filling out a DEA form 222 for the purchase of oxycodone at G.K.'s request. *Id.* at 4; *see also* RFAAX 2, at 3; RFAAX 3.

[7] The DI referenced 21 CFR 1317.90(a) once more in noting that ''because Respondent was not the 'ultimate user[]' or '[a] person[] lawfully entitled to dispose of an ultimate user's decedent's property,'[] he did not dispose of the controlled substances 'in compliance with applicable Federal, State, tribal[], and local laws and regulations.' '' *Id.* at 4.

[8] The DI also described how Respondent had been previously notified of violations in 2017, with Respondent at that time cited by DEA for failing to keep a biennial inventory, failing to maintain separate and readily retrievable records of controlled substances, failing to keep controlled substances in a securely locked, substantially constructed cabinet, and accepting controlled substances from end users without being licensed as a collector. *Id.* at 2, 4–5; *see also* RFAAX 10. Respondent was also subject to disciplinary action by the State of Wisconsin Veterinary Examining Board in 2018 following findings that Respondent had failed to store controlled substances in a securely locked, substantially constructed cabinet, had failed to keep a biennial inventory, and had sold a Schedule III controlled substance to an unregistered individual who had previously surrendered his DEA registration and was not authorized to possess or purchase controlled substances. Declaration, at 2, 5; *see also* RFAAX 11.

[9] As to Factor A, the Agency considers the recommendation of the appropriate state licensing board. Here, the state licensing board has taken disciplinary action against Respondent's veterinary license arising out of similar misconduct as that which forms the basis for the OSC in the current matter. *See* RFAAX 11; RFAAX 14, at 3. Nonetheless, because the Government has not made any representations as to Factor A in its RFAA, the Agency finds that Factor A weighs neither for nor against Respondent's continued registration. As to Factor C, there is no evidence in the record that Respondent has been convicted of an offense under either Federal or state law ''relating to the manufacture, distribution, or dispensing of controlled substances.'' 21 U.S.C. 823(g)(1)(C). However, as Agency cases have noted, there are a number of reasons why a person who has engaged in criminal misconduct may never have been convicted of an offense under this factor. *Dewey C. MacKay, M.D.,* 75 FR 49956, 49973 (2010). Agency cases have therefore found that ''the absence of such a conviction is of considerably less consequence in the public interest inquiry'' and is therefore not dispositive. *Id.* Finally, as to Factor E, the Government's evidence fits squarely within the parameters of Factors B and D and does not raise ''other conduct which may threaten the public health and safety.'' 21 U.S.C. 823(g)(1)(E). Accordingly, Factor E does not weigh for or against Respondent.

[10] In its RFAA, the Government noted that if the Agency were to find that Factors B and D did not weigh against Respondent's continued registration, it would rely on Factor E in the alternative. *Id.* at 6.

[11] Federal law also prohibits an individual from accepting controlled substances from end users without being authorized as a collector. 21 U.S.C. 822(g)(1)(A) (incorrectly cited in the OSC as 21 U.S.C. 821(g)(1)(A), *see* RFAAX 14, at 3); 21 CFR 1317.30 and 1317.40.

III. Sanction

Where, as here, the Government has established grounds to revoke Respondent's registration, the burden shifts to the registrant to show why he can be entrusted with the responsibility carried by a registration. *Garret Howard Smith, M.D.,* 83 FR 18882, 18910 (2018). When a registrant has committed acts inconsistent with the public interest, he must both accept responsibility and demonstrate that he has undertaken corrective measures. *Holiday CVS, L.L.C., dba CVS Pharmacy Nos 219 and 5195,* 77 FR 62316, 62339 (2012) (internal quotations omitted). Trust is necessarily a fact-dependent determination based on individual circumstances; therefore, the Agency looks at factors such as the acceptance of responsibility, the credibility of that acceptance as it relates to the probability of repeat violations or behavior, the nature of the misconduct that forms the basis for sanction, and the Agency's interest in deterring similar acts. *See, e.g., Robert Wayne Locklear, M.D.,* 86 FR 33738, 33746 (2021).

Here, although Respondent initially requested a hearing, he withdrew his hearing request and did not otherwise avail himself of the opportunity to refute the Government's case. As such, Respondent has made no representations as to his future compliance with the CSA nor made any demonstration that he can be entrusted with registration. In fact, despite having already been subject to state action and a Federal citation in 2017 and thus put on notice of the impropriety of his actions, Respondent failed to change his ways and continued to commit much of the same misconduct. Moreover, the evidence presented by the Government clearly shows that Respondent violated the CSA, further indicating that Respondent cannot be entrusted. Accordingly, the Agency will order the revocation of Respondent's registration.

Order

Pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 824(a), I hereby revoke DEA Certificate of Registration No. AK7830640 issued to Jagjit Kaleka, D.V.M. Further, pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 823(g)(1), I hereby deny any pending applications of Jagjit Kaleka, D.V.M., to renew or modify this registration, as well as any other pending application of Jagjit Kaleka, D.V.M., for additional registration in Wisconsin. This Order is effective December 7, 2023.

Signing Authority

This document of the Drug Enforcement Administration was signed on October 31, 2023, by Administrator Anne Milgram. That document with the original signature and date is maintained by DEA. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DEA Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of DEA. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Heather Achbach,

Federal Register Liaison Officer, Drug Enforcement Administration.

[FR Doc. 2023–24524 Filed 11–6–23; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. DEA–1285]

Importer of Controlled Substances Application: Mylan Technologies Inc.

AGENCY: Drug Enforcement Administration, Justice.

ACTION: Notice of application.

SUMMARY: Mylan Technologies Inc. as applied to be registered as an importer of basic class(es) of controlled substance(s). Refer to **SUPPLEMENTARY INFORMATION** listed below for further drug information.

DATES: Registered bulk manufacturers of the affected basic class(es), and applicants therefore, may submit electronic comments on or objections to the issuance of the proposed registration on or before December 7, 2023. Such persons may also file a written request for a hearing on the application on or before December 7, 2023.

ADDRESSES: The Drug Enforcement Administration requires that all comments be submitted electronically through the Federal eRulemaking Portal, which provides the ability to type short comments directly into the comment field on the web page or attach a file for lengthier comments. Please go to *https://www.regulations.gov* and follow the online instructions at that site for submitting comments. Upon submission of your comment, you will receive a Comment Tracking Number. Please be aware that submitted comments are not instantaneously available for public view on *https://www.regulations.gov.* If you have received a Comment Tracking Number, your comment has been successfully submitted and there is no need to resubmit the same comment. All requests for a hearing must be sent to: (1) Drug Enforcement Administration, Attn: Hearing Clerk/OALJ, 8701 Morrissette Drive, Springfield, Virginia 22152; and (2) Drug Enforcement Administration, Attn: DEA Federal Register Representative/DPW, 8701 Morrissette Drive, Springfield, Virginia 22152. All requests for a hearing should also be sent to: Drug Enforcement Administration, Attn: Administrator, 8701 Morrissette Drive, Springfield, Virginia 22152.

SUPPLEMENTARY INFORMATION: In accordance with 21 CFR 1301.34(a), this is notice that on October 5, 2023, Mylan Technologies Inc. 110 Lake Street, Saint Albans, Vermont 05478–2266 applied to be registered as an importer of the following basic class(es) of controlled substance(s)

Controlled substance	Drug code	Schedule
Fentanyl	9801	II
Methylphenidate	1724	II

The company plans to import the listed controlled substances in finished dosage form (FDF) from foreign sources for analytical testing and clinical trials in which the foreign FDF will be compared to the company's own domestically manufactured FDF to foreign markets. No other activities for these drug codes are authorized for this registration.

Approval of permit applications will occur only when the registrant's business activity is consistent with what is authorized under 21 U.S.C. 952(a)(2). Authorization will not extend to the import of Food and Drug Administration-approved or non-approved finished dosage forms for commercial sale.

Claude Redd,

Acting Deputy Assistant Administrator.

[FR Doc. 2023–24573 Filed 11–6–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Notice of Lodging of Proposed Modification to Consent Decree Under the Clean Water Act

On October 25, 2023, the Department of Justice lodged a proposed a Material Modification to the Consent Decrees' Wet Weather Improvement Program (''Modification'') with the United States District Court for the Southern District

of Ohio in the lawsuit entitled *United States et al.* v. *Board of County Commissioners of Hamilton County and the City of Cincinnati,* Civil Action No. C–1–02–107. The Modification (a) moves two projects back in priority order; (b) changes the descriptions and design criteria for a few projects; (c) adds a process to the Wet Weather Improvement Plan (''WWIP'') to address previously unidentified CSO or SSO outfalls; (d) adds an additional short ''phase'' of work to the WWIP's scheduling process; and (e) makes a few clarifying changes to other aspects of the WWIP. The parties' approval is conditioned on the Court's entry of this Modification.

The publication of this notice opens a period for public comment on the proposed Modification, which is available for public review as described below. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and should refer to *United States et al.* v. *Board of County Commissioners of Hamilton County and the City of Cincinnati,* D.J. Ref. No. 90–5–1–6–341A. All comments must be submitted no later than thirty (30) days after the publication date of this notice. Comments may be submitted either by email or by mail:

To submit comments:	*Send them to:*
By email	*pubcomment-ees.enrd@usdoj.gov.*
By mail	Assistant Attorney General, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

During the public comment period, the Modification may be examined and downloaded at this Justice Department website: *https://www.justice.gov/enrd/consent-decrees.* We will provide a paper copy of the Modification upon written request and payment of reproduction costs. Please mail your request and payment to: Consent Decree Library, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

Please enclose a check or money order for $10.75 (25 cents per page reproduction cost payable to the United States Treasury.

Patricia A. McKenna,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2023–24545 Filed 11–6–23; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

[OMB Number 1121–0030]

Agency Information Collection Activities; Proposed eCollection eComments Requested; Extension of a Previously Approved Collection; Capital Punishment Report of Inmates Under Sentence of Death

AGENCY: Bureau of Justice Statistics, Department of Justice.

ACTION: 60-Day notice.

SUMMARY: The Bureau of Justice Statistics (BJS), Department of Justice (DOJ), will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995.

DATES: Comments are encouraged and will be accepted for 60 days until January 8, 2024.

FOR FURTHER INFORMATION CONTACT: If you have additional comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Tracy L. Snell, Statistician, Bureau of Justice Statistics, 810 Seventh St NW, Washington, DC 20531 (email:*Tracy.L.Snell@usdoj.gov;* telephone: 202–598–1660).

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Bureau of Justice Statistics, including whether the information will have practical utility;

—Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Evaluate whether and if so how the quality, utility, and clarity of the information to be collected can be enhanced; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Abstract: Capital punishment information is collected by the Bureau of Justice Statistics (BJS) annually as part of the National Prisoner Statistics data series (NPS–8). These establishment surveys provide BJS with the capacity to report annually on changes in the size and composition of persons under State or Federal sentence of death and changes to the laws regulating the imposition and implementation of death sentences in the United States. The NPS–8 covers all persons held in a State or Federal correctional facility under sentence of death at any time during the calendar year. The coverage includes capital prisoners transferred from death row to non-correctional institutions, such as mental hospitals, and prisoners who may have escaped custody. Excluded are capital prisoners who for any reason remain in local correctional institutions outside the jurisdiction of State or Federal correctional authorities from whom data are collected for this series. NPS–8 also excludes persons who were convicted and sentenced to death under the Uniform Code of Military Justice. Information such as statutory, demographic, and criminal history data collected through NPS–8 is not attainable from any other single data source.

Overview of This Information Collection

(1) Type of Information Collection: Extension of a currently approved collection.

(2) The Title of the Form/Collection: Capital Punishment Report of Inmates Under Sentence of Death.

(3) The agency form number, if any, and the applicable component of the Department sponsoring the collection: The Capital Punishment Report of Inmates Under Sentence of Death (NPS–8) contains four forms: NPS–8 (Report of Inmates Under Sentence of Death; NPS–8A (Update Report of Inmates Under Sentence of Death); NPS–8B (Status of Death Penalty Statutes—No Statute in Force); and NPS–8C (Status of Death Penalty Statutes—Statute in Force). The applicable component: Bureau of Justice Statistics, OJP.

(4) Affected public who will be asked or required to respond, as well as the obligation to respond: staff from State departments of correction, offices of State attorneys general, the Federal Bureau of Prisons, and the U.S. Attorney for the District of Columbia. The obligation to respond is voluntary.

(5) An estimate of the total number of respondents and the amount of time

estimated for an average respondent to respond: The NPS–8 will collect data from an estimated 85 respondents from State departments of correction, the Federal Bureau of Prisons, State Attorneys General, and the U.S. Attorney for the District of Columbia. For each data collection cycle, we estimate an average burden of 30 minutes for the NPA–8, 30 minutes for the NPS–8A, 15 minutes for the NPS–8B, and 15 minutes to complete the NPS–8C. We estimate that data quality follow-up is needed for 50% of NPS–8 forms (10) and 5% of NPS–8A forms (124) and will run an average of 15 minutes for each response. We estimate a 10-minute follow-up for 10% (5) of NPS–8B and NPS–8C respondents.

(6) An estimate of the total annual burden (in hours) associated with the collection: There are approximately 1,292 total annual burden hours for this collection.

(7) An estimate of the total annual cost burden associated with the collection: $41,596.

TOTAL BURDEN HOURS

Form	Number of respondents	Freq	Total annual responses	Time per survey (mins)	Follow-up responses	Time for follow-up (mins)	Total time (mins)	Total annual burden (hrs.)
NPS–8	33	1	19	30	10	15	720	12 (720 min/60 min).
NPS–8A	33	1	2,469	30	124	15	75,930	1,266 (75,930 min/60 min).
NPS–8B/8C	52	1	52	15	5	10	830	14 (830 min/60 min).
Totals	85		2,540					1,292

If additional information is required contact: Darwin Arceo, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE, 4W–218, Washington, DC.

Dated: October 31, 2023.

Darwin Arceo,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2023–24544 Filed 11–6–23; 8:45 am]

BILLING CODE 4410–CW–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2007–0043]

TUV SUD America, Inc.: Application for Expansion of Recognition

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Notice.

SUMMARY: In this notice, OSHA announces the application of TUV SUD America, Inc. (TUVAM) for expansion of recognition as a Nationally Recognized Testing Laboratory (NRTL) and presents the agency's preliminary finding to grant the application.

DATES: Submit comments, information, and documents in response to this notice, or requests for an extension of time to make a submission, on or before November 22, 2023.

ADDRESSES: Comments may be submitted as follows:

Electronically: You may submit comments, including attachments, electronically at *http://www.regulations.gov,* the Federal eRulemaking Portal. Follow the online instructions for submitting comments.

Instructions: All submissions must include the agency's name and the docket number for this rulemaking (Docket No. OSHA–2007–0043). All comments, including any personal information you provide, are placed in the public docket without change and may be made available online at *https://www.regulations.gov.* Therefore, OSHA cautions commenters about submitting information they do not want made available to the public, or submitting materials that contain personal information (either about themselves or others), such as Social Security numbers and birthdates.

Docket: To read or download comments or other material in the docket, go to *http://www.regulations.gov.* Documents in the docket (including this **Federal Register** notice) are listed in the *http://www.regulations.gov* index; however, some information (*e.g.,* copyrighted material) is not publicly available to read or download through the website. All submissions, including copyrighted material, are available for inspection through the OSHA Docket Office. Contact the OSHA Docket Office at (202) 693–2350 (TTY (877) 889–5627) for assistance in locating docket submissions.

Extension of comment period: Submit requests for an extension of the comment period on or before November 22, 2023 to the Office of Technical Programs and Coordination Activities, Directorate of Technical Support and Emergency Management, Occupational Safety and Health Administration, U.S. Department of Labor, 200 Constitution Avenue NW, Room N–3653, Washington, DC 20210, or by fax to (202) 693–1644.

FOR FURTHER INFORMATION CONTACT: Information regarding this notice is available from the following sources:

Press inquiries: Contact Mr. Frank Meilinger, Director, OSHA Office of Communications, U.S. Department of Labor by phone: (202) 693–1999 or email: *meilinger.francis2@dol.gov.*

General and technical information: Contact Mr. Kevin Robinson, Director, Office of Technical Programs and Coordination Activities, Directorate of Technical Support and Emergency Management, Occupational Safety and Health Administration, U.S. Department of Labor by phone: (202) 693–1911 or email: *robinson.kevin@dol.gov.*

SUPPLEMENTARY INFORMATION:

I. Notice of the Application for Expansion

OSHA is providing notice that TUV SUD America, Inc. (TUVAM) is applying for expansion of the current recognition as a NRTL. TUVAM requests the addition of three test standards to their NRTL scope of recognition.

OSHA recognition of a NRTL signifies that the organization meets the requirements specified in 29 CFR 1910.7. Recognition is an acknowledgment that the organization can perform independent safety testing and certification of the specific products covered within its scope of recognition. Each NRTL's scope of recognition includes (1) the type of products the NRTL may test, with each type specified by its applicable test standard; and (2) the recognized site(s) that has/have the technical capability to perform the product-testing and product-

certification activities for test standards within the NRTL's scope. Recognition is not a delegation or grant of government authority; however, recognition enables employers to use products approved by the NRTL to meet OSHA standards that require product testing and certification.

The agency processes an application by a NRTL for initial recognition and for an expansion or renewal of this recognition, following requirements in Appendix A, 29 CFR 1910.7. This appendix requires that the agency publish two notices in the **Federal Register** in processing an application. In the first notice, OSHA announces the application and provides its preliminary finding. In the second notice, the agency provides the final decision on the application. These notices set forth the NRTL's scope of recognition or modifications of that scope. OSHA maintains an informational web page for each NRTL, including TUVAM, which details the NRTL's scope of recognition. These pages are available from the OSHA website at: *http://www.osha.gov/dts/otpca/nrtl/index.html.*

TUVAM currently has sixteen facilities (sites) recognized by OSHA for product testing and certification, with its headquarters located at: TUV SUD America, Inc., 401 Edgewater Place, Suite 500, Wakefield, MA 01880. A complete list of TUVAM's scope of recognition (including sites recognized by OSHA) is available at: *https://www.osha.gov/dts/otpca/nrtl/tuvam.html.*

II. General Background on the Application

TUVAM submitted an application, dated November 22, 2021 (OSHA–2007–0043–0049), to expand their recognition to include three additional test standards. OSHA staff performed detailed analysis of the application packet and reviewed other pertinent information. OSHA did not perform any on-site reviews in relation to this application.

Table 1 below lists the appropriate test standards found in TUVAM's application for expansion for testing and certification of products under the NRTL Program.

TABLE 1—PROPOSED LIST OF APPROPRIATE TEST STANDARDS FOR INCLUSION IN TUVAM'S NRTL SCOPE OF RECOGNITION

Test standard	Test standard title
UL 1973	Batteries for Use in Stationary, Vehicle Auxiliary Power and Light Electric Rail (LER) Applications.
UL 2054	Household and Commercial Batteries.
UL 2271	Batteries for Use in Light Electric Vehicle (LEV) Applications.

III. Preliminary Findings on the Application

TUVAM submitted an acceptable application for expansion of the NRTL scope of recognition. OSHA's review of the application file, and pertinent documentation, indicate that TUVAM can meet the requirements prescribed by 29 CFR 1910.7 for expanding their recognition to include the addition of these three test standards for NRTL testing and certification listed above. This preliminary finding does not constitute an interim or temporary approval of TUVAM's application. OSHA seeks comment on this preliminary determination.

IV. Public Participation

OSHA welcomes public comment as to whether TUVAM meets the requirements of 29 CFR 1910.7 for expansion of recognition as a NRTL. Comments should consist of pertinent written documents and exhibits.

Commenters needing more time to comment must submit a request in writing, stating the reasons for the request by the due date for comments. OSHA will limit any extension to 10 days unless the requester justifies a longer time period. OSHA may deny a request for an extension if it is not adequately justified.

To review copies of the exhibits identified in this notice, as well as comments submitted to the docket, contact the Docket Office, Occupational Safety and Health Administration, U.S. Department of Labor. These materials also are generally available online at *https://www.regulations.gov* under Docket No. OSHA–2007–0043 (for further information, see the "*Docket*" heading in the section of this notice titled **ADDRESSES**).

OSHA staff will review all comments to the docket submitted in a timely manner. After addressing the issues raised by these comments, staff will make a recommendation to the Assistant Secretary of Labor for Occupational Safety and Health on whether to grant TUVAM's application for expansion of the scope of recognition. The Assistant Secretary will make the final decision on granting the application. In making this decision, the Assistant Secretary may undertake other proceedings prescribed in Appendix A to 29 CFR 1910.7.

OSHA will publish a public notice of the final decision in the **Federal Register**.

V. Authority and Signature

James S. Frederick, Deputy Assistant Secretary of Labor for Occupational Safety and Health, 200 Constitution Avenue NW, Washington, DC 20210, authorized the preparation of this notice. Accordingly, the agency is issuing this notice pursuant to Section 29 U.S.C. 657(g)(2), Secretary of Labor's Order No. 8–2020 (85 FR 58393; Sept. 18, 2020), and 29 CFR 1910.7.

Signed at Washington, DC, on November 1, 2023.

James S. Frederick,

Deputy Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2023–24515 Filed 11–6–23; 8:45 am]

BILLING CODE 4510–26–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice: 23–112]

NASA Advisory Council; Human Exploration and Operations Committee

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, the National Aeronautics and Space Administration (NASA) announces a meeting of the Human Exploration and Operations Committee of the NASA Advisory Council (NAC). This Committee reports to the NAC.

DATES: Friday, November 17, 2023, 9 a.m. to 3 p.m.; and Monday, November 20, 2023, 9 a.m. to 4:30 p.m. All times are eastern time.

ADDRESSES: Public attendance will be virtual only. See dial-in and Webex information below under **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT: Dr. Bette Siegel, Designated Federal Officer, Human Exploration and Operations Committee, NASA Headquarters, Washington, DC 20546, via email at *bette.siegel@nasa.gov* or 202–358–2245.

SUPPLEMENTARY INFORMATION: As noted above, this meeting will be available to the public via Webex and telephonically. Webex connectivity information is provided below. For

audio, when you join the Webex event, you may use your computer or provide your phone number to receive a call back, otherwise, call the U.S. toll conference number listed.

On November 17, the event address for attendees is: *https://nasaenterprise.webex.com/nasaenterprise/j.php?MTID=mde213f73124d28623e6f87080ef007e5.*

The event number is 2760 298 4582 and the event password is Kzfr88Mef3$. If needed, the U.S. toll conference number is 1–929–251–9612 or 1–415–527–5035 and access code is 2760 298 4582 and password is 59378863.

The agenda for the meeting includes the following topics:

—Exploration Systems Development Mission Directorate Status
—Moon to Mars
—Strategy and Architecture

On November 20, the event address for attendees is: *https://nasaenterprise.webex.com/nasaenterprise/j.php?MTID=m5b8c7a6f8cce36e7e36e3cb560959a71.*

The event number: 2762 899 7482 and the event password: bnZydZM*683. If needed, the U.S. toll conference number is 1–929–251–9612 or 1–415–527–5035 and access code is 2762 899 7482 and password is 26993960.

The agenda for the meeting includes the following topics:

—Space Operations Mission Directorate Status
—International Space Station Update
—Commercial Crew
—Commercial LEO Development/Commercial Space Stations
—Space Communications and Navigation
—Launch Services

It is imperative that these meeting be held on these days to accommodate the scheduling priorities of the key participants.

Patricia Rausch,

Advisory Committee Management Officer, National Aeronautics and Space Administration.

[FR Doc. 2023–24549 Filed 11–6–23; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

[NARA–2024–003]

Freedom of Information Act (FOIA) Advisory Committee Meeting

AGENCY: Office of Government Information Services (OGIS), National Archives and Records Administration (NARA).

ACTION: Notice of Federal advisory committee meeting.

SUMMARY: We are announcing an upcoming Freedom of Information Act (FOIA) Advisory Committee meeting in accordance with the Federal Advisory Committee Act and the second United States Open Government National Action Plan.

DATES: The meeting will be on December 7, 2023, from 10 a.m. to 1 p.m. EST. You must register by 11:59 p.m. EST December 5, 2023, to attend.

ADDRESSES: This meeting will be a virtual meeting. We will send access instructions for the meeting to those who register according to the instructions below.

FOR FURTHER INFORMATION CONTACT: Dan Levenson, Alternate Designated Federal Officer for this committee, by email at *foia-advisory-committee@nara.gov,* or by telephone at 202.741.5773.

SUPPLEMENTARY INFORMATION: *Agendas and meeting materials:* We will post all meeting materials, including the agenda, at *https://www.archives.gov/ogis/foia-advisory-committee/2022-2024-term.*

This meeting will be the seventh of the 2022–2024 committee term. The purpose of the meeting will be to hear reports from and consider any recommendations from each of the three subcommittees: Implementation, Modernization, and Resources.

Procedures: This virtual meeting is open to the public in accordance with the Federal Advisory Committee Act (5 U.S.C. app. 2). If you wish to offer oral public comments during the public comments periods of the meetings, you must register in advance through Eventbrite *https://www.eventbrite.com/o/office-of-government-information-services-7515239993.* You must provide an email address so that we can provide you with information to access the meeting online. Public comments will be limited to three minutes per individual. We will also live-stream the meeting on the National Archives YouTube channel, *https://www.youtube.com/user/usnationalarchives,* and include a captioning option. To request additional accommodations (*e.g.,* a transcript), email *foia-advisory-committee@nara.gov* or call 202.741.5770. Members of the media who wish to register, those who are unable to register online, and those who require special accommodations, should contact Kirsten Mitchell (contact information listed above).

Tasha Ford,

Committee Management Officer.

[FR Doc. 2023–24563 Filed 11–6–23; 8:45 am]

BILLING CODE 7515–01–P

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

Institute of Museum and Library Services

Notice of Proposed Information Collection Requests: Native American Library Services Basic Grants Notice of Funding Opportunity

AGENCY: Institute of Museum and Library Services, National Foundation on the Arts and the Humanities.

ACTION: Notice, request for comments, collection of information.

SUMMARY: The Institute of Museum and Library Services (IMLS), as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act. This pre-clearance consultation program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. The purpose of this Notice is to communicate our intent to request renewal of the clearance for IMLS's Native American Library Services Basic Grants, a discretionary grant program designed to assist Native American tribes in improving library services for their communities. A copy of the proposed information collection request can be obtained by contacting the individual listed below in the **ADDRESSES** section of this Notice.

DATES: Written comments must be submitted to the office listed in the addressee section below on or before January 6, 2024.

ADDRESSES: Send comments to Sandra Narva, Acting Director of Grants Policy and Management, Office of Grants Policy and Management, Institute of Museum and Library Services, 955 L'Enfant Plaza North SW, Suite 4000, Washington, DC 20024–2135. Ms. Narva can be reached by telephone: 202–653–

4634, or by email at *snarva@imls.gov.* Office hours are from 8:30 a.m. to 5 p.m., E.T., Monday through Friday, except federal holidays.

Persons who are deaf or hard of hearing (TTY users) can contact IMLS at 202–207–7858 via 711 for TTY-Based Telecommunications Relay Service.

FOR FURTHER INFORMATION CONTACT: Jennifer Himmelreich, Senior Program Officer, Office of Library Services, Institute of Museum and Library Services, 955 L'Enfant Plaza North SW, Suite 4000, Washington DC 20024–2135. Ms. Himmelreich can be reached by telephone at 202–653–4797, or by email at *jhimmelreich@imls.gov.* Persons who are deaf or hard of hearing (TTY users) can contact IMLS at 202–207–7858 via 711 for TTY-Based Telecommunications Relay Service.

SUPPLEMENTARY INFORMATION: IMLS is particularly interested in public comments that help the agency to:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques, or other forms of information technology, *e.g.,* permitting electronic submissions of responses.

I. Background

The Institute of Museum and Library Services is the primary source of federal support for the Nation's libraries and museums. We advance, support, and empower America's museums, libraries, and related organizations through grant-making, research, and policy development. To learn more, visit *www.imls.gov.*

II. Current Actions

The purpose of the Native American Library Services Basic Grants Program is to assist Native American tribes in improving library services for their communities. IMLS recognizes that information needs and approaches to meeting them are evolving at an unprecedented pace in all communities, and to operate within this environment effectively for the benefit of their users, libraries must be able to both strengthen existing services and move quickly to adopt new and emerging technologies.

The two goals for this program will be (1) to improve services for learning and accessing information in a variety of formats to support needs for education, workforce development, economic and business development, health information, critical thinking skills, and digital literacy skills; and (2) to enhance the skills of the current library workforce and leadership through training, continuing education, and opportunities for professional development.

Agency: Institute of Museum and Library Services.

Title: Native American Library Services Basic Grants Notice of Funding Opportunity.

OMB Control Number: 3137–0093.

Agency Number: 3137.

Respondents/Affected Public: Federally Recognized Indian Tribes.

Total Estimated Number of Annual Respondents: TBD.

Frequency of Response: Once per request.

Average Minutes/Hours per Response: TBD.

Total Estimated Number of Annual Burden Hours: TBD.

Cost Burden (dollars): TBD.

Public Comments Invited: Comments submitted in response to this Notice will be summarized and/or included in the request for OMB's clearance of this information collection.

Dated: November 1, 2023.

Suzanne Mbollo,

Grants Management Specialist, Institute of Museum and Library Services.

[FR Doc. 2023–24540 Filed 11–6–23; 8:45 am]

BILLING CODE 7036–01–P

NATIONAL SCIENCE FOUNDATION

Sunshine Act Meetings

The National Science Board hereby gives notice of the scheduling of a teleconference of the National Science Board/National Science Foundation Commission on Merit Review (MRX) for the transaction of National Science Board business pursuant to the NSF Act and the Government in the Sunshine Act.

TIME AND DATE: Wednesday, November 8, 2023, from 12:00–1:00 p.m. EST.

PLACE: This meeting will be via videoconference through the National Science Foundation, 2415 Eisenhower Avenue, Alexandria, VA 22314.

STATUS: Closed.

MATTERS TO BE CONSIDERED: The agenda is: Committee Chair's opening remarks regarding the agenda; Discussion of data collection workplan to obtain information that informs MRX recommendations and suggestions for the National Science Foundation; and Closing remarks.

CONTACT PERSON FOR MORE INFORMATION: Point of contact for this meeting is: Chris Blair, *cblair@nsf.gov,* 703/292–7000. Meeting information and updates may be found at *www.nsf.gov/nsb.*

Christopher Blair,

Executive Assistant to the National Science Board Office.

[FR Doc. 2023–24658 Filed 11–3–23; 11:15 am]

BILLING CODE 7555–01–P

NATIONAL SCIENCE FOUNDATION

Notice of Permit Applications Received Under the Antarctic Conservation Act of 1978

AGENCY: National Science Foundation.

ACTION: Notice of permit applications received.

SUMMARY: The National Science Foundation (NSF) is required to publish a notice of permit applications received to conduct activities regulated under the Antarctic Conservation Act of 1978. NSF has published regulations under the Antarctic Conservation Act in the Code of Federal Regulations. This is the required notice of permit applications received.

DATES: Interested parties are invited to submit written data, comments, or views with respect to this permit application by December 7, 2023. This application may be inspected by interested parties at the Permit Office, address below.

ADDRESSES: Comments should be addressed to Permit Office, Office of Polar Programs, National Science Foundation, 2415 Eisenhower Avenue, Alexandria, Virginia 22314 or *ACApermits@nsf.gov.*

FOR FURTHER INFORMATION CONTACT: Andrew Titmus, ACA Permit Officer, at the above address, 703–292–4479.

SUPPLEMENTARY INFORMATION: The National Science Foundation, as directed by the Antarctic Conservation Act of 1978 (Pub. L. 95–541, 45 CFR 670), as amended by the Antarctic Science, Tourism and Conservation Act of 1996, has developed regulations for the establishment of a permit system for various activities in Antarctica and designation of certain animals and certain geographic areas as requiring special protection. The regulations

establish such a permit system to designate Antarctic Specially Protected Areas.

Application Details

1. *Applicant* Permit Application: 2024–014

Chris Eckstrom, Frans Lanting Studio, 108 High Road at Delaware Avenue, Santa Cruz, CA 95060.

Activity for Which Permit is Requested

Waste Management. The applicant seeks an Antarctic Conservation Act permit to fly a small battery- operated remotely piloted aircraft systems (RPAS) to take scenic photos and film the Antarctic for marketing, educational and commercial activities. The RPAS would not be flown over concentrations of birds or mammals or over Antarctic Specially Protected Areas. The RPAS would only be flown by the applicant who has extensive piloting experience in fair weather conditions. Several measures would be taken to prevent against loss of the RPAS. The applicant is seeking a Waste Permit to cover any accidental releases that may result from flying a UAV.

Location

Antarctic Peninsula Region

Dates of Permitted Activities

January 1, 2024–January 15, 2024

Kimiko S Bowens-Knox,

Program Analyst, Office of Polar Programs.

[FR Doc. 2023–24541 Filed 11–6–23; 8:45 am]

BILLING CODE 7555–01–P

NATIONAL SCIENCE FOUNDATION

Proposal Review; Notice of Meetings

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation (NSF) announces its intent to hold proposal review meetings throughout the year. The purpose of these meetings is to provide advice and recommendations concerning proposals submitted to the NSF for financial support. The agenda for each of these meetings is to review and evaluate proposals as part of the selection process for awards. The review and evaluation may also include assessment of the progress of awarded proposals. These meetings will primarily take place at NSF's headquarters, 2415 Eisenhower Avenue, Alexandria, VA 22314.

These meetings will be closed to the public. The proposals being reviewed include information of a proprietary or confidential nature, including technical information; financial data, such as salaries; and personal information concerning individuals associated with the proposals. These matters are exempt under 5 U.S.C. 552b(c), (4) and (6) of the Government in the Sunshine Act. NSF will continue to review the agenda and merits of each meeting for overall compliance of the Federal Advisory Committee Act.

These closed proposal review meetings will not be announced on an individual basis in the **Federal Register**. NSF intends to publish a notice similar to this on a quarterly basis. For an advance listing of the closed proposal review meetings that include the names of the proposal review panel and the time, date, place, and any information on changes, corrections, or cancellations, please visit the NSF website: *https://new.nsf.gov/events/proposal-review-panels.* This information may also be requested by telephoning, 703/292–8687.

Dated: November 2, 2023.

Crystal Robinson,

Committee Management Officer.

[FR Doc. 2023–24542 Filed 11–6–23; 8:45 am]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2023–0001]

Sunshine Act Meetings

TIME AND DATE: Weeks of November 6, 13, 20, 27, December 4, 11, 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 and closed.

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 November 6, 2023

There are no meetings scheduled for the week of November 6, 2023.

Week of November 13, 2023—Tentative

Tuesday, November 14, 2023

10:00 a.m. Briefing on Security Issues (Closed Ex. 1)

Tuesday, November 14, 2023

2:30 p.m. Succession Planning (Closed Ex. 2)

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/.*

Week of November 20, 2023—Tentative

There are no meetings scheduled for the week of November 20, 2023.

Week of November 27, 2023—Tentative

There are no meetings scheduled for the week of November 27, 2023.

Week of December 4, 2023—Tentative

There are no meetings scheduled for the week of December 4, 2023.

Week of December 11, 2023—Tentative

Tuesday, December 12, 2023

10:00 a.m. Discussion of the Administration's Short- and Long-term Domestic Uranium Fuel Strategy (Public Meeting) (Contact: Wesley Held: 301–287–3591)

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/.*

Thursday, December 14, 2023

10:00 a.m. Briefing on Equal Employment Opportunity, Affirmative Employment, and Small Business (Public Meeting) (Contact: Wesley Held: 301–287–3591)

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/*.

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: November 2, 2023.

For the Nuclear Regulatory Commission.

Wesley W. Held,

Policy Coordinator, Office of the Secretary.

[FR Doc. 2023–24644 Filed 11–3–23; 11:15 am]

BILLING CODE 7590–01–P

OFFICE OF PERSONNEL MANAGEMENT

Chief Human Capital Officers (CHCO) Council; Virtual Public Meeting

AGENCY: Office of Personnel Management.

ACTION: Notice of meeting.

SUMMARY: The Chief Human Capital Officers (CHCO) Council plans to meet on Tuesday, December 12, 2023. The meeting will start at 9:00 a.m. EST and will be held on Zoom.

FOR FURTHER INFORMATION CONTACT: Bridget Patterson, Administrative Support Specialist, *CHCOCouncil@opm.gov*, 202–936–0321.

SUPPLEMENTARY INFORMATION: The purpose of the meeting is for the CHCO Council to host their annual public meeting per *Public Law 107–296.*

The CHCO Council is the principal interagency forum to advise and coordinate the activities of the agencies of its members on such matters as modernization of human resources systems, improved quality of human resources information and legislation affecting human resources operations and organizations.

Persons desiring to attend this public meeting of the Chief Human Capital Officers Council should contact OPM at least 5 business days in advance of the meeting date at the email address shown below. Note: If you require an accommodation, please contact *chcocouncil@opm.gov* no later than December 5, 2023.

Office of Personnel Management.

Kayyonne Marston,

Federal Register Liaison.

[FR Doc. 2023–24596 Filed 11–6–23; 8:45 am]

BILLING CODE 6325–46–P

OFFICE OF PERSONNEL MANAGEMENT

[Docket ID: OPM–2023–0038]

Submission for Review: 3206–0246, CyberCorps®: Scholarship for Service (SFS) Registration System

AGENCY: Office of Personnel Management.

ACTION: 60-Day notice and request for comments.

SUMMARY: The Office of Personnel Management (OPM), Human Resources Solutions, offers the general public and other Federal agencies the opportunity to comment on the extension with change of a currently approved information collection request (ICR): 3206–0246, CyberCorps®: Scholarship for Service (SFS) Registration system.

DATES: Comments are encouraged and should be received on or before January 8, 2024.

ADDRESSES: You may submit comments, identified by docket number and title, by the following method:

- Federal Rulemaking Portal: *https://www.regulations.gov.* Follow the instructions for submitting comments.

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

FOR FURTHER INFORMATION CONTACT: A copy of this ICR, with applicable supporting documentation, may be obtained by contacting: U.S. Office of Personnel Management, Student Programs Branch, Attention: Laura Knowles, 601 East 12th Street, Kansas City, MO 64106–2826 or via electronic email to *sfs@opm.gov* or phone at 202–246–2740.

SUPPLEMENTARY INFORMATION: The CyberCorps® Scholarship for Service (SFS) Program was established by the National Science Foundation, in collaboration with the U.S. Office of Personnel Management and the Department of Homeland Security, in accordance with the Cybersecurity Enhancement Act of 2014 (Pub. L.: 113–274), as amended by the National Defense Authorization Act and CHIPS and Science Act and codified at 15 U.S.C. 7442. This initiative reflects the critical need for Information Technology (IT) professionals, industrial control system security professionals, and security managers in government. The goals of the SFS Program are to: (1) increase the number of qualified and diverse cybersecurity candidates for government cybersecurity positions; (2) improve the national capacity for the education of cybersecurity professionals and research and development workforce; (3) hire, monitor, and retain high-quality CyberCorps® graduates in the cybersecurity mission of Federal Government; and (4) strengthen partnerships between institutions of higher education and Federal, state, local, and tribal governments. OPM partners with NSF in this program by aiding in matching SFS students to potential agencies, coordinating students' transition into government employment, monitoring students' compliance with program requirements, and assessing whether the program helps meet the personnel needs of the federal government for information infrastructure protection.

The SFS Program provides funds to institutions of higher education for student scholarships in support of education in areas relevant to cybersecurity and cybersecurity-related aspects of other related fields as appropriate, including artificial intelligence, quantum computing, and aerospace. Students identified by their institutions for SFS Scholarships must meet selection criteria based on prior academic performance, likelihood of success in obtaining the degree, and suitability for government employment. Each scholarship recipient, as a condition of receiving a scholarship under the program, enters into an agreement under which the recipient agrees to work during the summer between academic terms, and work for a period equal to the length of the scholarship, following receipt of the student's degree, in a position related to cybersecurity and in the cyber security mission of—

(1) an executive agency (as defined in 5 U.S.C. 105);

(2) Congress, including any agency, entity, office, or commission established in the legislative branch;

(3) an interstate agency;

(4) a State, local, or Tribal government;

(5) a State, local, or Tribal government-affiliated non-profit that is critical infrastructure (as defined in section 1016(e) of the USA Patriot Act (42 U.S.C. 5195c(e)); or

(6) as an educator in the field of cybersecurity at a qualified institution of higher education that provides SFS scholarships.

Additionally, scholarship recipients agree to provide OPM (in coordination

with the NSF) and the qualified institution of higher education with annual verifiable documentation of post-award employment and up-to-date contact information.

As required by 15 U.S.C. 7442, an SFS scholarship recipient is financially liable to the United States if the individual: fails to maintain an acceptable level of academic standing; is dismissed from the applicable institution of higher education for disciplinary reasons; withdraws from the eligible degree program before completing the program; declares that they do not intend to fulfill the post-award employment obligation; or fails to maintain or fulfill any of the post-graduation or post-award employment obligations or requirements. Failure to satisfy the academic requirements of the program or to complete the service requirement results in forfeiture of the scholarship award, which must either be repaid or reverted by the institution to a student loan pro-rated accordingly to reflect partial service completed.

Approval of the SFS Registration system is necessary to continue management and operation of the program in accordance with the Cybersecurity Enhancement Act of 2014 (Pub. L.: 113–274), as amended by the National Defense Authorization Act and CHIPS and Science Act of 2022 (15 U.S.C. 7442), and to facilitate the timely registration, selection, placement, and monitoring of program-enrolled scholarship recipients in Government agencies.

The burden estimate associated with this request is increasing from past years. This is due to three primary reasons: an increased number of scholars, increased reporting requirements, and reassessment of previous reporting of burden estimates. Each year NSF awards grants to additional universities to use for scholarships under the SFS program which increases the number of students that receive scholarships, and consequently, the number of scholars that need to be monitored through the completion of their service commitment. Each student awarded a scholarship must register their profile and resume with the SFS website for the successful facilitation of their placement with a government agency, and they must maintain up-to-date profile and employment information through program completion. The annual employment verification and profile maintenance was not previously collected, and to meet this requirement, scholars and their affiliated academic officials must report employment and up-to-date profile information. Finally, the previous data collection requests only included new scholars registering with the SFS portal. Costs attributable to the requirement for scholars to provide annual employment verification and to maintain an up-to-date profile have been captured in this burden estimate in addition to the information collected from academic and agency officials.

OPM is particularly interested in comments that:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
3. Enhance the quality, utility, and clarity of the information to be collected; and
4. Ways in which we can minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses.

Analysis

Agency: Office of Personnel Management.

Title: Scholarship for Service (SFS) Program internet Site

OMB Number: 3206–0246.

Frequency: Annually.

Affected Public: Individuals or Households.

Number of Respondents: 1,303.

Estimated Time per Respondent:

New Scholars: 30 minutes.

Existing Scholars: 15 minutes.

Principal Investigators/Academic Officials: 35 minutes.

Agency Officials: 10 minutes.

Total Burden Hours: 965 hours.

Office of Personnel Management.

Kayyonne Marston,

Federal Register Liaison.

[FR Doc. 2023–24534 Filed 11–6–23; 8:45 am]

BILLING CODE 6325–43–P

POSTAL REGULATORY COMMISSION

[Docket Nos. CP2023–95; MC2024–30 and CP2024–30]

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:* November 8, 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:

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I. Introduction
II. Docketed Proceeding(s)

I. Introduction

The Commission gives notice that the Postal Service filed request(s) for the Commission to consider matters related to negotiated service agreement(s). The request(s) may propose the addition or removal of a negotiated service agreement from the Market Dominant or the Competitive product list, or the modification of an existing product currently appearing on the Market Dominant or the Competitive product list.

Section II identifies the docket number(s) associated with each Postal Service request, the title of each Postal Service request, the request's acceptance date, and the authority cited by the Postal Service for each request. For each request, the Commission appoints an officer of the Commission to represent the interests of the general public in the proceeding, pursuant to 39 U.S.C. 505 (Public Representative). Section II also establishes comment deadline(s) pertaining to each request.

The public portions of the Postal Service's request(s) can be accessed via the Commission's website (*http://www.prc.gov*). Non-public portions of the Postal Service's request(s), if any, can be accessed through compliance with the requirements of 39 CFR 3011.301.[1]

The Commission invites comments on whether the Postal Service's request(s) in the captioned docket(s) are consistent

[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).

with the policies of title 39. For request(s) that the Postal Service states concern Market Dominant product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3622, 39 U.S.C. 3642, 39 CFR part 3030, and 39 CFR part 3040, subpart B. For request(s) that the Postal Service states concern Competitive product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3632, 39 U.S.C. 3633, 39 U.S.C. 3642, 39 CFR part 3035, and 39 CFR part 3040, subpart B. Comment deadline(s) for each request appear in section II.

II. Docketed Proceeding(s)

1. *Docket No(s).:* CP2023–95; *Filing Title:* USPS Notice of Amendment to Priority Mail Express, Priority Mail & First-Class Package Service Contract 80, Filed Under Seal; *Filing Acceptance Date:* October 31, 2023; *Filing Authority:* 39 CFR 3035.105; *Public Representative:* Christopher C. Mohr; *Comments Due:* November 8, 2023.

2. *Docket No(s).:* MC2024–30 and CP2024–30; *Filing Title:* USPS Request to Add Priority Mail & USPS Ground Advantage Contract 86 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* October 31, 2023; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Christopher C. Mohr; *Comments Due:* November 8, 2023.

This Notice will be published in the **Federal Register**.

Erica A. Barker,

Secretary.

[FR Doc. 2023–24567 Filed 11–6–23; 8:45 am]

BILLING CODE 7710–FW–P

POSTAL REGULATORY COMMISSION

[Docket Nos. MC2024–31 and CP2024–31; MC2024–32 and CP2024–32]

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:* November 9, 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.

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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).:* MC2024–31 and CP2024–31; *Filing Title:* USPS Request to Add Priority Mail & USPS Ground Advantage Contract 87 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* November 1, 2023; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Kenneth R. Moeller; *Comments Due:* November 9, 2023.

2. *Docket No(s).:* MC2024–32 and CP2024–32; *Filing Title:* USPS Request to Add Priority Mail & USPS Ground Advantage Contract 88 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* November 1, 2023; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Kenneth R. Moeller; *Comments Due:* November 9, 2023.

This Notice will be published in the **Federal Register**.

Erica A. Barker,

Secretary.

[FR Doc. 2023–24595 Filed 11–6–23; 8:45 am]

BILLING CODE 7710–FW–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98843; File No. SR–NASDAQ–2023–025]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Order Approving a Proposed Rule Change Related to Notification and Disclosure of Reverse Stock Splits

November 1, 2023.

I. Introduction

On June 21, 2023, The Nasdaq Stock Market LLC (''Nasdaq'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change related to notification and disclosure of reverse stock splits. The proposed rule change was published for comment in the **Federal Register** on August 3, 2023.[3] On September 14,

[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).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 98014 (July 28, 2023), 88 FR 51376 (''Notice''). Comment received by the Commission on the proposed rule

Continued

2023, the Commission extended the time period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to approve or disapprove the proposed rule change to November 1, 2023.[4] This order approves the proposed rule change.

II. Description of the Proposed Rule Change

Nasdaq is proposing to amend its rules regarding the notification and disclosure of reverse stock splits in light of recent increased volume in reverse stock split activity.[5] Currently, a reverse stock split is considered a ''Substitution Listing Event'' under Nasdaq Rule 5005(a)(44).[6] Nasdaq Rule 5250(e)(4) requires a company to notify Nasdaq about any ''Substitution Listing Event (other than a re-incorporation or a change to a company's place of organization) no later than 15 calendar days prior to the implementation of such event by filing the appropriate form as designated by Nasdaq.'' While public disclosure of a reverse stock split is not specifically addressed under Nasdaq's current rules, Nasdaq Rule 5250(b)(1) requires a company to make ''prompt disclosure'' of ''any material information that would reasonably be expected to affect the value of its securities or influence investors' decisions,'' which Nasdaq interprets to include details on reverse stock splits.[7] While ''prompt'' disclosure is not expressly defined in the Exchange's rules, Nasdaq states that it has published an FAQ stating that ''[t]his disclosure should be disseminated prior to, or in conjunction with, the announcements that Corporate Data Operations will make on the day prior to the market effective date at approximately 1:00 p.m.'' [8]

Accordingly, Nasdaq proposes to amend its rules to require a company conducting a reverse stock split to notify Nasdaq about certain details of the reverse stock split no later than 12 p.m. ET five business days prior to the anticipated market effective date, and to expressly require in its rules a company to make public disclosure about the reverse stock split at least two business days (no later than 12:00 p.m. ET) prior to the anticipated market effective date.[9] Specifically, Nasdaq proposes to add new Rules 5250(b)(4), 5250(e)(7), and IM–5250–3, as discussed in more detail below, as well as update the information that a company must disclose about a reverse stock split to the Exchange on the Company Event Notification Form.[10] Nasdaq also proposes to amend Rule 5250(b)(1) concerning disclosure of material information to specify that a company should refer to Rules 5250(b)(4) and 5250(e)(7) for the disclosure and notification requirements related to reverse stock splits.[11]

Proposed Nasdaq Rule 5250(b)(4) will specify that a company must provide public notice about a reverse stock split using a Regulation FD compliant method no later than 12:00 p.m. ET at least two business days prior to the proposed market effective date.[12] In addition, the company shall, prior to the release of this information, provide notice of such disclosure to Nasdaq's MarketWatch Department, at least ten minutes prior to public announcement if the public release of the material information is made between 7:00 a.m. to 8:00 p.m. ET.[13] If the public release of this information is made outside the hours of 7:00 a.m. to 8:00 p.m. ET, Nasdaq companies must notify MarketWatch of the material information prior to 6:50 a.m. ET.[14] The prior notice of this disclosure must be made to the MarketWatch Department through the electronic disclosure submission system available at *https://www.nasdaq.net,* except in emergency situations, when notification may instead be provided by telephone or facsimile.[15]

Proposed Nasdaq Rule 5250(e)(7) will specify that, for a reverse stock split, the company must notify Nasdaq by submitting a complete Company Event Notification Form [16] no later than 12:00

change is available on the Commission's website at: *https://www.sec.gov/comments/sr-nasdaq-2023-025/srnasdaq2023025.htm.* The Commission received two comment letters in support of the proposed rule change. *See* Letter from Thomas M. Merritt, Deputy General Counsel, Virtu Financial, Inc., dated August 23, 2023 (''Virtu Letter''); Letter from Imran Javaid, Director and Association General Counsel, Robinhood Markets, Inc., dated October 24, 2023 (''Robinhood Letter'').

[4] *See* Securities Exchange Act Release No. 98386, 88 FR 64936 (Sept. 20, 2023).

[5] Nasdaq states that in 2022, Nasdaq processed 196 reverse stock splits, compared to 31 in 2021 and 94 in 2020. *See* Notice, *supra* note 3, at 51376. As of June 23, 2023, Nasdaq states that it has processed 164 reverse stock splits, and projects significantly more throughout 2023. *See id.* In most cases, Nasdaq observes, companies are conducting reverse stock splits to achieve compliance with Nasdaq's $1 bid price requirement to remain on the Capital Market tier. *See id.* Nasdaq Rule 5550(a)(2) states that a company that has its Primary Equity Security listed on the Capital Market must have a minimum bid price of at least $1 per share. *See also* Nasdaq Rule 5450(a)(1) (Global and Global Select Markets).

[6] Nasdaq Rule 5505(a)(44) states, in part, that a ''Substitution Listing Event'' means: ''a reverse stock split, re-incorporation or a change in the Company's place of organization, the formation of a holding company that replaces a listed Company, reclassification or exchange of a Company's listed shares for another security, the listing of a new class of securities in substitution for a previously-listed class of securities, a business combination described in IM–5101–2, a change in the obligor of a listed debt security, or any technical change whereby the Shareholders of the original Company receive a share-for-share interest in the new Company without any change in their equity position or rights.''

[7] *See* Notice, *supra* note 3, at 51376.

[8] *See* Nasdaq FAQs-Listings #317, *available at https://listingcenter.nasdaq.com/Material_search.aspx?materials=317&mcd=LQ&criteria=2&cid=120%2C1%2C145%2C108%2C157%2C14%2C22%2C126%2C142%2C29%2C107%2C34%2C37%2C38%2C45%2C16%2C110%2C52%2C71%2C156%2C69%0A%0A.* Nasdaq states that these announcements are published as Equity Corporate Action Alerts on *https://www.nasdaqtrader.com/* (the ''Nasdaq Trader website'') on the day prior to the reverse stock split. *See* Notice, *supra* note 3, at 51377, n.7. *See also* infra note 12.

[9] For example, Nasdaq states that if a company desires to effect a reverse stock split with a market effective date of Monday, July 24, the company would have to provide Nasdaq with a draft of the disclosure required by proposed Nasdaq Rule 5250(b)(4) and a complete Company Event Notification Form by 12:00 p.m. ET on Monday, July 17, and provide the public disclosure by 12:00 p.m. ET by Thursday, July 20 (assuming there are no holidays during these dates). *See id.* at 51376, n.5.

[10] Nasdaq also proposes to delete the existing reference to a reverse stock split in Nasdaq Rule 5005(a)(44) that currently defines a ''Substitution Listing Event'' to include a reverse stock split. *See supra* note 6 and accompanying text.

[11] Nasdaq also proposes clarifying edits in Nasdaq Rule 5250(b)(1) to specify that the time deadlines refer to Eastern Time.

[12] Currently, the Nasdaq Trader website announcement and the company's press release are published the day prior to a reverse split, and includes material information such as the CUSIP number and split ratio. Nasdaq states that if a market participant inadvertently misses the announcement, they may continue to accept orders at the pre-split price, rather than the post-split adjusted price, which could lead to volatility in the stock price and trading inaccurate share amounts. *See id.* at 51378. Accordingly, proposed Nasdaq Rule 5250(b)(4) would provide market participants with at least one additional business day to review the company's public disclosure about the reverse stock split and update their systems. *See id.*

[13] *See* proposed Nasdaq Rule 5250(b)(4). The timing for notifying Nasdaq about disclosure of material news before the public announcement of a reverse stock split in the proposed rule mirrors the timing for notifying Nasdaq's MarketWatch Department about the disclosure of other material news in current Nasdaq Rule 5250(b)(1).

[14] *See id.*

[15] *See id. See also* IM–5250–1, which states that examples of an emergency situation include: lack of computer or internet access; technical problems on either the company or Nasdaq system or an incompatibility between those systems; and a material development such that no draft disclosure document exists, but immediate notification to MarketWatch is important based on the material event.

[16] Nasdaq filed the text of the proposed Company Event Notification Form (''Form'') as Exhibit 3 to Nasdaq's rule filing. *See* Notice, *supra* note 3, at 51377, n.9. The proposed Company Event Notification Form to be used for reverse mergers is being modified, in conjunction with the rule changes being approved in this order, to require a company to provide additional information to Nasdaq on the reverse merger than is currently required in the Company Event Notification Form. *See* Exhibit 3 to Nasdaq's rule filing. The Form will

p.m. ET five business days prior to the proposed market effective date. The submission must include all information required by the form and a draft of the disclosure required by proposed Nasdaq Rule 5250(b)(4).[17] Nasdaq will not process a reverse stock split unless the requirements set forth in proposed Rules 5250(b)(4) and 5250(e)(7) have been timely satisfied.[18] Additionally, if a company takes legal action to effect a reverse stock split notwithstanding its failure to timely satisfy these requirements, or provides incomplete or inaccurate information about the timing or ratio of the reverse stock split in its public disclosure,[19] Nasdaq will halt the stock in accordance with the procedure set forth in Nasdaq Equity 4, Rule 4120, that provides Nasdaq with the authority to halt trading to permit the dissemination of material news.[20]

Proposed Nasdaq IM–5250–3 repeats the requirements of both proposed Nasdaq Rules 5250(b)(4) and (e)(7). According to Nasdaq this will provide issuers and market participants with additional transparency by having all information related to the reverse split process in one location in the Nasdaq rulebook.[21]

Nasdaq believes the proposed amendments will provide additional transparency and clarity to companies and market participants by specifying the notification and disclosure requirements related to reverse stock splits.[22] Nasdaq states that the requirement for companies to submit a completed Company Event Notification Form no later than 12:00 p.m. ET five business days prior to the market effective date will help ensure that Nasdaq has timely and complete information to process the reverse stock split prior to the effective date.[23] Nasdaq also states that by shortening the deadline for the notification from 15 calendar days to five business days, Nasdaq believes that companies will be able to provide complete information in a single submission of the form, which they often cannot do today.[24] As such, Nasdaq states the shorter time frame will simplify a company's ability to submit a completed Company Event Notification Form because all relevant information can be provided in one submission closer to the market effective date and thereby improve Nasdaq's processing of the forms and reduce the possibility of errors to the forms.[25] Additionally, Nasdaq states the requirement under proposed Nasdaq Rule 5250(e)(7) for companies to submit a draft of the Regulation FD disclosure required by proposed Rule 5250(b)(4) will help ensure that the information disseminated to the market by the company aligns with Nasdaq's announcement, including the split ratio and market effective date.[26] Nasdaq also states that it would publish an announcement through the Nasdaq Trader website one and two business days prior to the market effective date.[27] Furthermore, Nasdaq states that the requirement under proposed Nasdaq Rule 5250(b)(4) for a company to make public disclosure about a reverse stock split no later than 12:00 p.m. ET two business days prior to the market effective date will help ensure that sufficient notice is provided to market participants, thereby allowing them to process the event in their systems.[28]

III. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[29] In particular, the Commission finds that the proposed rule change is consistent with section 6(b)(5) of the Act,[30] which requires, among other things, that a national securities exchange have rules 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; and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

As noted above, current Nasdaq Rule 5250(b)(1) requires a company to make ''prompt disclosure'' of ''any material information that would reasonably be expected to affect the value of its securities or influence investors' decisions,'' which Nasdaq interprets to include details on reverse stock splits.[31] In light of recent increased volume in reverse stock split activity, Nasdaq proposes to expressly set forth new notification and disclosure requirements for reverse stock splits in Nasdaq Rules 5250(b)(4), 5250(e)(7), and IM–5250–3.[32] The Exchange's proposal is reasonably designed to address this recent market activity, including for companies that are listed on the Nasdaq Capital Market tier, by providing additional transparency of reverse stock splits to investors through public disclosure of material information about such splits,[33] thus allowing them to better manage investment decisions.

Further, the Exchange has represented that the requirement for companies to

indicate the requirements for the company's notification to the Exchange and public under the newly adopted rules herein as well as require the company to provide information including: (1) split ratio; (2) new CUSIP number; (3) dates of board approval, shareholder approval, and DTC eligibility; and (4) the effective date of the reverse stock split.

[17] *See* proposed Nasdaq Rule 5250(e)(7).

[18] *See id.*

[19] For example, Nasdaq states that it will not process a proposed reverse stock split if the Company Event Notification Form does not include the new CUSIP number or a split ratio if the press release contains a split ratio or market effective date that is inconsistent with the draft submission previously provided to Nasdaq. *See* Notice, *supra* note 3, at 51377, n.12.

[20] *See* proposed Nasdaq Rule 4120(a)(1) and 5250(e)(7). Nasdaq has submitted a separate rule filing to adopt a new regulatory halt procedure specific to the pre-market trading and opening of a Nasdaq-listed security undergoing a reverse stock split. *See* Securities Exchange Act Release No. 98489 (September 22, 2023), 88 FR 66913 (September 28, 2023) (Notice of Filing of Proposed Rule Change to Amend Rule 4120 and Rule 4753).

[21] *See id.* at 51377.

[22] *See id.*

[23] *See id.*

[24] *See id.* For example, Nasdaq states that currently some companies may submit a form without CUSIP information, and then will email the CUSIP information to Nasdaq a few days later. *See id.* Additionally, some companies may not have received confirmation of DTC eligibility, and receive it closer to the market effective date of the reverse stock split. *See id.* Nasdaq also indicated that where a company is conducting a reverse stock split to demonstrate compliance with the minimum $1 bid price requirement, as many companies are doing to remain on Nasdaq's Capital Market tier, as described above in note 5, *supra,* the company may need to modify the ratio of the reverse stock split after providing initial notice due to changes in market conditions and the company's stock price. *See id.*

[25] *See id.* Nasdaq represents that the five business day timeframe still provides sufficient time for Nasdaq to process the notification. *See id.* at 51377, n.13.

[26] *See id.* at 51377.

[27] *See id.* at 51378. Nasdaq states that a company may publish a press release earlier than two business days prior to the market effective date of the reverse stock split. *See id.* at 51377, n. 15. However, Nasdaq states that it will only publish an announcement through the Nasdaq Trader website one and two business days prior to the reverse stock split. *See id.* As an example, Nasdaq states that if a company publishes a press release on Monday announcing a reverse stock split with a market effective date on Friday, Nasdaq will only publish an announcement through the Nasdaq Trader website on Wednesday and Thursday. *See id.*

[28] *See id. See also supra* note 12.

[29] 15 U.S.C. 78f(b). In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[30] 15 U.S.C. 78f(b)(5).

[31] *See supra* notes 7 and 8.

[32] *See supra* notes 10 and 11 and accompanying text.

[33] *See supra* note 16.

submit a completed Company Event Notification Form no later than 12:00 p.m. ET five business days prior to the market effective date will help ensure that Nasdaq has timely, complete, and accurate information to process the reverse stock split prior to the effective date.[34] While Nasdaq currently is required to receive notification and certain information about a reverse stock split no later than 15 calendar days before it is scheduled to occur, Nasdaq has represented in its proposal that this longer time frame creates issues because some of the terms of the reverse stock split may not be set or available at that time or may change before the reverse stock split is to occur. As Nasdaq has stated, shortening the timeframe for notifying the Exchange about a reverse stock split to five business days should help to reduce the possibility of errors and allow companies to provide more complete and accurate information about a reverse stock split in a single submission to Nasdaq. This can also inure to the benefit of investors by ultimately providing the marketplace with improved and timely information about a reverse stock split.

The Commission also believes that the other changes in proposed Nasdaq Rule 5250(e)(7) and to the Company Notification Form appear to be reasonable additions to address Nasdaq's and market participants' concerns about having adequate, accurate, and complete information in a timely manner about reverse stock splits. As described above, these changes include, among others, requiring companies to submit a draft of its public disclosure of the reverse stock split no later than 12 p.m. ET five business days prior to the market effective date so that the Exchange can ensure the disclosure aligns with the announcement Nasdaq will be making, including on the split ratio and effective date of the reverse split. In addition, as described above, new Nasdaq Rule 5250(e)(7) will specifically indicate that in certain circumstances such as when a company takes action to effect a reverse stock split but has failed to satisfy the rule's requirements or a company provides incomplete or inaccurate information about the timing or ratio of the reverse stock split in its public disclosure, Nasdaq will halt the trading in the stock in accordance with its provisions on material news halts in Equity Rule 4, Rule 4120(a)(1).

The proposal will also provide the investing public and other market participants with at least one additional business day of public notice to help reduce the risk that investors and brokers inadvertently miss the public announcement of the reverse stock split or fail to process the event in their systems, helping to maintain fair and orderly markets, and protecting investors and the public interest.[35]

The Commission also finds that the other changes in proposed Nasdaq Rule 5250(b)(1) and the addition of Nasdaq Rule 5250(b)(4) and IM–5250–3 will enhance the transparency of the reverse stock split disclosure process to issuers and investors. Finally, the Commission notes that the two comment letters received on the proposal were supportive.[36]

For the reasons discussed above, the Commission finds that the proposed rule change is consistent with section 6(b)(5) of the Act[37] and the rules and regulations thereunder applicable to a national securities exchange.

IV. Conclusion

It is therefore ordered, pursuant to section 19(b)(2) of the Act,[38] that the proposed rule change (SR–NASDAQ–2023–025), be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[39]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–24522 Filed 11–6–23; 8:45 am]

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[34] *See supra* note 23.

[35] *See supra* note 12 (noting concerns about market volatility in stock prices if a market participant misses the current one business day announcement and continues to accept orders at pre-split prices and trading inaccurate share amounts). The Exchange also state that it believes the changes to both the notification and disclosure requirements should help to address these concerns about trading volatility and potential price mistakes. *See* Notice, *supra* note 3, at 51378. *See also* proposed Nasdaq Rule 5250(b)(4).

[36] *See* Virtu Letter, *supra* note 3 (stating that, among other things, (i) shortening the notice requirement to Nasdaq from 15 calendar days to five business days before the planned reverse stock split would ''provide issuers with additional time to obtain more complete data and thorough information before reporting the planned corporate action to Nasdaq,'' and ''result in Nasdaq having more complete information in advance of the planned reverse split date to ensure that all of the technical requirements have been satisfied''; and (ii) increasing the public notice requirement to two business days ''will enable market participants to plan more effectively for a reverse stock split, which will contribute to the maintenance of fair, orderly, and efficient markets''); Robinhood Letter, *supra* note 3 (expressing general support for the proposal and, in particular, the requirement to increase the public notice requirement to two business days).

[37] 15 U.S.C. 78f(b)(5).

[38] 15 U.S.C. 78s(b)(2).

[39] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98833; File No. SR–ICC–2023–014]

Self-Regulatory Organizations; ICE Clear Credit LLC; Notice of Filing of Proposed Rule Change Relating to the Clearance of Additional Credit Default Swap Contracts

November 1, 2023.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934,[1] and Rule 19b–4,[2] notice is hereby given that on October 25, 2023, ICE Clear Credit LLC (''ICC'') filed with the Securities and Exchange Commission the proposed rule change as described in Items I, II and III below, which Items have been prepared primarily by ICC. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Clearing Agency's Statement of the Terms of Substance of the Proposed Rule Change

The principal purpose of the proposed rule change is to revise the ICC Rulebook (the ''Rules'') to provide for the clearance of additional Standard Emerging Market Sovereign Single Name CDS contracts (''EM Contracts'').

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, ICC 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. ICC has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of these statements.

(A) Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

(a) Purpose

The purpose of the proposed rule change is to adopt rules that will provide the basis for ICC to clear additional CDS contracts. ICC proposes to make such change effective following Commission approval of the proposed rule change. ICC believes the addition of these EM Contracts will benefit the market for CDS by providing market participants the benefits of clearing, including reduction in counterparty risk, and safeguarding of margin assets

[1] 15 U.S.C. 78s(b)(1)

[2] 17 CFR 240.19b–4

pursuant to clearing house rules. Clearing of the additional EM Contracts will not require any changes to ICC's Risk Management Framework or other policies and procedures constituting rules within the meaning of the Securities Exchange Act of 1934 (''Act'').

ICC proposes amending Subchapter 26D of its Rules to provide for the clearance of additional EM Contracts, specifically the Kingdom of Morocco and the Federal Republic of Nigeria. These additional EM Contracts have terms consistent with the other EM Contracts approved for clearing at ICC and governed by Subchapter 26D of the Rules. Minor revisions to Subchapter 26D (Standard Emerging Market Sovereign (''SES'') Single Name) are made to provide for clearing the additional EM Contracts. Specifically, in Rule 26D–102 (Definitions), ''Eligible SES Reference Entities'' is modified to include the Kingdom of Morocco and the Federal Republic of Nigeria in the list of specific Eligible SES Reference Entities to be cleared by ICC.

(b) Statutory Basis

Section 17A(b)(3)(F) of the Act [3] requires, among other things, that the rules of a clearing agency be designed to promote the prompt and accurate clearance and settlement of securities transactions and, to the extent applicable, derivative agreements, contracts, and transactions; to assure the safeguarding of securities and funds which are in the custody or control of ICC or for which it is responsible; and to comply with the provisions of the Act and the rules and regulations thereunder. The additional EM Contracts proposed for clearing are similar to the EM Contracts currently cleared by ICC and will be cleared pursuant to ICC's existing clearing arrangements and related financial safeguards, protections, and risk management procedures. Clearing of the additional EM Contracts will allow market participants an increased ability to manage risk and ensure the safeguarding of margin assets pursuant to clearing house rules. ICC believes that acceptance of the new EM Contracts, on the terms and conditions set out in the Rules, is consistent with the prompt and accurate clearance and settlement of securities transactions and derivative agreements, contracts and transactions cleared by ICC, the safeguarding of securities and funds in the custody or control of ICC or for which it is responsible, and the protection of investors and the public interest, within the meaning of section 17A(b)(3)(F) of the Act.[4]

Clearing of the additional EM Contracts will also satisfy the relevant requirements of Rule 17Ad–22,[5] as set forth in the following discussion.

Rule 17Ad–22(e)(6)(i) [6] requires each covered clearing agency to establish, implement, maintain, and enforce written policies and procedures reasonably designed to cover its credit exposures to its participants by establishing a risk-based margin system that, at a minimum, considers, and produces margin levels commensurate with, the risks and particular attributes of each relevant product, portfolio, and market. In terms of financial resources, ICC will apply its existing margin methodology to the new EM Contracts, which are similar to the EM Contracts currently cleared by ICC. ICC believes that this model will provide sufficient margin requirements to cover its credit exposure to its clearing members from clearing such contracts, consistent with the requirements of Rule 17Ad–22(e)(6)(i).[7]

Rule 17Ad–22(e)(4)(ii) [8] requires each covered clearing agency to establish, implement, maintain, and enforce written policies and procedures reasonably designed to effectively identify, measure, monitor, and manage its credit exposures to participants and those arising from its payment, clearing, and settlement processes, including by maintaining additional financial resources at the minimum to enable it to cover a wide range of foreseeable stress scenarios that include, but are not limited to, the default of the two participant families that would potentially cause the largest aggregate credit exposure for the covered clearing agency in extreme but plausible market conditions. ICC believes its Guaranty Fund, under its existing methodology, will, together with the required initial margin, provide sufficient financial resources to support the clearing of the additional EM Contracts, consistent with the requirements of Rule 17Ad–22(e)(4)(ii).[9]

Rule 17Ad–22(e)(17) [10] requires, in relevant part, each covered clearing agency to establish, implement, maintain, and enforce written policies and procedures reasonably designed to manage its operational risks by (i) identifying the plausible sources of operational risk, both internal and external, and mitigating their impact through the use of appropriate systems, policies, procedures, and controls; and (ii) ensuring that systems have a high degree of security, resiliency, operational reliability, and adequate, scalable capacity. ICC believes that its existing operational and managerial resources will be sufficient for clearing of the additional EM Contracts, consistent with the requirements of Rule 17Ad–22(e)(17),[11] as the new contracts are substantially the same from an operational perspective as existing contracts.

Rule 17Ad–22(e)(8), (9) and (10) [12] requires each covered clearing agency to establish, implement, maintain, and enforce written policies and procedures reasonably designed to define the point at which settlement is final to be no later than the end of the day on which payment or obligation is due and, where necessary or appropriate, intraday or in real time; conduct its money settlements in central bank money, where available and determined to be practical by the Board, and minimize and manage credit and liquidity risk arising from conducting its money settlements in commercial bank money if central bank money is not used; and establish and maintain transparent written standards that state its obligations with respect to the delivery of physical instruments, and establish and maintain operational practices that identify, monitor, and manage the risks associated with such physical deliveries. ICC will use its existing rules, settlement procedures and account structures for the new EM Contracts, which are similar to the SES contracts currently cleared by ICC, consistent with the requirements of Rule 17Ad–22(e)(8), (9) and (10) [13] as to the finality and accuracy of its daily settlement process and addressing the risks associated with physical deliveries.

Rule 17Ad–22(e)(2)(i) and (v) [14] requires each covered clearing agency to establish, implement, maintain, and enforce written policies and procedures reasonably designed to provide for governance arrangements that are clear and transparent and specify clear and direct lines of responsibility. ICC determined to accept the additional EM Contracts for clearing in accordance with its governance process, which included review of the contract and related risk management considerations by the ICC Risk Committee and approval

[3] 15 U.S.C. 78q–1(b)(3)(F).

[4] *Id.*

[5] 17 CFR 240.17Ad–22.

[6] 17 CFR 240.17Ad–22(e)(6)(i).

[7] *Id.*

[8] 17 CFR 240.17Ad–22(e)(4)(ii).

[9] *Id.*

[10] 17 CFR 240.17Ad–22(e)(17)(i) and (ii).

[11] *Id.*

[12] 17 CFR 240.17Ad–22(e)(8), (9) and (10).

[13] *Id.*

[14] 17 CFR 240.17Ad–22(e)(2)(i) and (v).

by the ICC Board. These governance arrangements continue to be clear and transparent, such that information relating to the assignment of responsibilities and the requisite involvement of the ICC Board and committees is clearly detailed in the ICC Rules and policies and procedures, consistent with the requirements of Rule 17Ad–22(e)(2)(i) and (v).[15]

Rule 17Ad–22(e)(13)[16] requires each covered clearing agency to establish, implement, maintain, and enforce written policies and procedures reasonably designed to ensure it has the authority and operational capacity to take timely action to contain losses and liquidity demands and continue to meet its obligations by, at a minimum, requiring its participants and, when practicable, other stakeholders to participate in the testing and review of its default procedures, including any close-out procedures, at least annually and following material changes thereto. ICC will apply its existing default management policies and procedures for the additional EM Contracts. ICC believes that these procedures allow for it to take timely action to contain losses and liquidity demands and to continue meeting its obligations in the event of clearing member insolvencies or defaults in respect of the additional single name, in accordance with Rule 17Ad–22(e)(13).[17]

(B) Clearing Agency's Statement on Burden on Competition

ICC does not believe the proposed amendments will have any impact, or impose any burden, on competition not necessary or appropriate in furtherance of the purposes of the Act. As discussed above, the purpose of the proposed rule change is to adopt rules that will provide the basis for ICC to clear additional credit default swap contracts. The additional EM Contracts will be available to all ICC participants for clearing. The clearing of the additional EM Contracts by ICC does not preclude the offering of the additional EM Contracts for clearing by other market participants. Accordingly, ICC does not believe that clearance of the additional EM Contracts will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

(C) Clearing Agency's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments relating to the proposed rule change have not been solicited or received. ICC will notify the Commission of any written comments received by ICC.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) by order approve or disapprove such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be 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–ICC–2023–014 on the subject line.

Paper Comments

Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

All submissions should refer to file number SR–ICC–2023–014. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*https://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filings will also be available for inspection and copying at the principal office of ICE Clear Credit and on ICE Clear Credit's website at *https://www.ice.com/clear-credit/regulation.*

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–ICC–2023–014 and should be submitted on or before November 28, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[18]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–24517 Filed 11–6–23; 8:45 am]

BILLING CODE 8011–01–P

[15] *Id.*

[16] 17 CFR 240.17Ad–22(e)(13).

[17] *Id.*

[18] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98836; File No. SR–CboeEDGA–2023–018]

Self-Regulatory Organizations; Cboe EDGA Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Rules Relating to the Continuing Education for Registered Persons

November 1, 2023.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on October 19, 2023, Cboe EDGA Exchange, Inc. (the ''Exchange'' or ''EDGA'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange filed the proposal as a ''non-controversial'' proposed rule change pursuant to section 19(b)(3)(A)(iii) of the Act[3] and Rule 19b–4(f)(6) thereunder.[4] The Commission is publishing this

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(6).

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 EDGA Exchange, Inc. (the ''Exchange'' or ''EDGA'') proposes to amend its rules relating to the Continuing Education for Registered Persons as provided under Exchange Rule 2.16.01. 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/edga/*), 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.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The proposed rule change amends Exchange Rule 2.16.01 to provide eligible individuals another opportunity to elect to participate in the Maintaining Qualifications Program (''MQP'').

In 2021, the Financial Industry Regulatory Authority, Inc. (''FINRA'') implemented rule changes, which amended FINRA's Continuing Education (''CE'') Program requirements to, among other things, provide eligible individuals who terminate any of their representative or principal registration categories the option of maintaining their qualification for any terminated registration categories by completing annual continuing education through a new program, the MQP.[5] Under FINRA Rule 1240.01, the MQP designated a look-back provision that, subject to specified conditions, extended the option to participate in the MQP to individuals who: (1) were registered as a representative or principal within two years immediately prior to March 15, 2022 (the implementation date of the MQP); and (2) individuals who were participating in the Financial Services Affiliate Waiver Program (''FSAWP'')[6] under FINRA Rule 1210.09 (Waiver of Examinations for Individuals Working for a Financial Services Industry Affiliate of a Member) immediately prior to March 15, 2022 (collectively, ''Look-Back Individuals'').

In response to FINRA's rule changes and to facilitate compliance with the Exchange's CE Program requirements by members of multiple exchanges, the Exchange implemented rule changes to align with FINRA's CE Program and adopted, among other rule changes, Exchange Rules 2.16(c), 2.16.01, and 2.16.02. Such rules, among other things, provide eligible individuals who terminate any of their representative or principal registrations the option of maintaining their qualification for any of the terminated registrations by completing continuing education through the MQP. Further, Exchange Rule 2.16.01 includes a look-back provision that, subject to specified conditions, extends the option for maintaining qualifications following a registration category termination to (i) individuals who have been registered as a representative or principal within two years immediately preceding March 15, 2022, and (ii) individuals who have been participants of the FSAWP immediately preceding March 15, 2022 implementation (*i.e.,* Look-Back Individuals). With respect to the FSAWP, the Exchange made the look-back provision available to individuals who are participants in the FSA waiver programs of Exchange's affiliates, Cboe Exchange, Inc. (''Cboe Options'') and Cboe C2 Exchange, Inc. (''C2 Options''), and/or FINRA immediately preceding March 15, 2022. Look-Back Individuals who elected to participate in the new MQP were required to make such election by March 15, 2022 (the implementation date of the MQP).[7]

FINRA recently submitted a proposal related to its CE Program (the ''FINRA Rule Change'').[8] The proposal set forth changes to FINRA Rule 1240.01, which provide Look-Back Individuals a second opportunity to elect to participate in the MQP (the ''Second Enrollment Period'').[9] In addition, the proposed rule change requires that Look-Back Individuals who elect to participate in the MQP during the Second Enrollment Period complete any prescribed 2022 and 2023 MQP content by March 31, 2024. In the FINRA Rule Change, FINRA noted that in Regulatory Notice 21–41 (November 17, 2021), it announced that Look-Back Individuals who wanted to take part in the MQP were required to make their election between January 31, 2022, and March 15, 2022 (the ''First Enrollment Period''). In addition to the announcement in Regulatory Notice 21–41, FINRA notified the Look-Back Individuals about the MQP and the First Enrollment Period via two separate mailings of postcards to their home addresses and communications through their FINRA Financial Professional Gateway (''FinPro'') accounts.[10]

In the FINRA Rule Change, FINRA further noted that shortly after the First Enrollment Period had ended, a number of Look-Back Individuals contacted FINRA and indicated that they had only recently become aware of the MQP. FINRA noted that it also received anecdotal information that a number of these individuals may not have learned of the MQP, or the First Enrollment Period, in a timely manner, or at all, due to communication and operational issues.[11] In addition, the original six-week enrollment period may not have provided Look-Back Individuals with sufficient time to evaluate whether they

[5] *See* Securities Exchange Act Release No. 93097 (September 21, 2021), 86 FR 53358 (September 27, 2021) (Order Approving File No. SR–FINRA–2021–015). Other exchanges, including EDGA, subsequently filed copycat rule filings to align their continuing education rules with those of FINRA. *See* Securities Exchange Act Release No. 94526 (March 28, 2022), 87 FR 19153 (April 1, 2022), (SR–CboeEDGA–2022–005).

[6] The FSAWP is a waiver program for eligible individuals who have left a member firm to work for a foreign or domestic financial services affiliate of a member firm. FINRA stopped accepting new participants for the FSAWP beginning on March 15, 2022; however, individuals who were already participating in the FSAWP prior to that date had the option of continuing in the FSAWP.

[7] *See* Rule 2.16.01. If such individuals elect to participate, they would be required to complete their initial annual content by the end of 2022 (*i.e.,* by the end of the calendar year in which the proposed rule change is implemented). In addition, if such individuals elect to participate, their initial participation period would be adjusted based on the date that their registration was terminated.

[8] *See* Securities Exchange Act Release No. 97184 (March 22, 2023), 88 FR 18359 (March 28, 2023) (SR–FINRA–2023–005).

[9] To reflect the availability of the Second Enrollment Period, FINRA Rule 1240.01 clarifies that for all Look-Back Individuals who elect to participate in the MQP, their participation period would also be for a period of five years following the termination of their registration categories, as with other MQP participants.

[10] Look-Back Individuals were able to notify FINRA of their election to participate in the MQP through their FinPro accounts.

[11] According to FINRA, this may have been a result of the timing of FINRA's announcements relating to the MQP, which coincided with the holiday season and the transition to the New Year. Further, given that Look-Back Individuals were out of the industry at the time of these announcements, it was unlikely that they would have learned of the MQP, or the First Enrollment Period, through informal communication channels.

should participate in the MQP. For these reasons, FINRA recently amended its rules to provide Look-Back Individuals a second opportunity to elect to participate in the MQP.

For similar reasons and to facilitate compliance with the Exchange's CE Program requirements by members of multiple exchanges, the Exchange is also proposing to amend its rules (*i.e.,* Exchange Rule 2.16.01) to provide Look-Back Individuals with a Second Enrollment Period. The Exchange also understands that other exchanges have or will propose similar amendments based on FINRA's rule changes. The Second Enrollment Period will be between the effective date of this filing, and December 31, 2023.[12] In addition, the proposed rule change requires that Look-Back Individuals who elect to participate in the MQP during the Second Enrollment Period complete any prescribed 2022 and 2023 MQP content by March 31, 2024.[13]

The Exchange proposes to revise Exchange Rule 2.16.01 to state that persons eligible under Exchange Rule 2.16.01 shall make their election to participate in the continuing education program under Exchange Rule 2.16(c) by either (1) March 15, 2022; or (2) between the effective date of this filing, and December 31, 2023.

The Exchange also proposes to amend Exchange Rule 2.16.01 to state that eligible persons who elect to participate in the continuing education program between the effective date of this filing, and December 31, 2023, must complete any prescribed 2022 and 2023 continuing education content by March 31, 2024.

Finally, the Exchange proposes to amend Exchange Rule 2.16.01 to remove reference to Exchange Rule 2.5.08. This Exchange Rule references the FSA waiver programs of Cboe Options Rule 3.30.09, C2 Options Chapter 3, Section B and/or FINRA Rule 1210.09.[14] As there were no participants in the FSA waiver programs of the Exchange's affiliates, Cboe Options or C2 Options, immediately preceding March 15, 2022, the Exchange proposes to amend Exchange Rule 2.16.01 to refer specifically to FINRA Rule 1210.09 and clarify that anyone participating in the FINRA FSAWP immediately preceding March 15, 2022 would still be eligible to participate in the MQP, provided conditions in Exchange Rule 2.16(c) are met.[15]

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the ''Act'') and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of section 6(b) of the Act.[16] Specifically, the Exchange believes the proposed rule change is consistent with the section 6(b)(5)[17] 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)[18] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes that providing Look-Back Individuals a second opportunity to elect to participate in the MQP is warranted because participation in the MQP would reduce unnecessary impediments to requalification for these individuals without diminishing investor protection. In addition, the proposed rule change is consistent with other goals, such as the promotion of diversity and inclusion in the securities industry by attracting and retaining a broader and diverse group of professionals. The MQP also allows the industry to retain expertise from skilled individuals, providing investors with the advantage of greater experience among the individuals working in the industry. The Exchange believes that providing Look-Back Individuals a second opportunity to elect to participate in the MQP will further these goals and objectives.

Further, the Exchange believes the proposed amendments reduce the possibility of a significant regulatory gap between Exchange and FINRA rules, providing more uniform standards across the securities industry. The Exchange believes that the proposed rule change will bring consistency and uniformity with FINRA's recently amended CE Program, which will, in turn, assist Members and their associated persons in complying with these rules and improve regulatory efficiency. The proposed rule changes make ministerial changes to the Exchange's continuing education rules to align them with the continuing education rules of FINRA and other exchanges as discussed above, in order to prevent unnecessary regulatory burdens and to promote efficient administration of the rules.

Finally, the Exchange believes the proposed amendments to remove reference to Exchange Rule 2.5.08, which references the FSA waiver programs under Cboe Options Rule 3.30.09, C2 Options Chapter 3, Section B and/or FINRA Rule 1210.09, and to amend Exchange Rule 2.16.01 to refer specifically to FINRA Rule 1210.09 will add clarity to the Exchange Rules, as there were no participants in the FSA waiver programs of the Exchange's affiliates, Cboe Options or C2 Options, immediately preceding March 15, 2022. Further, the Exchange believes that the amendments to clarify that anyone participating in the FINRA FSAWP immediately preceding March 15, 2022 would still be eligible to participate in the MQP, provided conditions in Exchange Rule 2.16(c) are met, ensures consistency and uniformity with FINRA's recently amended CE Program, which, as noted above, will in turn assist Members and their associated persons in complying with these rules and improve regulatory efficiency.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange believes that the proposed rule changes which are, in all material

[12] The current rule text also provides that if Look-Back Individuals elect to participate in the MQP, the Exchange shall adjust their participation period by deducting from that period the amount of time that has lapsed between the date that such persons terminated their registration categories and March 15, 2022. To reflect the availability of the Second Enrollment Period, the proposed rule change clarifies that for all Look-Back Individuals who elect to participate in the MQP, their participation period would also be for a period of five years following the termination of their registration categories, as with other MQP participants. *See supra* note 9.

[13] Look-Back Individuals who elect to enroll in the MQP during the Second Enrollment Period would also need to pay the annual program fee of $100 for both 2022 and 2023 at the time of their enrollment.

[14] The Exchange notes that the text proposed for deletion includes an incorrect rule reference to Rule 2.5.08; the FSA Waiver Program is described in Rule 2.5.07. The Exchange further notes that, as described herein, while the Exchange's affiliates, Cboe Options or C2 Options, maintained FSA waiver programs, there were no participants in their FSA waiver programs immediately preceding March 15, 2022.

[15] The Exchange also proposes a non-substantive change to Exchange Rule 2.5.07, to correct the referenced FINRA Rule from Rule 2110.09 to Rule 1210.09.

[16] 15 U.S.C. 78f(b).

[17] 15 U.S.C. 78f(b)(5).

[18] *Id.*

respects, based upon and substantially similar to, recent rule changes adopted by FINRA, will reduce the regulatory burden placed on market participants engaged in trading activities across different markets. The Exchange believes that the harmonization of the CE Program requirements across the various markets will reduce burdens on competition by removing impediments to participation in the national market system and promoting competition among participants across the multiple national securities exchanges.

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

EDGA has filed the proposed rule change pursuant to section 19(b)(3)(A) of the Act [19] and Rule 19b–4(f)(6) thereunder.[20] Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate, it has become effective pursuant to 19(b)(3)(A) of the Act and Rule 19b–4(f)(6)(iii) thereunder.[21]

A proposed rule change filed under Rule 19b–4(f)(6) [22] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b4(f)(6)(iii),[23] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. EDGA has indicated that the immediate operation of the proposed rule change is appropriate because it would allow the Exchange to implement the proposed changes to its continuing education rules without delay, thereby eliminating the possibility of a significant regulatory gap between the FINRA rules and the Exchange rules, providing more uniform standards across the securities industry, and helping to avoid confusion for Exchange members that are also FINRA members. EDGA also noted that FINRA plans to conduct additional public outreach efforts to promote awareness of the MQP and the availability of the Second Enrollment Period among Look-Back Individuals. Therefore, EDGA indicated that the immediate operation of the proposed rule change is also appropriate because it would help to further notify Look-Back Individuals of their options and provide additional time for them to consider whether they wish to participate in the MQP before the December 31, 2023 deadline. For these reasons, the Commission believes that waiver of the 30-day operative delay for this proposal is consistent with the protection of investors and the public interest. Accordingly, the Commission hereby waives the 30-day operative delay and designates the proposal operative upon filing.[24]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule 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–CboeEDGA–2023–018 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–CboeEDGA–2023–018. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*https://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR–CboeEDGA–2023–018 and should be submitted on or before November 28, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[25]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–24520 Filed 11–6–23; 8:45 am]

BILLING CODE 8011–01–P

[19] 15 U.S.C. 78s(b)(3)(A)(iii).

[20] 17 CFR 240.19b–4(f)(6).

[21] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[22] 17 CFR 240.19b–4(f)(6).

[23] 17 CFR 240.19b–4(f)(6)(iii).

[24] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule change's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[25] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98837; File No. SR–CboeEDGX–2023–066]

Self-Regulatory Organizations; Cboe EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Rules Relating to the Continuing Education for Registered Persons

November 1, 2023.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on October 19, 2023, Cboe EDGX Exchange, Inc. (the ''Exchange'' or ''EDGX'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange filed the proposal as a ''non-controversial'' proposed rule change pursuant to section 19(b)(3)(A)(iii) of the Act[3] and Rule 19b–4(f)(6) thereunder.[4] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe EDGX Exchange, Inc. (the ''Exchange'' or ''EDGX'') proposes to amend its rules relating to the Continuing Education for Registered Persons as provided under Exchange Rule 2.16.01. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange's website (*http://markets.cboe.com/us/options/regulation/rule_filings/edgx/*), 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.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The proposed rule change amends Exchange Rule 2.16.01 to provide eligible individuals another opportunity to elect to participate in the Maintaining Qualifications Program (''MQP'').

In 2021, the Financial Industry Regulatory Authority, Inc. (''FINRA'') implemented rule changes, which amended FINRA's Continuing Education (''CE'') Program requirements to, among other things, provide eligible individuals who terminate any of their representative or principal registration categories the option of maintaining their qualification for any terminated registration categories by completing annual continuing education through a new program, the MQP.[5] Under FINRA Rule 1240.01, the MQP designated a look-back provision that, subject to specified conditions, extended the option to participate in the MQP to individuals who: (1) were registered as a representative or principal within two years immediately prior to March 15, 2022 (the implementation date of the MQP); and (2) individuals who were participating in the Financial Services Affiliate Waiver Program (''FSAWP'')[6] under FINRA Rule 1210.09 (Waiver of Examinations for Individuals Working for a Financial Services Industry Affiliate of a Member) immediately prior to March 15, 2022 (collectively, ''Look-Back Individuals'').

In response to FINRA's rule changes and to facilitate compliance with the Exchange's CE Program requirements by members of multiple exchanges, the Exchange implemented rule changes to align with FINRA's CE Program and adopted, among other rule changes, Exchange Rules 2.16(c), 2.16.01, and 2.16.02. Such rules, among other things, provide eligible individuals who terminate any of their representative or principal registrations the option of maintaining their qualification for any of the terminated registrations by completing continuing education through the MQP. Further, Exchange Rule 2.16.01 includes a look-back provision that, subject to specified conditions, extends the option for maintaining qualifications following a registration category termination to (i) individuals who have been registered as a representative or principal within two years immediately preceding March 15, 2022, and (ii) individuals who have been participants of the FSAWP immediately preceding March 15, 2022 implementation (*i.e.,* Look-Back Individuals). With respect to the FSAWP, the Exchange made the look-back provision available to individuals who are participants in the FSA waiver programs of Exchange's affiliates, Cboe Exchange, Inc. (''Cboe Options'') and Cboe C2 Exchange, Inc. (''C2 Options''), and/or FINRA immediately preceding March 15, 2022. Look-Back Individuals who elected to participate in the new MQP were required to make such election by March 15, 2022 (the implementation date of the MQP).[7]

FINRA recently submitted a proposal related to its CE Program (the ''FINRA Rule Change'').[8] The proposal set forth changes to FINRA Rule 1240.01, which provide Look-Back Individuals a second opportunity to elect to participate in the MQP (the ''Second Enrollment Period'').[9] In addition, the proposed rule change requires that Look-Back Individuals who elect to participate in the MQP during the Second Enrollment Period complete any prescribed 2022 and 2023 MQP content by March 31, 2024. In the FINRA Rule Change, FINRA noted that in Regulatory Notice 21–41 (November 17, 2021), it announced that Look-Back Individuals who wanted to take part in the MQP were required to make their election between January 31, 2022, and March 15, 2022 (the ''First Enrollment Period''). In addition to the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(6).

[5] *See* Securities Exchange Act Release No. 93097 (September 21, 2021), 86 FR 53358 (September 27, 2021) (Order Approving File No. SR–FINRA–2021–015). Other exchanges, including EDGX, subsequently filed copycat rule filings to align their continuing education rules with those of FINRA. *See* Securities Exchange Act Release No. 94527 (March 28, 2022), 87 FR 18825 (March 31, 2022), (SR–CboeEDGX–2022–017).

[6] The FSAWP is a waiver program for eligible individuals who have left a member firm to work for a foreign or domestic financial services affiliate of a member firm. FINRA stopped accepting new participants for the FSAWP beginning on March 15, 2022; however, individuals who were already participating in the FSAWP prior to that date had the option of continuing in the FSAWP.

[7] *See* Rule 2.16.01. If such individuals elect to participate, they would be required to complete their initial annual content by the end of 2022 (*i.e.,* by the end of the calendar year in which the proposed rule change is implemented). In addition, if such individuals elect to participate, their initial participation period would be adjusted based on the date that their registration was terminated.

[8] *See* Securities Exchange Act Release No. 97184 (March 22, 2023), 88 FR 18359 (March 28, 2023) (SR–FINRA–2023–005).

[9] To reflect the availability of the Second Enrollment Period, FINRA Rule 1240.01 clarifies that for all Look-Back Individuals who elect to participate in the MQP, their participation period would also be for a period of five years following the termination of their registration categories, as with other MQP participants.

announcement in Regulatory Notice 21–41, FINRA notified the Look-Back Individuals about the MQP and the First Enrollment Period via two separate mailings of postcards to their home addresses and communications through their FINRA Financial Professional Gateway (''FinPro'') accounts.[10]

In the FINRA Rule Change, FINRA further noted that shortly after the First Enrollment Period had ended, a number of Look-Back Individuals contacted FINRA and indicated that they had only recently become aware of the MQP. FINRA noted that it also received anecdotal information that a number of these individuals may not have learned of the MQP, or the First Enrollment Period, in a timely manner, or at all, due to communication and operational issues.[11] In addition, the original six-week enrollment period may not have provided Look-Back Individuals with sufficient time to evaluate whether they should participate in the MQP. For these reasons, FINRA recently amended its rules to provide Look-Back Individuals a second opportunity to elect to participate in the MQP.

For similar reasons and to facilitate compliance with the Exchange's CE Program requirements by members of multiple exchanges, the Exchange is also proposing to amend its rules (*i.e.,* Exchange Rule 2.16.01) to provide Look-Back Individuals with a Second Enrollment Period. The Exchange also understands that other exchanges have or will propose similar amendments based on FINRA's rule changes. The Second Enrollment Period will be between the effective date of this filing, and December 31, 2023.[12] In addition, the proposed rule change requires that Look-Back Individuals who elect to participate in the MQP during the Second Enrollment Period complete any prescribed 2022 and 2023 MQP content by March 31, 2024.[13]

The Exchange proposes to revise Exchange Rule 2.16.01 to state that persons eligible under Exchange Rule 2.16.01 shall make their election to participate in the continuing education program under Exchange Rule 2.16(c) by either (1) March 15, 2022; or (2) between the effective date of this filing, and December 31, 2023.

The Exchange also proposes to amend Exchange Rule 2.16.01 to state that eligible persons who elect to participate in the continuing education program between the effective date of this filing, and December 31, 2023, must complete any prescribed 2022 and 2023 continuing education content by March 31, 2024.

Finally, the Exchange proposes to amend Exchange Rule 2.16.01 to remove reference to Exchange Rule 2.5.08. This Exchange Rule references the FSA waiver programs of Cboe Options Rule 3.30.09, C2 Options Chapter 3, Section B and/or FINRA Rule 1210.09.[14] As there were no participants in the FSA waiver programs of the Exchange's affiliates, Cboe Options or C2 Options, immediately preceding March 15, 2022, the Exchange proposes to amend Exchange Rule 2.16.01 to refer specifically to FINRA Rule 1210.09 and clarify that anyone participating in the FINRA FSAWP immediately preceding March 15, 2022 would still be eligible to participate in the MQP, provided conditions in Exchange Rule 2.16(c) are met.[15]

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the ''Act'') and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of section 6(b) of the Act.[16] Specifically, the Exchange believes the proposed rule change is consistent with the section 6(b)(5)[17] 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)[18] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes that providing Look-Back Individuals a second opportunity to elect to participate in the MQP is warranted because participation in the MQP would reduce unnecessary impediments to requalification for these individuals without diminishing investor protection. In addition, the proposed rule change is consistent with other goals, such as the promotion of diversity and inclusion in the securities industry by attracting and retaining a broader and diverse group of professionals. The MQP also allows the industry to retain expertise from skilled individuals, providing investors with the advantage of greater experience among the individuals working in the industry. The Exchange believes that providing Look-Back Individuals a second opportunity to elect to participate in the MQP will further these goals and objectives.

Further, the Exchange believes the proposed amendments reduce the possibility of a significant regulatory gap between Exchange and FINRA rules, providing more uniform standards across the securities industry. The Exchange believes that the proposed rule change will bring consistency and uniformity with FINRA's recently amended CE Program, which will, in turn, assist Members and their associated persons in complying with these rules and improve regulatory efficiency. The proposed rule changes make ministerial changes to the Exchange's continuing education rules to align them with the continuing education rules of FINRA and other exchanges as discussed above, in order to prevent unnecessary regulatory burdens and to promote efficient administration of the rules.

Finally, the Exchange believes the proposed amendments to remove reference to Exchange Rule 2.5.08,

[10] Look-Back Individuals were able to notify FINRA of their election to participate in the MQP through their FinPro accounts.

[11] According to FINRA, this may have been a result of the timing of FINRA's announcements relating to the MQP, which coincided with the holiday season and the transition to the New Year. Further, given that Look-Back Individuals were out of the industry at the time of these announcements, it was unlikely that they would have learned of the MQP, or the First Enrollment Period, through informal communication channels.

[12] The current rule text also provides that if Look-Back Individuals elect to participate in the MQP, the Exchange shall adjust their participation period by deducting from that period the amount of time that has lapsed between the date that such persons terminated their registration categories and March 15, 2022. To reflect the availability of the Second Enrollment Period, the proposed rule change clarifies that for all Look-Back Individuals who elect to participate in the MQP, their participation period would also be for a period of five years following the termination of their registration categories, as with other MQP participants. *See supra* note 9.

[13] Look-Back Individuals who elect to enroll in the MQP during the Second Enrollment Period would also need to pay the annual program fee of $100 for both 2022 and 2023 at the time of their enrollment.

[14] The Exchange notes that the text proposed for deletion includes an incorrect rule reference to Rule 2.5.08; the FSA Waiver Program is described in Rule 2.5.07. The Exchange further notes that, as described herein, while the Exchange's affiliates, Cboe Options or C2 Options, maintained FSA waiver programs, there were no participants in their FSA waiver programs immediately preceding March 15, 2022.

[15] The Exchange also proposes a non-substantive change to Exchange Rule 2.5.07, to correct the referenced FINRA Rule from Rule 2110.09 to Rule 1210.09.

[16] 15 U.S.C. 78f(b).

[17] 15 U.S.C. 78f(b)(5).

[18] *Id.*

which references the FSA waiver programs under Cboe Options Rule 3.30.09, C2 Options Chapter 3, Section B and/or FINRA Rule 1210.09, and to amend Exchange Rule 2.16.01 to refer specifically to FINRA Rule 1210.09 will add clarity to the Exchange Rules, as there were no participants in the FSA waiver programs of the Exchange's affiliates, Cboe Options or C2 Options, immediately preceding March 15, 2022. Further, the Exchange believes that the amendments to clarify that anyone participating in the FINRA FSAWP immediately preceding March 15, 2022 would still be eligible to participate in the MQP, provided conditions in Exchange Rule 2.16(c) are met, ensures consistency and uniformity with FINRA's recently amended CE Program, which, as noted above, will in turn assist Members and their associated persons in complying with these rules and improve regulatory efficiency.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange believes that the proposed rule changes which are, in all material respects, based upon and substantially similar to, recent rule changes adopted by FINRA, will reduce the regulatory burden placed on market participants engaged in trading activities across different markets. The Exchange believes that the harmonization of the CE Program requirements across the various markets will reduce burdens on competition by removing impediments to participation in the national market system and promoting competition among participants across the multiple national securities exchanges.

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

EDGX has filed the proposed rule change pursuant to section 19(b)(3)(A) of the Act [19] and Rule 19b–4(f)(6) thereunder.[20] Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate, it has become effective pursuant to 19(b)(3)(A) of the Act and Rule 19b–4(f)(6)(iii) thereunder.[21]

A proposed rule change filed under Rule 19b–4(f)(6) [22] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b4(f)(6)(iii),[23] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. EDGX has indicated that the immediate operation of the proposed rule change is appropriate because it would allow the Exchange to implement the proposed changes to its continuing education rules without delay, thereby eliminating the possibility of a significant regulatory gap between the FINRA rules and the Exchange rules, providing more uniform standards across the securities industry, and helping to avoid confusion for Exchange members that are also FINRA members. EDGX also noted that FINRA plans to conduct additional public outreach efforts to promote awareness of the MQP and the availability of the Second Enrollment Period among Look-Back Individuals. Therefore, EDGX indicated that the immediate operation of the proposed rule change is also appropriate because it would help to further notify Look-Back Individuals of their options and provide additional time for them to consider whether they wish to participate in the MQP before the December 31, 2023 deadline. For these reasons, the Commission believes that waiver of the 30-day operative delay for this proposal is consistent with the protection of investors and the public interest. Accordingly, the Commission hereby waives the 30-day operative delay and designates the proposal operative upon filing.[24]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule 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–CboeEDGX–2023–066 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to file number SR–CboeEDGX–2023–066. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*https://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information

[19] 15 U.S.C. 78s(b)(3)(A)(iii).

[20] 17 CFR 240.19b–4(f)(6).

[21] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[22] 17 CFR 240.19b–4(f)(6).

[23] 17 CFR 240.19b–4(f)(6)(iii).

[24] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule change's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

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–CboeEDGX–2023–066 and should be submitted on or before November 28, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[25]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–24521 Filed 11–6–23; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98834; File No. SR–CboeBYX–2023–016]

Self-Regulatory Organizations; Cboe BYX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Rules Relating to the Continuing Education for Registered Persons

November 1, 2023.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on October 19, 2023, Cboe BYX Exchange, Inc. (the ''Exchange'' or ''BYX'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange filed the proposal as a ''non-controversial'' proposed rule change pursuant to section 19(b)(3)(A)(iii) of the Act[3] and Rule 19b–4(f)(6) thereunder.[4] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe BYX Exchange, Inc. (the ''Exchange'' or ''BYX'') proposes to amend its rules relating to the Continuing Education for Registered Persons as provided under Exchange Rule 2.16.01. 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/byx/*), 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.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The proposed rule change amends Exchange Rule 2.16.01 to provide eligible individuals another opportunity to elect to participate in the Maintaining Qualifications Program (''MQP'').

In 2021, the Financial Industry Regulatory Authority, Inc. (''FINRA'') implemented rule changes, which amended FINRA's Continuing Education (''CE'') Program requirements to, among other things, provide eligible individuals who terminate any of their representative or principal registration categories the option of maintaining their qualification for any terminated registration categories by completing annual continuing education through a new program, the MQP.[5] Under FINRA Rule 1240.01, the MQP designated a look-back provision that, subject to specified conditions, extended the option to participate in the MQP to individuals who: (1) were registered as a representative or principal within two years immediately prior to March 15, 2022 (the implementation date of the MQP); and (2) individuals who were participating in the Financial Services Affiliate Waiver Program (''FSAWP'')[6] under FINRA Rule 1210.09 (Waiver of Examinations for Individuals Working for a Financial Services Industry Affiliate of a Member) immediately prior to March 15, 2022 (collectively, ''Look-Back Individuals'').

In response to FINRA's rule changes and to facilitate compliance with the Exchange's CE Program requirements by members of multiple exchanges, the Exchange implemented rule changes to align with FINRA's CE Program and adopted, among other rule changes, Exchange Rules 2.16(c), 2.16.01, and 2.16.02. Such rules, among other things, provide eligible individuals who terminate any of their representative or principal registrations the option of maintaining their qualification for any of the terminated registrations by completing continuing education through the MQP. Further, Exchange Rule 2.16.01 includes a look-back provision that, subject to specified conditions, extends the option for maintaining qualifications following a registration category termination to (i) individuals who have been registered as a representative or principal within two years immediately preceding March 15, 2022, and (ii) individuals who have been participants of the FSAWP immediately preceding March 15, 2022 implementation (*i.e.,* Look-Back Individuals). With respect to the FSAWP, the Exchange made the look-back provision available to individuals who are participants in the FSA waiver programs of Exchange's affiliates, Cboe Exchange, Inc. (''Cboe Options'') and Cboe C2 Exchange, Inc. (''C2 Options''), and/or FINRA immediately preceding March 15, 2022. Look-Back Individuals who elected to participate in the new MQP were required to make such election by March 15, 2022 (the implementation date of the MQP).[7]

FINRA recently submitted a proposal related to its CE Program (the ''FINRA Rule Change'').[8] The proposal set forth changes to FINRA Rule 1240.01, which provide Look-Back Individuals a second opportunity to elect to participate in the MQP (the ''Second Enrollment

[25] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(6).

[5] *See* Securities Exchange Act Release No. 93097 (September 21, 2021), 86 FR 53358 (September 27, 2021) (Order Approving File No. SR–FINRA–2021–015). Other exchanges, including BYX, subsequently filed copycat rule filings to align their continuing education rules with those of FINRA. *See* Securities Exchange Act Release No. 94532 (March 28, 2022), 87 FR 19159 (April 1, 2022), (SR–CboeBYX–2022–006).

[6] The FSAWP is a waiver program for eligible individuals who have left a member firm to work for a foreign or domestic financial services affiliate of a member firm. FINRA stopped accepting new participants for the FSAWP beginning on March 15, 2022; however, individuals who were already participating in the FSAWP prior to that date had the option of continuing in the FSAWP.

[7] *See* Rule 2.16.01. If such individuals elect to participate, they would be required to complete their initial annual content by the end of 2022 (*i.e.,* by the end of the calendar year in which the proposed rule change is implemented). In addition, if such individuals elect to participate, their initial participation period would be adjusted based on the date that their registration was terminated.

[8] *See* Securities Exchange Act Release No. 97184 (March 22, 2023), 88 FR 18359 (March 28, 2023) (SR–FINRA–2023–005).

Period'').[9] In addition, the proposed rule change requires that Look-Back Individuals who elect to participate in the MQP during the Second Enrollment Period complete any prescribed 2022 and 2023 MQP content by March 31, 2024. In the FINRA Rule Change, FINRA noted that in Regulatory Notice 21–41 (November 17, 2021), it announced that Look-Back Individuals who wanted to take part in the MQP were required to make their election between January 31, 2022, and March 15, 2022 (the ''First Enrollment Period''). In addition to the announcement in Regulatory Notice 21–41, FINRA notified the Look-Back Individuals about the MQP and the First Enrollment Period via two separate mailings of postcards to their home addresses and communications through their FINRA Financial Professional Gateway (''FinPro'') accounts.[10]

In the FINRA Rule Change, FINRA further noted that shortly after the First Enrollment Period had ended, a number of Look-Back Individuals contacted FINRA and indicated that they had only recently become aware of the MQP. FINRA noted that it also received anecdotal information that a number of these individuals may not have learned of the MQP, or the First Enrollment Period, in a timely manner, or at all, due to communication and operational issues.[11] In addition, the original six-week enrollment period may not have provided Look-Back Individuals with sufficient time to evaluate whether they should participate in the MQP. For these reasons, FINRA recently amended its rules to provide Look-Back Individuals a second opportunity to elect to participate in the MQP.

For similar reasons and to facilitate compliance with the Exchange's CE Program requirements by members of multiple exchanges, the Exchange is also proposing to amend its rules (*i.e.,* Exchange Rule 2.16.01) to provide Look-Back Individuals with a Second Enrollment Period. The Exchange also understands that other exchanges have or will propose similar amendments based on FINRA's rule changes. The Second Enrollment Period will be between the effective date of this filing, and December 31, 2023.[12] In addition, the proposed rule change requires that Look-Back Individuals who elect to participate in the MQP during the Second Enrollment Period complete any prescribed 2022 and 2023 MQP content by March 31, 2024.[13]

The Exchange proposes to revise Exchange Rule 2.16.01 to state that persons eligible under Exchange Rule 2.16.01 shall make their election to participate in the continuing education program under Exchange Rule 2.16(c) by either (1) March 15, 2022; or (2) between the effective date of this filing, and December 31, 2023.

The Exchange also proposes to amend Exchange Rule 2.16.01 to state that eligible persons who elect to participate in the continuing education program between the effective date of this filing, and December 31, 2023, must complete any prescribed 2022 and 2023 continuing education content by March 31, 2024.

Finally, the Exchange proposes to amend Exchange Rule 2.16.01 to remove reference to Exchange Rule 2.5.08. This Exchange Rule references the FSA waiver programs of Cboe Options Rule 3.30.09, C2 Options Chapter 3, Section B and/or FINRA Rule 1210.09.[14] As there were no participants in the FSA waiver programs of the Exchange's affiliates, Cboe Options or C2 Options, immediately preceding March 15, 2022, the Exchange proposes to amend Exchange Rule 2.16.01 to refer specifically to FINRA Rule 1210.09 and clarify that anyone participating in the FINRA FSAWP immediately preceding March 15, 2022 would still be eligible to participate in the MQP, provided conditions in Exchange Rule 2.16(c) are met.[15]

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the ''Act'') and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of section 6(b) of the Act.[16] Specifically, the Exchange believes the proposed rule change is consistent with the section 6(b)(5)[17] 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)[18] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes that providing Look-Back Individuals a second opportunity to elect to participate in the MQP is warranted because participation in the MQP would reduce unnecessary impediments to requalification for these individuals without diminishing investor protection. In addition, the proposed rule change is consistent with other goals, such as the promotion of diversity and inclusion in the securities industry by attracting and retaining a broader and diverse group of professionals. The MQP also allows the industry to retain expertise from skilled individuals, providing investors with the advantage of greater experience among the individuals working in the industry. The Exchange believes that providing Look-Back Individuals a second opportunity to elect to participate in the MQP will further these goals and objectives.

Further, the Exchange believes the proposed amendments reduce the possibility of a significant regulatory gap between Exchange and FINRA rules,

[9] To reflect the availability of the Second Enrollment Period, FINRA Rule 1240.01 clarifies that for all Look-Back Individuals who elect to participate in the MQP, their participation period would also be for a period of five years following the termination of their registration categories, as with other MQP participants.

[10] Look-Back Individuals were able to notify FINRA of their election to participate in the MQP through their FinPro accounts.

[11] According to FINRA, this may have been a result of the timing of FINRA's announcements relating to the MQP, which coincided with the holiday season and the transition to the New Year. Further, given that Look-Back Individuals were out of the industry at the time of these announcements, it was unlikely that they would have learned of the MQP, or the First Enrollment Period, through informal communication channels.

[12] The current rule text also provides that if Look-Back Individuals elect to participate in the MQP, the Exchange shall adjust their participation period by deducting from that period the amount of time that has lapsed between the date that such persons terminated their registration categories and March 15, 2022. To reflect the availability of the Second Enrollment Period, the proposed rule change clarifies that for all Look-Back Individuals who elect to participate in the MQP, their participation period would also be for a period of five years following the termination of their registration categories, as with other MQP participants. *See supra* note 9.

[13] Look-Back Individuals who elect to enroll in the MQP during the Second Enrollment Period would also need to pay the annual program fee of $100 for both 2022 and 2023 at the time of their enrollment.

[14] The Exchange notes that the text proposed for deletion includes an incorrect rule reference to Rule 2.5.08; the FSA Waiver Program is described in Rule 2.5.07. The Exchange further notes that, as described herein, while the Exchange's affiliates, Cboe Options or C2 Options, maintained FSA waiver programs, there were no participants in their FSA waiver programs immediately preceding March 15, 2022.

[15] The Exchange also proposes a non-substantive change to Exchange Rule 2.5.07, to correct the referenced FINRA Rule from Rule 2110.09 to Rule 1210.09.

[16] 15 U.S.C. 78f(b).

[17] 15 U.S.C. 78f(b)(5).

[18] *Id.*

providing more uniform standards across the securities industry. The Exchange believes that the proposed rule change will bring consistency and uniformity with FINRA's recently amended CE Program, which will, in turn, assist Members and their associated persons in complying with these rules and improve regulatory efficiency. The proposed rule changes make ministerial changes to the Exchange's continuing education rules to align them with the continuing education rules of FINRA and other exchanges as discussed above, in order to prevent unnecessary regulatory burdens and to promote efficient administration of the rules.

Finally, the Exchange believes the proposed amendments to remove reference to Exchange Rule 2.5.08, which references the FSA waiver programs under Cboe Options Rule 3.30.09, C2 Options Chapter 3, Section B and/or FINRA Rule 1210.09, and to amend Exchange Rule 2.16.01 to refer specifically to FINRA Rule 1210.09 will add clarity to the Exchange Rules, as there were no participants in the FSA waiver programs of the Exchange's affiliates, Cboe Options or C2 Options, immediately preceding March 15, 2022. Further, the Exchange believes that the amendments to clarify that anyone participating in the FINRA FSAWP immediately preceding March 15, 2022 would still be eligible to participate in the MQP, provided conditions in Exchange Rule 2.16(c) are met, ensures consistency and uniformity with FINRA's recently amended CE Program, which, as noted above, will in turn assist Members and their associated persons in complying with these rules and improve regulatory efficiency.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange believes that the proposed rule changes which are, in all material respects, based upon and substantially similar to, recent rule changes adopted by FINRA, will reduce the regulatory burden placed on market participants engaged in trading activities across different markets. The Exchange believes that the harmonization of the CE Program requirements across the various markets will reduce burdens on competition by removing impediments to participation in the national market system and promoting competition among participants across the multiple national securities exchanges.

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

BYX has filed the proposed rule change pursuant to section 19(b)(3)(A) of the Act [19] and Rule 19b–4(f)(6) thereunder.[20] Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate, it has become effective pursuant to 19(b)(3)(A) of the Act and Rule 19b–4(f)(6)(iii) thereunder.[21]

A proposed rule change filed under Rule 19b–4(f)(6) [22] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b4(f)(6)(iii),[23] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. BYX has indicated that the immediate operation of the proposed rule change is appropriate because it would allow the Exchange to implement the proposed changes to its continuing education rules without delay, thereby eliminating the possibility of a significant regulatory gap between the FINRA rules and the Exchange rules, providing more uniform standards across the securities industry, and helping to avoid confusion for Exchange members that are also FINRA members. BYX also noted that FINRA plans to conduct additional public outreach efforts to promote awareness of the MQP and the availability of the Second Enrollment Period among Look-Back Individuals. Therefore, BYX indicated that the immediate operation of the proposed rule change is also appropriate because it would help to further notify Look-Back Individuals of their options and provide additional time for them to consider whether they wish to participate in the MQP before the December 31, 2023 deadline. For these reasons, the Commission believes that waiver of the 30-day operative delay for this proposal is consistent with the protection of investors and the public interest. Accordingly, the Commission hereby waives the 30-day operative delay and designates the proposal operative upon filing.[24]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule 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–CboeBYX–2023–016 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to file number SR–CboeBYX–2023–016. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*https://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule

[19] 15 U.S.C. 78s(b)(3)(A)(iii).

[20] 17 CFR 240.19b–4(f)(6).

[21] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[22] 17 CFR 240.19b–4(f)(6).

[23] 17 CFR 240.19b–4(f)(6)(iii).

[24] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule change's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR–CboeBYX–2023–016 and should be submitted on or before November 28, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[25]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–24518 Filed 11–6–23; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98835; File No. SR–CboeBZX–2023–085]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Rules Relating to the Continuing Education for Registered Persons

November 1, 2023.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on October 19, 2023, Cboe BZX Exchange, Inc. (the ''Exchange'' or ''BZX'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been substantially prepared by the Exchange. The Exchange filed the proposal as a ''non-controversial'' proposed rule change pursuant to section 19(b)(3)(A)(iii) of the Act[3] and Rule 19b–4(f)(6) thereunder.[4] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe BZX Exchange, Inc. (the ''Exchange'' or ''BZX'') proposes to amend its rules relating to the Continuing Education for Registered Persons as provided under Exchange Rule 2.16.01. 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.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The proposed rule change amends Exchange Rule 2.16.01 to provide eligible individuals another opportunity to elect to participate in the Maintaining Qualifications Program (''MQP'').

In 2021, the Financial Industry Regulatory Authority, Inc. (''FINRA'') implemented rule changes, which amended FINRA's Continuing Education (''CE'') Program requirements to, among other things, provide eligible individuals who terminate any of their representative or principal registration categories the option of maintaining their qualification for any terminated registration categories by completing annual continuing education through a new program, the MQP.[5] Under FINRA Rule 1240.01, the MQP designated a look-back provision that, subject to specified conditions, extended the option to participate in the MQP to individuals who: (1) were registered as a representative or principal within two years immediately prior to March 15, 2022 (the implementation date of the MQP); and (2) individuals who were participating in the Financial Services Affiliate Waiver Program (''FSAWP'')[6] under FINRA Rule 1210.09 (Waiver of Examinations for Individuals Working for a Financial Services Industry Affiliate of a Member) immediately prior to March 15, 2022 (collectively, ''Look-Back Individuals'').

In response to FINRA's rule changes and to facilitate compliance with the Exchange's CE Program requirements by members of multiple exchanges, the Exchange implemented rule changes to align with FINRA's CE Program and adopted, among other rule changes, Exchange Rules 2.16(c), 2.16.01, and 2.16.02. Such rules, among other things, provide eligible individuals who terminate any of their representative or principal registrations the option of maintaining their qualification for any of the terminated registrations by completing continuing education through the MQP. Further, Exchange Rule 2.16.01 includes a look-back provision that, subject to specified conditions, extends the option for maintaining qualifications following a registration category termination to (i) individuals who have been registered as a representative or principal within two years immediately preceding March 15, 2022, and (ii) individuals who have been participants of the FSAWP immediately preceding March 15, 2022 implementation (*i.e.,* Look-Back Individuals). With respect to the FSAWP, the Exchange made the look-back provision available to individuals who are participants in the FSA waiver programs of Exchange's affiliates, Cboe Exchange, Inc. (''Cboe Options'') and Cboe C2 Exchange, Inc. (''C2 Options''), and/or FINRA immediately preceding March 15, 2022. Look-Back Individuals who elected to participate in the new

[25] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(6).

[5] *See* Securities Exchange Act Release No. 93097 (September 21, 2021), 86 FR 53358 (September 27, 2021) (Order Approving File No. SR–FINRA–2021–015). Other exchanges, including BZX, subsequently filed copycat rule filings to align their continuing education rules with those of FINRA. *See* Securities Exchange Act Release No. 94528 (March 28, 2022), 87 FR 19146 (April 1, 2022), (SR–CboeBZX–2022–022).

[6] The FSAWP is a waiver program for eligible individuals who have left a member firm to work for a foreign or domestic financial services affiliate of a member firm. FINRA stopped accepting new participants for the FSAWP beginning on March 15, 2022; however, individuals who were already participating in the FSAWP prior to that date had the option of continuing in the FSAWP.

MQP were required to make such election by March 15, 2022 (the implementation date of the MQP).[7]

FINRA recently submitted a proposal related to its CE Program (the ''FINRA Rule Change'').[8] The proposal set forth changes to FINRA Rule 1240.01, which provide Look-Back Individuals a second opportunity to elect to participate in the MQP (the ''Second Enrollment Period'').[9] In addition, the proposed rule change requires that Look-Back Individuals who elect to participate in the MQP during the Second Enrollment Period complete any prescribed 2022 and 2023 MQP content by March 31, 2024. In the FINRA Rule Change, FINRA noted that in Regulatory Notice 21–41 (November 17, 2021), it announced that Look-Back Individuals who wanted to take part in the MQP were required to make their election between January 31, 2022, and March 15, 2022 (the ''First Enrollment Period''). In addition to the announcement in Regulatory Notice 21–41, FINRA notified the Look-Back Individuals about the MQP and the First Enrollment Period via two separate mailings of postcards to their home addresses and communications through their FINRA Financial Professional Gateway (''FinPro'') accounts.[10]

In the FINRA Rule Change, FINRA further noted that shortly after the First Enrollment Period had ended, a number of Look-Back Individuals contacted FINRA and indicated that they had only recently become aware of the MQP. FINRA noted that it also received anecdotal information that a number of these individuals may not have learned of the MQP, or the First Enrollment Period, in a timely manner, or at all, due to communication and operational issues.[11] In addition, the original six-week enrollment period may not have provided Look-Back Individuals with sufficient time to evaluate whether they should participate in the MQP. For these reasons, FINRA recently amended its rules to provide Look-Back Individuals a second opportunity to elect to participate in the MQP.

For similar reasons and to facilitate compliance with the Exchange's CE Program requirements by members of multiple exchanges, the Exchange is also proposing to amend its rules (*i.e.,* Exchange Rule 2.16.01) to provide Look-Back Individuals with a Second Enrollment Period. The Exchange also understands that other exchanges have or will propose similar amendments based on FINRA's rule changes. The Second Enrollment Period will be between the effective date of this filing, and December 31, 2023.[12] In addition, the proposed rule change requires that Look-Back Individuals who elect to participate in the MQP during the Second Enrollment Period complete any prescribed 2022 and 2023 MQP content by March 31, 2024.[13]

The Exchange proposes to revise Exchange Rule 2.16.01 to state that persons eligible under Exchange Rule 2.16.01 shall make their election to participate in the continuing education program under Exchange Rule 2.16(c) by either (1) March 15, 2022; or (2) between the effective date of this filing, and December 31, 2023.

The Exchange also proposes to amend Exchange Rule 2.16.01 to state that eligible persons who elect to participate in the continuing education program between the effective date of this filing, and December 31, 2023, must complete any prescribed 2022 and 2023 continuing education content by March 31, 2024.

Finally, the Exchange proposes to amend Exchange Rule 2.16.01 to remove reference to Exchange Rule 2.5.08. This Exchange Rule references the FSA waiver programs of Cboe Options Rule 3.30.09, C2 Options Chapter 3, Section B and/or FINRA Rule 1210.09.[14] As there were no participants in the FSA waiver programs of the Exchange's affiliates, Cboe Options or C2 Options, immediately preceding March 15, 2022, the Exchange proposes to amend Exchange Rule 2.16.01 to refer specifically to FINRA Rule 1210.09 and clarify that anyone participating in the FINRA FSAWP immediately preceding March 15, 2022 would still be eligible to participate in the MQP, provided conditions in Exchange Rule 2.16(c) are met.[15]

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the ''Act'') and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of section 6(b) of the Act.[16] Specifically, the Exchange believes the proposed rule change is consistent with the section 6(b)(5)[17] 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)[18] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes that providing Look-Back Individuals a second opportunity to elect to participate in the MQP is warranted because participation in the MQP would reduce unnecessary impediments to requalification for these individuals without diminishing investor protection. In addition, the

[7] *See* Rule 2.16.01. If such individuals elect to participate, they would be required to complete their initial annual content by the end of 2022 (*i.e.,* by the end of the calendar year in which the proposed rule change is implemented). In addition, if such individuals elect to participate, their initial participation period would be adjusted based on the date that their registration was terminated.

[8] *See* Securities Exchange Act Release No. 97184 (March 22, 2023), 88 FR 18359 (March 28, 2023) (SR–FINRA–2023–005).

[9] To reflect the availability of the Second Enrollment Period, FINRA Rule 1240.01 clarifies that for all Look-Back Individuals who elect to participate in the MQP, their participation period would also be for a period of five years following the termination of their registration categories, as with other MQP participants.

[10] Look-Back Individuals were able to notify FINRA of their election to participate in the MQP through their FinPro accounts.

[11] According to FINRA, this may have been a result of the timing of FINRA's announcements relating to the MQP, which coincided with the holiday season and the transition to the New Year. Further, given that Look-Back Individuals were out of the industry at the time of these announcements, it was unlikely that they would have learned of the MQP, or the First Enrollment Period, through informal communication channels.

[12] The current rule text also provides that if Look-Back Individuals elect to participate in the MQP, the Exchange shall adjust their participation period by deducting from that period the amount of time that has lapsed between the date that such persons terminated their registration categories and March 15, 2022. To reflect the availability of the Second Enrollment Period, the proposed rule change clarifies that for all Look-Back Individuals who elect to participate in the MQP, their participation period would also be for a period of five years following the termination of their registration categories, as with other MQP participants. *See supra* note 9.

[13] Look-Back Individuals who elect to enroll in the MQP during the Second Enrollment Period would also need to pay the annual program fee of $100 for both 2022 and 2023 at the time of their enrollment.

[14] The Exchange notes that the text proposed for deletion includes an incorrect rule reference to Rule 2.5.08; the FSA Waiver Program is described in Rule 2.5.07. The Exchange further notes that, as described herein, while the Exchange's affiliates, Cboe Options or C2 Options, maintained FSA waiver programs, there were no participants in their FSA waiver programs immediately preceding March 15, 2022.

[15] The Exchange also proposes a non-substantive change to Exchange Rule 2.5.07, to correct the referenced FINRA Rule from Rule 2110.09 to Rule 1210.09.

[16] 15 U.S.C. 78f(b).

[17] 15 U.S.C. 78f(b)(5).

[18] *Id.*

proposed rule change is consistent with other goals, such as the promotion of diversity and inclusion in the securities industry by attracting and retaining a broader and diverse group of professionals. The MQP also allows the industry to retain expertise from skilled individuals, providing investors with the advantage of greater experience among the individuals working in the industry. The Exchange believes that providing Look-Back Individuals a second opportunity to elect to participate in the MQP will further these goals and objectives.

Further, the Exchange believes the proposed amendments reduce the possibility of a significant regulatory gap between Exchange and FINRA rules, providing more uniform standards across the securities industry. The Exchange believes that the proposed rule change will bring consistency and uniformity with FINRA's recently amended CE Program, which will, in turn, assist Members and their associated persons in complying with these rules and improve regulatory efficiency. The proposed rule changes make ministerial changes to the Exchange's continuing education rules to align them with the continuing education rules of FINRA and other exchanges as discussed above, in order to prevent unnecessary regulatory burdens and to promote efficient administration of the rules.

Finally, the Exchange believes the proposed amendments to remove reference to Exchange Rule 2.5.08, which references the FSA waiver programs under Cboe Options Rule 3.30.09, C2 Options Chapter 3, Section B and/or FINRA Rule 1210.09, and to amend Exchange Rule 2.16.01 to refer specifically to FINRA Rule 1210.09 will add clarity to the Exchange Rules, as there were no participants in the FSA waiver programs of the Exchange's affiliates, Cboe Options or C2 Options, immediately preceding March 15, 2022. Further, the Exchange believes that the amendments to clarify that anyone participating in the FINRA FSAWP immediately preceding March 15, 2022 would still be eligible to participate in the MQP, provided conditions in Exchange Rule 2.16(c) are met, ensures consistency and uniformity with FINRA's recently amended CE Program, which, as noted above, will in turn assist Members and their associated persons in complying with these rules and improve regulatory efficiency.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange believes that the proposed rule changes which are, in all material respects, based upon and substantially similar to, recent rule changes adopted by FINRA, will reduce the regulatory burden placed on market participants engaged in trading activities across different markets. The Exchange believes that the harmonization of the CE Program requirements across the various markets will reduce burdens on competition by removing impediments to participation in the national market system and promoting competition among participants across the multiple national securities exchanges.

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

BZX has filed the proposed rule change pursuant to section 19(b)(3)(A) of the Act [19] and Rule 19b–4(f)(6) thereunder.[20] Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate, it has become effective pursuant to 19(b)(3)(A) of the Act and Rule 19b–4(f)(6)(iii) thereunder.[21]

A proposed rule change filed under Rule 19b–4(f)(6) [22] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b4(f)(6)(iii),[23] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. BZX has indicated that the immediate operation of the proposed rule change is appropriate because it would allow the Exchange to implement the proposed changes to its continuing education rules without delay, thereby eliminating the possibility of a significant regulatory gap between the FINRA rules and the Exchange rules, providing more uniform standards across the securities industry, and helping to avoid confusion for Exchange members that are also FINRA members. BZX also noted that FINRA plans to conduct additional public outreach efforts to promote awareness of the MQP and the availability of the Second Enrollment Period among Look-Back Individuals. Therefore, BZX indicated that the immediate operation of the proposed rule change is also appropriate because it would help to further notify Look-Back Individuals of their options and provide additional time for them to consider whether they wish to participate in the MQP before the December 31, 2023 deadline. For these reasons, the Commission believes that waiver of the 30-day operative delay for this proposal is consistent with the protection of investors and the public interest. Accordingly, the Commission hereby waives the 30-day operative delay and designates the proposal operative upon filing.[24]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule 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–2023–085 on the subject line.

[19] 15 U.S.C. 78s(b)(3)(A)(iii).

[20] 17 CFR 240.19b–4(f)(6).

[21] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[22] 17 CFR 240.19b–4(f)(6).

[23] 17 CFR 240.19b–4(f)(6)(iii).

[24] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule change's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

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–2023–085. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*https://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR–CboeBZX–2023–085 and should be submitted on or before November 28, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[25]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–24519 Filed 11–6–23; 8:45 am]

BILLING CODE 8011–01–P

[25] 17 CFR 200.30–3(a)(12).

SOCIAL SECURITY ADMINISTRATION

[Docket No. SSA–2023–0013]

Social Security Ruling, SSR 23–1p.; Titles II and XVI: Duration Requirement for Disability

AGENCY: Social Security Administration.

ACTION: Notice of social security ruling (SSR).

SUMMARY: We are providing notice of SSR 23–1p. This SSR explains and clarifies our policy regarding the duration requirement for establishing disability under Titles II and XVI of the Social Security Act and implementing regulations. This ruling rescinds and replaces SSR 82–52.

DATES: We will apply this notice on November 7, 2023.

FOR FURTHER INFORMATION CONTACT: Mary Quatroche, Social Security Administration, Office of Disability Policy, 6401 Security Boulevard, Baltimore, MD 21235–6401, (410) 966–4794 or TTY 410–966–5609, for information about this notice. For information on eligibility or filing for benefits, call our national toll-free number, 1–800–772–1213 or TTY 1–800–325–0778, or visit our internet site, Social Security Online, at *https://www.ssa.gov.*

SUPPLEMENTARY INFORMATION: Although 5 U.S.C. 552(a)(1) and (a)(2) do not require us to publish this SSR, we are publishing it in accordance with 20 CFR 402.35(b)(1).

SSRs represent precedential final opinions, orders, and statements of policy and interpretations that we have adopted relating to the Federal Old Age, Survivors, and Disability Insurance program, and Supplemental Security Income program. We may base SSRs on determinations or decisions made in our administrative review process, Federal court decisions, decisions of our Commissioner, opinions from our Office of the General Counsel, or other interpretations of law and regulations.

Although SSRs do not have the same force and effect as law, they are binding on all SSA components in accordance with 20 CFR 402.35(b)(1).

This SSR will remain in effect until we publish a notice in the **Federal Register** that rescinds it, or until we publish a new SSR that replaces or modifies it.

(Federal Assistance Listings, Program Nos. 96.001, Social Security—Disability Insurance; 96.002, Social Security—Retirement Insurance; 96.004—Social Security—Survivors Insurance; 96.006 Supplemental Security Income.)

The Acting Commissioner of Social Security, Kilolo Kijakazi, Ph.D., M.S.W., having reviewed and approved this document, is delegating the authority to electronically sign this document to Faye I. Lipsky, who is the primary Federal Register Liaison for the Social Security Administration, for purposes of publication in the **Federal Register**.

Faye I. Lipsky,

Federal Register Liaison, Office of Legislation and Congressional Affairs, Social Security Administration.

Policy Interpretation Ruling

SSR 23–1p

Titles II and XVI: Duration Requirement for Disability

This Social Security Ruling (SSR) rescinds and replaces SSR 82–52: Titles II and XVI: Duration of the Impairment.

Purpose: This SSR updates and consolidates our policy regarding the duration requirement for establishing disability under Titles II and XVI of the Social Security Act (Act) and its implementing regulations. We published SSR 82–52 in 1982, and in the ensuing four decades we revised several rules and issued policy guidance that leave the original ruling misaligned with current regulatory authority and policy guidance. For instance, we changed the sequential evaluation process for widows and Title XVI children;[1] established the process for evaluating medical improvement in continuing disability review (CDR) cases;[2] instituted multiple work incentives for recipients of Title XVI payments;[3] and extended the reentitlement period for Title II claims.[4]

Citations (Authority): Sections 216(i), 223(d), and 1614(a) of the Act, 42 U.S.C. 416(i), 423(d), and 1382c(a), as amended; Regulations No. 4, subpart P, sections 404.988, 404.1505, 404.1509, 404.1520, 404.1523, 404.1545, 404.1574, 404.1581, 404.1592, 404.1592a, 404.1592b, 404.1594, and 404.1598; Regulations No. 16, Subpart I, sections 416.260, 416.262, 416.905, 416.906, 416.909, 416.920, 416.923, 416.924, 416.945, 416.974, 416.981, 416.994, 416.994a, 416.998, and 416.1488.

Dates: We will apply this SSR on November 7, 2023.[5]

[1] See 20 CFR 404.1520(a)(2) and 416.924.

[2] See 20 CFR 404.1594, 416.994, and 416.994a.

[3] See section 1619(a)–(b) of the Act. See also 20 CFR 416.260 and 416.262.

[4] See 20 CFR 404.1592a and 404.1592b.

[5] We will use this SSR beginning on its applicable date. We will apply this SSR to new applications filed on or after the applicable date of the SSR and to claims that are pending on and after the applicable date. This means that we will use this SSR on and after its applicable date in any case in which we make a determination or decision. We expect that Federal courts will review our final decisions using the rules that were in effect at the time we issued the decisions. If a court reverses our final decision and remands a case for further administrative proceedings after the applicable date of this SSR, we will apply this SSR to the entire period at issue in the decision we make after the court's remand.

Policy Interpretation

To be disabled under Title II of the Act, or as an adult[6] under Title XVI of the Act, a claimant must be unable to engage in any substantial gainful activity (SGA) by reason of one or more medically determinable physical or mental impairments (MDIs) which can be expected to result in death, or which has lasted or can be expected to last for a continuous period of at least 12 months.[7] We refer to the period of time during which a claimant is continuously unable to engage in SGA because of one or more MDI(s) as ''duration.''[8]

The following information is in a question-and-answer format that provides guidance on how we assess whether a person meets the duration requirement for disability. Questions 1 through 3 explain how we define and measure the duration requirement. Questions 4 and 5 provide information about how the duration requirement affects the sequential disability evaluation process. Question 6 addresses how we consider duration in continuing disability review (CDR) cases when the beneficiary or recipient has a new, severe MDI(s). Question 7 explains how we make a finding about the expected duration of an impairment and what will happen if we learn of a return to SGA within 12 months of a claimant's onset of disability.

List of Questions—

1. *How does a claimant meet the duration requirement for disability?*
2. *What is an MDI that ''can be expected to result in death''?*
3. *What do we mean by ''12 continuous months'' and how do we measure it in initial claims?*
4. *How does the duration requirement affect the five-step sequential disability evaluation process?*
5. *How does the duration requirement affect the three-step sequential disability evaluation process for Title XVI claimants who have not yet attained 18 years of age?*
6. *How do we consider the duration requirement when the claimant has new, severe MDI(s) in continuing disability review (CDR) cases?*
7. *What if we find that the claimant meets the duration requirement based on an expectation of continued severity, but the claimant returned to SGA within 12 months?*

Answers—

1. *How does a claimant meet the duration requirement for disability?*

Duration is the period of time during which a claimant is continuously unable to engage in SGA because of one or more MDI(s).[9] To satisfy the duration requirement for disability, the claimant's relevant MDI(s) must have lasted or must be expected to last for a continuous period of at least 12 months, unless we expect the MDI(s) to result in death within 12 months of the onset of disability.[10] An individual's inability to perform SGA because of the relevant MDI(s) must also last the required 12-month period, unless we expect an MDI(s) to result in death within 12 months of the onset of disability. A claimant must satisfy both elements to meet the duration requirement.[11] A claimant who was previously entitled to a period of disability must again meet the duration requirement for the current application before a subsequent period of disability can be established.[12]

2. *What is an MDI that ''can be expected to result in death''?*

An MDI that ''can be expected to result in death'' is one for which the generally accepted prognosis within the medical field and the evidence in the case file demonstrate that the claimant is expected to die as a result of that impairment within 12 months of the date that the claimant became unable to engage in SGA. We also consider an MDI that actually results in death to be one that was ''expected to result in death.''

3. *What do we mean by ''12 continuous months'' and how do we measure it in initial claims?*

The phrase ''12 continuous months'' means both that the MDI(s) must have lasted, or be expected to last, for a continuous period of at least 12 months and that the claimant's resulting inability to perform SGA by reason of the MDI(s) must also have lasted, or be expected to last, for not less than 12 months without interruption or stopping.[13]

We measure the 12-month period from any date[14] the claimant's MDI(s) first prevented the claimant from performing SGA.[15] We do not consider any period during which an MDI or combination of MDIs did not prevent the claimant from performing SGA when measuring duration. The duration period may begin before, but cannot end before, the period during which we can establish entitlement or eligibility.[16] For example, the duration period may begin before the date first insured (DFI) in Title II disability insurance benefit (DIB) claims, before the date of a spouse's death in Title II disabled widow(er)'s benefit (DWB) claims, prior to the potential onset date in Title II childhood disability benefits (CDB) claims, or prior to the filing date in Title XVI claims.

Unless the MDI(s) is expected to result in death, duration continues through the earliest of the following dates:

- When the MDI(s) no longer prevents the claimant from engaging in SGA; or
- When the MDI(s) is no longer expected to prevent the claimant from engaging in SGA.[17]

4. *How does the duration requirement affect the five-step sequential disability evaluation process?*

We consider the duration requirement at multiple steps of the five-step sequential evaluation process we use to evaluate disability in initial claims under Title II,[18] age 18 redeterminations,[19] and adult claims under Title XVI.[20] At step one, if the claimant is currently performing SGA we will generally find that the claimant is not disabled. However, if the claimant is not currently performing SGA, or if the claimant is currently performing

[6] Title XVI claimants under age 18 are disabled if they are not performing SGA and their medically determinable physical or mental impairment(s) causes marked and severe functional limitations and can be expected to cause death or has lasted or can be expected to last for a continuous period of 12 months. See section 1614(a)(3)(C) of the Act and 20 CFR 416.906.

[7] See sections 216(i), 223(d), 1614(a) of the Act. See also 20 CFR 404.1505, 404.1521 and 416.905, 416.921. While there is no duration requirement for statutorily blind individuals under Title XVI, the duration requirement applies to statutorily blind individuals under Title II. See generally 216(i) and 1614(a) of the Act. See also 20 CFR 404.1581 and 416.981.

[8] 20 CFR 404.1509 and 416.909.

[9] For title XVI claimants under the age of 18, duration is the period of time during which the claimant is not performing SGA and experiences marked and severe functional limitations because of a medically determinable physical or mental impairment, or a combination of impairments. See 20 CFR 416.906 and 416.924. For these claimants, we generally measure duration from the first date the claimant's MDI(s) results in marked and severe functional limitations. An impairment(s) causes marked and severe functional limitations if it meets or medically equals the severity of a set of criteria for an impairment in the listings, or if it functionally equals the listings. See 20 CFR 416.924.

[10] 20 CFR 404.1509 and 416.909.

[11] See *Barnhart* v. *Walton,* 535 U.S. 212 (2002).

[12] 20 CFR 404.321.

[13] See *Barnhart* v. *Walton,* 535 U.S. 212 (2002).

[14] For detailed guidance on how we determine whether a claimant meets the statutory definition of disability, and if so, when the claimant first met that definition, see SSR 18–1p Titles II and XVI: Determining the Established Onset Date (EOD) in Disability Claims.

[15] For Title XVI claimants under age 18, we generally measure duration from the first date the claimant's MDI(s) results in marked and severe functional limitations. See 20 CFR 416.924.

[16] See *Walton,* 535 U.S. 212 (2002).

[17] For Title XVI claimants under age 18, duration ends when the child engages in SGA or no longer has marked and severe functional limitations. See 20 CFR 416.924.

[18] See 20 CFR 404.1520.

[19] See 20 CFR 416.987.

[20] See 20 CFR 416.920.

SGA but during the period covered by the current application they did not perform SGA for at least 12 continuous months, the duration requirement could be met (as discussed in Question 1) and the sequential evaluation process would proceed to step two.

At step two, if the claimant does not have a severe MDI, or combination of MDIs that is medically severe, and has lasted, or is expected to last, for a continuous period of not less than 12 months or is expected to result in death, the claimant cannot meet the duration requirement and we will find the claimant is not disabled.[21]

Further, we do not combine two or more successive, unrelated impairments to meet the 12-month requirement in initial claims.[22] For example, a claimant involved in a bicycling accident on January 1, 2022, suffered a pelvic fracture for which they underwent immediate surgery. The fracture completely healed by August 1, 2022. The same claimant injured their rotator cuff in a fall on July 1, 2022. With treatment, the rotator cuff injury resolved completely by February 2, 2023. The MDIs were unrelated and neither MDI lasted 12 months. We will find the claimant not disabled at step two because there is no severe MDI that could meet the duration requirement.[23]

Because of the duration requirement, we will not consider an MDI that completely resolves in less than 12 months after step two of the sequential evaluation process. Consider, instead, a case where the individual sustained a pelvic fracture that resolved completely within nine months but had a subsequent rotator cuff injury that remained severe for 12 continuous months. Sequential evaluation for the rotator cuff impairment would continue but we would not consider the pelvic fracture beyond step two.

If the analysis proceeds to step three, we will consider: (1) whether an MDI(s) meets or medically equals a listing in the Listing of Impairments (listings), according to the set of medical criteria in the listing; and, if so (2) whether the MDI(s) meets the duration requirement.[24] Once the claimant establishes that their MDI(s) is severe enough to meet or equal a listed impairment, the claimant must also show that this level of severity lasted, or is expected to last, for a continuous period of at least 12 months, or that the impairment is expected to result in death.[25]

Some listings specify a period of time we will consider the claimant under a disability if their MDI(s) meets all the criteria of the listing. This listing specification does not change, supersede, or establish that the MDI(s) meets the duration requirement. We use this listing specification in certain instances to establish the appropriate timeline for our continuing disability review process as it relates to that impairment. The evidence of record must show that the MDI(s) also meets the duration requirement. For example, listing 6.04 (chronic kidney disease, with kidney transplant) states that we will consider an individual who has a kidney transplant due to chronic kidney disease to be under a disability for one year from the date of the transplant due to the potential for complications, such as rejection episodes and post-transplant functioning. Thereafter, we will evaluate any residual limiting effects of the impairment. If the claimant engages in SGA within 12 months from the date the MDI(s) first prevented them from performing SGA we generally will find them not disabled under the Act (as discussed in Question 7).[26]

Other listings contain criteria with temporal requirements during which certain findings must be present. These temporal requirements do not establish that the MDI(s) met the duration requirement but instead serve as a specific indicator of listing-level severity. For example, listing 11.02 (Epilepsy, generalized tonic-clonic seizures or dyscognitive seizures) states that the seizures must occur at least once a month for at least three consecutive months, despite adherence to prescribed treatment. The frequency of seizures outlined in the listing criteria establishes that the impairment is of listing-level severity but is distinct from the duration requirement. To meet the duration requirement, the evidence must show the MDI(s) lasted at listing level or is expected to last at listing level for 12 continuous months and that the claimant's resulting inability to perform SGA by reason of the MDI(s) has lasted, or is expected to last, for not less than 12 months without interruption or stopping.

If we cannot find the claimant disabled at step three, the sequential evaluation process continues.[27] We assess the claimant's residual functional capacity (RFC), which is the most an individual can do despite their impairment-related limitations.[28] Because of the duration requirement, we will not include limitations in the RFC assessment that completely resolve, or that we expect to completely resolve, within 12 months.

If the analysis proceeds to steps four or five of the sequential evaluation process, we consider the claimant's RFC when determining whether an individual can perform past relevant work, or other work that exists in significant numbers in the national economy.

5. *How does the duration requirement affect the three-step sequential evaluation process for Title XVI claimants who have not yet attained 18 years of age?*

For Title XVI disability claimants under age 18, we will consider the child disabled if the child does not perform SGA and has a medically determinable physical or mental impairment, or combination of impairments, that causes marked and severe functional limitations and has lasted or can be expected to last for a continuous period of not less than 12 months, or is expected to result in death.[29] In these cases, we use a three-step sequential evaluation process, and the duration requirement for disability applies throughout the sequential evaluation process for children. [30]

At steps one and two of the sequential evaluation process for Title XVI children, we will apply the same rules discussed for steps one and two of the adult sequential evaluation process (as discussed above in response to Question 4). If the child satisfies the requirements for both steps one and two, we will proceed to step three where we consider whether the child's MDI(s) meets, medically equals, or functionally equals a listing.[31]

At step three, to establish that the child has an MDI(s) that meets, medically equals or functionally equals the listings, the evidence must show that the MDI(s) has lasted, or is expected to last, for a continuous period of at least 12 months at listing level severity or is expected to result in death.[32] If a child's MDI(s) is severe but does not meet or medically equal any listing, we will determine if the MDI(s)

[21] See 20 CFR 404.1509, 404.1520(a)(4)(ii) and 416.909, 416.920(a)(4)(ii).

[22] See 20 CFR 404.1523(a) and 416.923(a).

[23] *Id.*

[24] See 20 CFR 404.1520(a)(4)(iii) and 416.920(a)(4)(iii).

[25] See 20 CFR 404.1520(d) and 416.920(d).

[26] See sections 216(i), 223(d), 1614(a) of the Act. See 20 CFR 404.1505, 404.1509, 404.1520 and 416.905, 416.909, 416.920. See also *Walton,* 535 U.S. at 217–22.

[27] See 20 CFR 404.1520(a)(4) and 416.920(a)(4).

[28] See 20 CFR 404.1545 and 416.945.

[29] See section 1614(a)(3)(C) of the Act. See also 20 CFR 416.906.

[30] See 20 CFR 416.924.

[31] See 20 CFR 416.924(d).

[32] See 20 CFR 416.924.

functionally equals the listings.[33] We will decide that the MDI(s) functionally equals the listings if it results in marked limitations in two domains of functioning, or an extreme limitation in one domain of functioning for a continuous 12-month period.[34] If the child's MDI(s) does not meet, medically equal, or functionally equal the listings, or does not meet the duration requirement, we will find the child is not disabled.

6. *How do we consider the duration requirement when the claimant has a new, severe MDI(s) in CDRs cases?*

In CDR cases, the beneficiary or recipient has already satisfied the duration requirement and established disability. As a result, we only consider the duration requirement when the impairment for which the claimant was originally found disabled has improved, and disability ended.

How we consider duration when evaluating a new severe MDI(s) depends on whether the new MDI(s) is disabling and, if so, when it became disabling. To be disabling, the new impairment(s) must be so severe as to prevent SGA.[35] If the previously established MDI(s) is no longer disabling but the new, severe MDI(s) is disabling, and if the new disabling MDI(s) begins in, or before, the month in which the previously established MDI(s) is no longer disabling,[36] we do not consider duration and will find that disability continues.[37] If, however, the claimant has a new disabling MDI(s) that begins after the month in which the last impairment(s) was no longer disabling, we consider the duration requirement and determine whether to establish a new period of disability using the rules for initial claims.

7. *What if we find that the claimant's MDI(s) meets the duration requirement based on an expectation of continued severity, but the claimant returned to SGA within 12 months?*

A claimant who recovers their ability to engage in SGA within 12 months is not disabled under the Act.[38] How we evaluate an actual return to work that is SGA depends, in part, on whether we have already approved an award of benefits.

If we have not issued a final determination or decision that the individual was disabled and entitled to benefits, and we determine the individual returned to work within 12 months of the first date the individual's MDI(s) otherwise met the definition of disability, we deny the claim. If we issued a final determination or decision that the individual was disabled, and we later find that the individual has returned to SGA after an award of benefits, but within the 12-month period after onset, we do not reopen and reverse the determination or decision. This is because once disability payments begin, individuals might be entitled to a trial work period (Title II), or to continued Supplemental Security Income payments under section 1619(a) of the Act.[39]

If we issued a final determination or decision that the individual was entitled to disability insurance benefits and we later determine the individual returned to SGA during the 5-month waiting period for Title II, we may reopen and revise the determination or decision to issue a denial. These individuals are not entitled to any disability benefit payments. If we later determine the return to work was an unsuccessful work attempt,[40] we may reopen and revise the denial to issue an allowance. However, we can only reopen the determination or decision within the time limitations under the rules of administrative finality.[41]

[FR Doc. 2023–24523 Filed 11–6–23; 8:45 am]

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[33] See 20 CFR 416.924(d) and 416.926a.

[34] See 20 CFR 416.926a(d).

[35] Or, in the case of a child under age 18 receiving Supplemental Security Income payments, the new impairment(s) must be so severe as to result in marked and severe functional limitations. See 20 CFR 416.998.

[36] See 20 CFR 404.1594(g) and 416.994(b)(6), 416.994a(g), for how we determine the month in which the individual's last impairment(s) is no longer disabling.

[37] See 20 CFR 404.1598 and 416.998.

[38] See sections 216(i), 223(d), 1614(a) of the Act, 20 CFR 404.1505, 404.1509, 404.1520 and 416.905, 416.909, 416.920. See also *Walton,* 535 U.S. at 217–22.

[39] See 20 CFR 404.1592.

[40] See 20 CFR 404.1574(c) and 416.974(c).

[41] See 20 CFR 404.988 and 416.1488.

DEPARTMENT OF STATE

[Public Notice: 12251]

60-Day Notice of Proposed Information Collection: DS–157, Petition for Special Immigrant Classification for Afghan Special Immigrant Visa (SIV) Applicant

ACTION: Notice of request for public comment.

SUMMARY: The Department of State is seeking Office of Management and Budget (OMB) approval for the information collection described below. In accordance with the Paperwork Reduction Act of 1995, we are requesting comments on this collection from all interested individuals and organizations. The purpose of this notice is to allow 60 days for public comment preceding submission of the collection to OMB.

DATES: The Department will accept comments from the public up to January 8, 2024.

ADDRESSES: You may submit comments by any of the following methods:

- *Web:* Persons with access to the internet may comment on this notice by going to *www.Regulations.gov.* You can search for the document by entering ''Docket Number: –DOS–2023–0035'' in the Search field. Then click the ''Comment Now'' button and complete the comment form.
- *Email: PRA_BurdenComments@state.gov.*

You must include the DS form number (if applicable), information collection title, and the OMB control number in any correspondence.

SUPPLEMENTARY INFORMATION:

- *Title of Information Collection:* DS–157, Petition for Special Immigrant Classification for Afghan SIV Applicant.
- *OMB Control Number:* 1405–0134.
- *Type of Request:* Extension of a currently approved collection.
- *Originating Office:* CA/VO.
- *Form Number:* DS–157.
- *Respondents:* Afghan Special Immigrant Visa (SIV) applicants.
- *Estimated Number of Respondents:* 15,000.
- *Estimated Number of Responses:* 15,000.
- *Average Time per Response:* 1 hour.
- *Total Estimated Burden Time:* 15,000 hours.
- *Frequency:* Once per application.
- *Obligation to Respond:* Required to obtain or retain a benefit.

We are soliciting public comments to permit the Department to:

- Evaluate whether the proposed information collection is necessary for the proper functions of the Department.
- Evaluate the accuracy of our estimate of the time and cost burden for this proposed collection, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected.
- Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Please note that comments submitted in response to this Notice are public record. Before including any detailed personal information, you should be aware that your comments as submitted, including your personal information, will be available for public review.

Abstract of Proposed Collection

The Department of State uses Form DS–157, Petition for Special Immigrant Classification for Afghan SIV Applicant in the adjudication of the petition for classification as a special immigrant under Section 203(b)(4) of the Immigration and Nationality Act (''INA'') (8 U.S.C. 1153(b)(4)), as provided for under section 602(b)(1) of the AAPA.

The information requested on the form is limited to that which is necessary to adjudicate the applicant's petition for classification.

Methodology

Form DS–157 is available in an electronic PDF format at *travel.state.gov* and must be submitted via email to the Department.

Julie M. Stufft,

Deputy Assistant Secretary, Bureau of Consular Affairs, Department of State.

[FR Doc. 2023–24556 Filed 11–6–23; 8:45 am]

BILLING CODE 4710–06–P

DEPARTMENT OF STATE

[Public Notice: 12255]

Notice of Meeting of Advisory Committee on International Law

AGENCY: Advisory Committee on International Law.

ACTION: Notice of open meeting.

SUMMARY: A meeting of the Department of State's Advisory Committee on International Law (''ACIL'') will take place on December 1, 2023, from 9 a.m. to 3:15 p.m. Acting Legal Adviser Richard C. Visek will chair the meeting, which will be open to the public up to the capacity of the meeting room. The meeting will include discussions on international law topics. These topics include: Special Tribunal for the Crime of Aggression against Ukraine; the International Law Commission's proposals on ''General Principles of Law;'' and new horizons for legal diplomacy in investment and trade, human rights, and climate change.

ADDRESSES: George Washington University Law School, Faculty Conference Center, 716 20th St. NW, 5th Floor, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Tara M. Rangchi, Office of the Legal Adviser, at *rangchitm@state.gov* or 202–240–1662.

SUPPLEMENTARY INFORMATION: Members of the public who wish to attend should contact Tara Rangchi by November 24, 2023, and provide their name, professional affiliation (if any), email address, and phone number. Priority for in-person seating will be given to members of the Advisory Committee, and remaining seating will be reserved based upon when persons contact the Office of the Legal Adviser. Individuals who wish to attend virtually may request a link to the virtual meeting platform. Attendees who require reasonable accommodation should make their requests by November 24, 2023. Requests received after that date will be considered but might not be possible to accommodate.

(Authority: 5 U.S.C. 1009 and 41 CFR 102–3.150.)

Tara M. Rangchi,

Executive Director, Advisory Committee on International Law, Department of State.

[FR Doc. 2023–24558 Filed 11–6–23; 8:45 am]

BILLING CODE 4710–08–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

[Docket No.: PHMSA–2023–0113; Notice No. 2023–14]

Hazardous Materials: Public Meeting Notice for the Office of Hazardous Materials Safety Research, Development & Technology Virtual Forum

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), Department of Transportation.

ACTION: Notice of public meeting.

SUMMARY: The Pipeline and Hazardous Materials Safety Administration's (PHMSA) Office of Hazardous Materials Safety (OHMS) will hold a public Research, Development & Technology Virtual Forum on Zoom Webinar on November 28, 2023. During this one-day event, OHMS will present the results of recently completed projects; brief attendees on new project plans; and obtain stakeholder input on the direction of current and future research topics, including mitigation of climate change, risk management and mitigation, packaging integrity, emerging technology, and technical analysis to aid risk assessment. The forum will enable OHMS to solicit comments related to new research topics that may be considered for inclusion in its future work. OHMS is particularly interested in the research gaps associated with energetic materials (explosives) characterization and transportation; safe transportation of energy products (*e.g.,* crude oil); safe containment and transportation of compressed gases; and safe packaging and transportation of charge storage devices (*e.g.,* lithium- ion batteries) and how these might aid in mitigation of climate change. The forum will also provide opportunities for stakeholder input to identify other research gaps related to the transportation of hazardous materials.

ADDRESSES: The meeting will be held virtually on Zoom Meeting on November 28, 2023, from 09:00 a.m. to 5:00 p.m. EST.

Registration: DOT requests attendees pre-register for this meeting by completing the form at *https://usdot.zoomgov.com/webinar/register/WN_pCY0ntXkQbejLrbZFcScow.* In addition to Zoom Meeting, conference call-in and ''live meeting'' capability will also be provided. Conference call-in and live meeting access information will be provided in the registration confirmation email.

FOR FURTHER INFORMATION CONTACT: Andy Leyder by mail at the Office of Hazardous Materials Safety, Research, Development & Technology, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building: Room W12–140, Washington, DC 20590–0001; by phone at 202–360–0664; or by email at *Andrew.Leyder@dot.gov.*

Issued in Washington, DC, on November 2, 2023.

William Quade,

Deputy Associate Administrator for Hazardous Materials Safety Pipeline and Hazardous Materials Safety Administration.

[FR Doc. 2023–24609 Filed 11–6–23; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Notice of OFAC Sanctions Actions

SUB-AGENCY: Office of Foreign Assets Control, Department of the Treasury.

ACTION: Notice.

SUMMARY: The U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) is publishing the names of one or more persons whose property and interests in property have been unblocked and who have been removed from the Specially Designated Nationals and Blocked Persons List (SDN List).

DATES: See **SUPPLEMENTARY INFORMATION** section for effective date(s).

FOR FURTHER INFORMATION CONTACT:

OFAC: Associate Director for Global Targeting, tel: 202–622–2420; Assistant Director for Licensing, tel.: 202–622–2480; Assistant Director for Regulatory Affairs, tel.: 202–622–4855; or Assistant Director for Sanctions Compliance & Evaluation, tel.: 202–622–2490.

SUPPLEMENTARY INFORMATION:

Electronic Availability

The SDN List and additional information concerning OFAC sanctions programs are available on OFAC's website (*https://ofac.treasury.gov*).

Notice of OFAC Actions

A. On October 31, 2023, OFAC determined that the property and interests in property subject to U.S. jurisdiction of the following persons are unblocked and they have been removed from the SDN List.

Individuals

1. BARAHONA CORDOBEZ, Jaime (a.k.a. BARONA CORDOBES, Jaime; a.k.a. BARONA CORDOBEZ, Jaime), Km. 16.5 El Salvador 169, Andalucia, Guatemala; Avenida Reforma 8–33 Zona 10, Guatemala City, Guatemala; 10 Calle 5–60 Zona 9, Guatemala City, Guatemala; c/o OVERSEAS TRADING COMPANY S.A., Guatemala City, Guatemala; DOB 01 Oct 1960; POB Guatemala; Passport 16660729 (Guatemala); NIT #953243–9 (Guatemala) (individual) [SDNT].

2. BOHADA AVILA, Lubin, Calle 142A No. 106A–21 apt. 302, Bogota, Colombia; Carrera 100 No. 11–90 of. 403, Cali, Colombia; c/o AGRONILO S.A., Toro, Valle, Colombia; c/o ARMAGEDON S.A., La Union, Valle, Colombia; c/o GAD S.A., La Union, Valle, Colombia; c/o INDUSTRIAS DEL ESPIRITU SANTO S.A., Malambo, Atlantico, Colombia; c/o FRUTAS DE LA COSTA S.A., Malambo, Atlantico, Colombia; c/o TARRITOS S.A., Cali, Colombia; c/o ASESORES CONSULTORES ASOCIADOS LTDA., Cali, Colombia; c/o CONSTRUCCIONES E INVERSIONES LTDA., La Union, Valle, Colombia; c/o FUNDACION CENTRO FRUTICOLA ANDINO, La Union, Valle, Colombia; c/o WORLD WORKING COMERCIALIZADORA INTERNACIONAL S.A., Cali, Colombia; Cedula No. 19093178 (Colombia) (individual) [SDNT].

3. GOMEZ PIQUERAS, Jose Luis, c/o LINEAS AEREAS ANDINAS LINCANDISA S.A., Quito, Ecuador; c/o OBRAS Y PROYECTOS PIQUEHERVA S.L., Madrid, Spain; Calle San Jose, No. 20, Urbanizacion El Berrocal I y II, El Boalo, Mataelpino, Madrid, Spain; DOB 25 May 1941; POB Barcelona, Spain; Passport BC045629 (Spain); Tax ID No. 02681293–E (Spain) (individual) [SDNTK].

4. GOMEZ QUINTERO, Carlos Alberto, Calle 14 No. 4–124, La Union, Valle, Colombia; Factoria La Rivera, La Union, Valle, Colombia; c/o CASA GRAJALES S.A., La Union, Valle, Colombia; c/o FREXCO S.A., La Union, Valle, Colombia; c/o GRAJALES S.A., La Union, Valle, Colombia; c/o INVERSIONES SANTA CECILIA S.C.S., La Union, Valle, Colombia; c/o INVERSIONES SANTA MONICA LTDA., La Union, Valle, Colombia; c/o CONSTRUCCIONES E INVERSIONES LTDA., La Union, Valle, Colombia; c/o FUNDACION CENTRO FRUTICOLA ANDINO, La Union, Valle, Colombia; DOB 23 Jan 1957; POB Palmira, Valle, Colombia; Cedula No. 6355791 (Colombia); Passport AH411417 (Colombia) (individual) [SDNT].

5. GRAJALES HERNANDEZ, Agustin, c/o CASA GRAJALES S.A., La Union, Valle, Colombia; c/o FREXCO S.A., La Union, Valle, Colombia; c/o GRAJALES S.A., La Union, Valle, Colombia; Cedula No. 2697864 (Colombia) (individual) [SDNT].

6. GRAJALES LEMOS, Raul Alberto, Carrera 15 No. 13–39, La Union, Valle, Colombia; Carrera 10 Norte No. 31–01, Cali, Colombia; c/o AGRONILO S.A., Toro, Valle, Colombia; c/o AGUSTIN GRAJALES Y CIA. LTDA., La Union, Valle, Colombia; c/o ALMACAES S.A., Bogota, Colombia; c/o ARMAGEDON S.A., La Union, Valle, Colombia; c/o C.A.D. S.A., Bogota, Colombia; c/o CASA GRAJALES S.A., La Union, Valle, Colombia; c/o CRETA S.A., La Union, Valle, Colombia; c/o FREXCO S.A., La Union, Valle, Colombia; c/o GAD S.A., La Union, Valle, Colombia; c/o G.L.G. S.A., Bogota, Colombia; c/o GRAJALES S.A., La Union, Valle, Colombia; c/o HEBRON S.A., Tulua, Valle, Colombia; c/o HOTEL LOS VINEDOS, La Union, Valle, Colombia; c/o IBADAN LTDA., Tulua, Valle, Colombia; c/o ILOVIN S.A., Bogota, Colombia; c/o INDUSTRIAS DEL ESPIRITU SANTO S.A., Malambo, Atlantico, Colombia; c/o INTERNATIONAL FREEZE DRIED S.A., Bogota, Colombia; c/o INVERSIONES AGUILA LTDA., La Union, Valle, Colombia; c/o INVERSIONES GRAME LTDA., La Union, Valle, Colombia; c/o INVERSIONES LOS POSSO LTDA. S.C.S., La Union, Valle, Colombia; c/o INVERSIONES SANTA CECILIA S.C.S., La Union, Valle, Colombia; c/o INVERSIONES SANTA MONICA LTDA., La Union, Valle, Colombia; c/o JOSAFAT S.A., Tulua, Valle, Colombia; c/o MACEDONIA LTDA., La Union, Valle, Colombia; c/o PANAMERICANA LTDA., Cali, Colombia; c/o RAMAL S.A., Bogota, Colombia; c/o SALIM S.A., La Union, Valle, Colombia; c/o SALOME GRAJALES Y CIA. LTDA., Bogota, Colombia; c/o SOCIEDAD DE NEGOCIOS SAN AGUSTIN LTDA., La Union, Valle, Colombia; c/o TRANSPORTES DEL ESPIRITU SANTO S.A., La Union, Valle, Colombia; c/o FRUTAS DE LA COSTA S.A., Malambo, Atlantico, Colombia; c/o CONFECCIONES LINA MARIA LTDA., La Union, Valle, Colombia; c/o FUNDACION CENTRO FRUTICOLA ANDINO, La Union, Valle, Colombia; c/o FUNDACION CENTRO DE INVESTIGACION HORTIFRUTICOLA DE COLOMBIA, La Union, Valle, Colombia; DOB 13 Dec 1957; POB La Union, Valle, Colombia; Cedula No. 6356044 (Colombia) (individual) [SDNT].

7. GRAJALES MEJIA, Jorge Julio, c/o AGUSTIN GRAJALES Y CIA. LTDA., La Union, Valle, Colombia; c/o FREXCO S.A., La Union, Valle, Colombia; c/o GRAJALES S.A., La Union, Valle, Colombia; c/o INVERSIONES GRAME LTDA., La Union, Valle, Colombia; c/o SOCIEDAD DE NEGOCIOS SAN AGUSTIN LTDA., La Union, Valle, Colombia; c/o FUNDACION CENTRO FRUTICOLA ANDINO, La Union, Valle, Colombia; c/o FUNDACION CENTRO DE INVESTIGACION HORTIFRUTICOLA DE COLOMBIA, La Union, Valle, Colombia; Cedula No. 14961290 (Colombia) (individual) [SDNT].

8. GRAJALES PUENTES, Diana Carolina, Transversal 13A No. 123–10 Int. 2 apt. 203, Bogota, Colombia; DOB 15 Mar 1979; POB La Victoria, Valle, Colombia; Cedula No. 52455790 (Colombia) (individual) [SDNT] (Linked To: SALIM S.A.; Linked To: HEBRON S.A.; Linked To: INDUSTRIAS DEL ESPIRITU SANTO S.A.; Linked To: JOSAFAT S.A.; Linked To: DOXA S.A.; Linked To: CITICAR LTDA.; Linked To: AGROPECUARIA EL NILO S.A.).

9. HENAO MONTOYA, Lorena, Calle 52 No. 28E–30, Cali, Colombia; Calle 8 No. 39–79 of. 201, Cali, Colombia; c/o AGROINVERSORA URDINOLA HENAO Y CIA. S.C.S., Cali, Colombia; c/o CONSTRUCTORA UNIVERSAL LTDA., Cali, Colombia; c/o EXPLOTACIONES AGRICOLAS Y GANADERAS LA LORENA S.C.S., Cali, Colombia; c/o INDUSTRIAS AGROPECUARIAS DEL VALLE LTDA., Cali, Colombia; c/o INVERSIONES EL EDEN S.C.S., Cali, Colombia; c/o CASA GRAJALES S.A., La Union, Valle, Colombia; c/o FREXCO S.A., La Union, Valle, Colombia; c/o GRAJALES S.A., La Union, Valle, Colombia; c/o HOTEL LOS VINEDOS, La Union, Valle, Colombia; c/o IBADAN LTDA., Tulua, Valle, Colombia; c/o

INVERSIONES AGUILA LTDA., La Union, Valle, Colombia; c/o INVERSIONES GRAME LTDA., La Union, Valle, Colombia; c/o INVERSIONES LOS POSSO LTDA. S.C.S., La Union, Valle, Colombia; c/o INVERSIONES SANTA CECILIA S.C.S., La Union, Valle, Colombia; c/o INVERSIONES SANTA MONICA LTDA., La Union, Valle, Colombia; c/o PANAMERICANA LTDA., Cali, Colombia; c/o SOCIEDAD DE NEGOCIOS SAN AGUSTIN LTDA., La Union, Valle, Colombia; c/o INDUSTRIAS AGROPECUARIAS EL EDEN S.A., Higueronal Torti, Darien, Panama; DOB 09 Oct 1968; Cedula No. 31981533 (Colombia) (individual) [SDNT].

10. PALACIO MONTOYA, Nelson Albeiro; DOB 28 Nov 1968; POB Medellin, Antioquia, Colombia; Cedula No. 71702964 (Colombia) (individual) [SDNTK] (Linked To: SUBASTA GANADERA DE CAUCASIA S.A.; Linked To: FRIGORIFICO DEL CAUCA S.A.S.).

11. PIEDRAHITA CEBALLOS, Jose Bayron; DOB 27 Dec 1958; POB Bello, Antioquia, Colombia; Cedula No. 8399245 (Colombia); C.U.I.T. 20–60357110–0 (Argentina) (individual) [SDNTK] (Linked To: ARROCERA CONTADORA; Linked To: JOSE PIELES; Linked To: COMERCIALIZADORA TROPPO SOCIEDAD ANONIMA; Linked To: SUBASTA GANADERA DE CAUCASIA S.A.; Linked To: FRIGORIFICO DEL CAUCA S.A.S.; Linked To: RECREO S.A.; Linked To: DYSTRY PANAMA S.A.; Linked To: LA ALIANZA GANADERA LTDA.; Linked To: LA OFICINA DE ENVIGADO).

12. QUINTERO MARIN, Lucio, c/o INDUSTRIAS AGROPECUARIAS EL EDEN S.A., Higueronal Torti, Darien, Panama; DOB 03 Apr 1966; POB El Dovio, Valle, Colombia; Cedula No. 94191399 (Colombia); Passport 94191399 (Colombia) (individual) [SDNT].

13. QUINTERO MARIN, Maria Eugenia, c/o INDUSTRIAS AGROPECUARIAS EL EDEN S.A., Higueronal Torti, Darien, Panama; DOB 29 Jul 1968; POB El Dovio, Valle, Colombia; Cedula No. 66703157 (Colombia); Passport 66703157 (Colombia) (individual) [SDNT].

14. RENTERIA MANTILLA, Carlos Alberto (a.k.a. ''BETO RENTERIA''), Carrera 26 No. 29–75, Tulua, Colombia; DOB 11 Mar 1945; POB Colombia; citizen Colombia; Cedula No. 6494208 (Colombia) (individual) [SDNT] (Linked To: DIMABE LTDA.; Linked To: COLOMBO ANDINA COMERCIAL COALSA LTDA.).

15. ROJAS MONTOYA, Maritza, c/o CASA GRAJALES S.A., La Union, Valle, Colombia; c/o FREXCO S.A., La Union, Valle, Colombia; c/o GRAJALES S.A., La Union, Valle, Colombia; c/o IBADAN LTDA., Tulua, Valle, Colombia; c/o INVERSIONES AGUILA LTDA., La Union, Valle, Colombia; Cedula No. 31838109 (Colombia) (individual) [SDNT].

16. ROLL CIFUENTES, Jaime Alberto, c/o C.I. GLOBAL INVESTMENTS S.A., Medellin, Colombia; c/o HOTELES Y BIENES S.A, Bogota, Colombia; DOB 15 Mar 1979; POB Medellin, Colombia; Cedula No. 98667284 (Colombia) (individual) [SDNTK].

17. SABAGH CAJELI, Romez Jose (a.k.a. SABAGH, Ramzi); DOB 04 Jun 1960; POB El Carmen de Bolivar, Bolivar, Colombia; Cedula No. 17848240 (Colombia) (individual) [SDNTK] (Linked To: ALMACEN SONIPAL).

18. URDINOLA GRAJALES, Ivan (a.k.a. URDINOLA GRAJALES, Jairo Ivan), Calle 52 No. 28E–30, Cali, Colombia; Hacienda La Lorena, Zarzal, Valle del Cauca, Colombia; c/o AGROINVERSORA URDINOLA HENAO Y CIA. S.C.S., Cali, Colombia; c/o CONSTRUCTORA UNIVERSAL LTDA., Cali, Colombia; c/o EXPLOTACIONES AGRICOLAS Y GANADERAS LA LORENA S.C.S., Cali, Colombia; c/o INDUSTRIAS AGROPECUARIAS DEL VALLE LTDA., Cali, Colombia; c/o INVERSIONES EL EDEN S.C.S., Cali, Colombia; DOB 01 Dec 1960; Cedula No. 94190353 (Colombia); Passport AD129003 (Colombia) (individual) [SDNT].

19. URDINOLA GRAJALES, Julio Fabio, Carrera 40 No. 5A–40, Cali, Colombia; c/o CONSTRUCTORA E INMOBILIARIA URVALLE CIA. LTDA., Cali, Colombia; Cedula No. 16801454 (Colombia) (individual) [SDNT].

20. VARGAS CORREA, Humberto; DOB 25 Mar 1959; POB Iztacalco, Distrito Federal, Mexico; R.F.C. VACH5903253B0 (Mexico); C.U.R.P. VACH590325HDFRRM07 (Mexico) (individual) [SDNTK].

Entities

1. AGROINVERSORA URDINOLA HENAO Y CIA. S.C.S., Calle 5 No. 22–39 of. 205, Cali, Colombia; Calle 52 No. 28E–30, Cali, Colombia; NIT # 800042180–1 (Colombia) [SDNT].

2. AGROPECUARIA EL NILO S.A. (a.k.a. AGRONILO S.A.), Calle 14 No. 4–123, La Union, Valle, Colombia; Corregimiento El Bohio Finca El Nilo, Toro, Valle, Colombia; Establecimientos Corabastos Bodega Reina Puesto 35A, Bogota, Colombia; Establecimientos Corabastos Bodega Reina Puesto 64A, Bogota, Colombia; NIT # 800099699–5 (Colombia) [SDNT].

3. AGUSTIN GRAJALES Y CIA. LTDA., Factoria La Rivera, La Union, Valle, Colombia; NIT # 800166941–0 (Colombia) [SDNT].

4. ALMACAES S.A., Avenida 15 No. 123–30, Local 1–13, Bogota, Colombia; Carrera 65 No. 71–74, Barranquilla, Colombia; Diagonal 127 No. 17–34 Piso 2, Bogota, Colombia; NIT # 830086515–1 (Colombia) [SDNT].

5. ALMACEN SONIPAL, Carrera 10 No. 12–20, Maicao, Guajira, Colombia; Matricula Mercantil No 0004638 (Colombia) [SDNTK].

6. ARMAGEDON S.A., Factoria La Rivera, La Union, Valle, Colombia; NIT # 800112221–4 (Colombia) [SDNT].

7. ARROCERA CONTADORA, Vereda Rioman, Caceres, Antioquia, Colombia; Carrera 4A No. 7A–47, Barrio Centro, Ayapel, Cordoba, Colombia; Matricula Mercantil No 57192402 (Medellin) [SDNTK].

8. ASESORES CONSULTORES ASOCIADOS LTDA. (a.k.a. ACA LTDA.), Carrera 100 No. 11–90 Ofc. 403, Cali, Colombia; NIT # 805007818–1 (Colombia) [SDNT].

9. CALI@TELE.COM LTDA. (a.k.a. HOLA TELECOMUNICACIONES), Calle 13 No. 80–60 Loc. 224, Cali, Colombia; NIT # 805021515–1 (Colombia) [SDNT].

10. CANADUZ S.A., Calle 23BN No. 5N–37, Ofc. 202, Cali, Colombia; NIT # 805024035–1 (Colombia) [SDNT].

11. CASA GRAJALES S.A., Apartado Aereo 20288, Cali, Colombia; Calle 96 No. 11B–39, Bogota, Colombia; Carrera 10 No. 31–01, Cali, Colombia; Factoria La Rivera, La Union, Valle, Colombia; Zona Industrial Los Mangos, Cali, Colombia; NIT # 891902138–1 (Colombia) [SDNT].

12. C.I. GLOBAL INVESTMENTS S.A., Carrera 48 No. 38–46, Medellin, Colombia; NIT # 811039750–7 (Colombia) [SDNTK].

13. CITICAR LTDA., Calle 15 No. 10–52, La Union, Valle, Colombia; NIT # 800026660–6 (Colombia) [SDNT].

14. COLOMBO ANDINA COMERCIAL COALSA LTDA., Carrera 14 No. 95–47, Ofc.201, Bogota, Colombia; NIT # 800084516–0 (Colombia) [SDNT].

15. COMERCIALIZADORA TROPPO SOCIEDAD ANONIMA (a.k.a. TROPPO S.A.), Calle 7 Sur 42 70 603, Medellin, Antioquia, Colombia; NIT # 800142500–2 (Colombia) [SDNTK].

16. COMUNICACIONES ABIERTAS CAMARY LTDA., Calle 13 No. 80–60 Loc. 224, Cali, Colombia; NIT # 805028107–1 (Colombia) [SDNT].

17. CONFECCIONES LINA MARIA LTDA., Factoria La Rivera, La Union, Valle, Colombia; NIT # 800026667–7 (Colombia) [SDNT].

18. CONSTRUCCIONES E INVERSIONES LTDA., Calle 15 No. 10–52, La Union, Valle, Colombia; NIT # 800154939–3 (Colombia) [SDNT].

19. CONSTRUCTORA E INMOBILIARIA URVALLE CIA. LTDA., Carrera 9 No. 9–49 of. 902, Cali, Colombia; NIT # 800094652–7 (Colombia) [SDNT].

20. CONSTRUCTORA PIEDRA DEL CASTILLO S.A.S., Cr. 27 Nro. 35 Sur 162, Of. 336, Envigado, Antioquia, Colombia; NIT # 900848164–4 (Colombia) [SDNTK].

21. CONSTRUCTORA UNIVERSAL LTDA., Carrera 50 No. 9B–20 of. 07, Cali, Colombia; Calle 52 No. 28E–30, Cali, Colombia; NIT # 800112051–9 (Colombia) [SDNT].

22. CORPORACION DE ALMACENES POR DEPARTAMENTOS S.A. (a.k.a. C.A.D. S.A.), Diagonal 127A No. 17–34, Bogota, Colombia; NIT # 800173127–0 (Colombia) [SDNT].

23. CORPORACION HOTELERA DEL CARIBE LIMITADA (a.k.a. APARTAHOTEL TRES CASITAS; a.k.a. ''TRES CASITAS''), Avenida Colombia No. 1–60, San Andres, Providencia, Colombia; NIT # 800104679–1 (Colombia) [SDNT].

24. CRETA S.A., Calle 15 No. 10–52, La Union, Valle, Colombia; NIT # 800019962–6 (Colombia) [SDNT].

25. DIMABE LTDA., Diagonal 127A No. 30–25, Bogota, Colombia; NIT # 800107988–4 (Colombia) [SDNT].

26. DOXA S.A., Carrera 16 No. 13–31, La Union, Valle, Colombia; NIT # 821002801–0 (Colombia) [SDNT].

27. DYSTRY PANAMA S.A., Av. Ramon Arias Malina, Primer Piso, Ciudad de Panama, Panama; Calle Calderon de La Barca 1315, Buenos Aires, Argentina; RUC # 245800–1–402386 (Panama) [SDNTK].

28. EAGLE COMMUNICATION BROKERS INC., Panama City, Panama [SDNT].

29. EXPLOTACIONES AGRICOLAS Y GANADERAS LA LORENA S.C.S. (a.k.a. EXAGAN), Calle 5 No. 22–39 of. 205, Cali, Colombia; Calle 52 No. 28E–30, Cali, Colombia; NIT # 800083192–3 (Colombia) [SDNT].

30. FRIGORIFICO DEL CAUCA S.A.S., Calle 30 28 A 14, Kilometro 1 Via Monteria, Caucasia, Antioquia, Colombia; NIT # 811017934–0 (Colombia) [SDNTK].

31. FRUTAS EXOTICAS COLOMBIANOS S.A. (a.k.a. FREXCO S.A.), Factoria La Rivera, La Union, Valle, Colombia; NIT # 800183514–0 (Colombia) [SDNT].

32. FUNDACION CENTRO DE INVESTIGACION HORTIFRUTICOLA DE COLOMBIA (a.k.a. CENIHF), Km. 2 La Victoria, La Union, Valle, Colombia; NIT # 821002640–1 (Colombia) [SDNT].

33. FUNDACION CENTRO FRUTICOLA ANDINO, Km. 2 Via La Victoria, La Union, Valle, Colombia; NIT # 800077756–2 (Colombia) [SDNT].

34. GAD S.A., Factoria La Rivera, La Union, Valle, Colombia; NIT # 821002971–4 (Colombia) [SDNT].

35. GBS TRADING S.A., Carrera 85 No. 15–110, Cali, Colombia; NIT # 805026824–5 (Colombia) [SDNT].

36. G.L.G. S.A. (a.k.a. CASA ESTRELLA), Apartado Aereo 250752, Bogota, Colombia; Avenida 15 No. 123–30, Local 1–13, Bogota, Colombia; Calle 53 No. 25–30, Bogota, Colombia; Calle 164 No. 40–40, Bogota, Colombia; Carrera 65 No. 71–74, Barranquilla, Colombia; Centro Comercial Chipichape, Cali, Colombia; Centro Comercial Galerias, Bogota, Colombia; Centro Comercial Unicentro, Local 1–13, Bogota, Colombia; Centro Comercial Unicentro, Local 209, Cali, Colombia; Diagonal 127A No. 17–34 Piso 5, Bogota, Colombia; NIT # 800023807–8 (Colombia) [SDNT].

37. GOODY PET S.A.S. (f.k.a. PET TREATS FACTORY COLOMBIA S.A.S.), Av. 36 C DG No. 42 CC 20, Bello, Antioquia, Colombia; Ciudad de Guatemala, Guatemala; NIT # 900713562–2 (Colombia) [SDNTK].

38. GRAJALES S.A., Carrera 25 No. 8–78, Bogota, Colombia; Factoria La Rivera, La Union, Valle, Colombia; Via Roldanillo Finca La Palmera, La Union, Valle, Colombia; NIT # 891900090–8 (Colombia) [SDNT].

39. HEBRON S.A., Calle 28 No. 27–18, Tulua, Valle, Colombia; NIT # 800107304–7 (Colombia) [SDNT].

40. IBADAN LTDA., Calle 28 No. 27–18, Tulua, Valle, Colombia; NIT # 800112215–1 (Colombia) [SDNT].

41. ILOVIN S.A., Avenida 15 No. 123–30, Local 1–13, Bogota, Colombia; NIT # 800141304–0 (Colombia) [SDNT].

42. INDUSTRIAS AGROPECUARIAS DEL VALLE LTDA., Carrera 50 No. 9B–20 of. 07, Cali, Colombia; Calle 52 No. 28E–30, Cali, Colombia; NIT # 800068160–5 (Colombia) [SDNT].

43. INDUSTRIAS AGROPECUARIAS EL EDEN S.A., Higueronal Torti, Darien, Panama [SDNT].

44. INDUSTRIAS DEL ESPIRITU SANTO S.A. (a.k.a. FRUCOSTA; n.k.a. FRUTAS DE LA COSTA S.A.), Carretera Oriental Km. 2 Via Barranquilla, Malambo, Atlantico, Colombia; NIT # 821002015–8 (Colombia) [SDNT].

45. INTERNATIONAL FREEZE DRIED S.A. (a.k.a. IFD S.A.), Carrera 92 No. 62–30, Bogota, Colombia; NIT # 830132968–1 (Colombia) [SDNT].

46. INVERSIONES AGUILA LTDA., Carrera 14 No. 14–56, La Union, Valle, Colombia; Factoria La Rivera, La Union, Valle, Colombia; NIT # 891903843–0 (Colombia) [SDNT].

47. INVERSIONES EL EDEN S.C.S., Calle 5 No. 22–39 of. 205, Cali, Colombia; Calle 52 No. 28E–30, Cali, Colombia; NIT # 800083195–5 (Colombia) [SDNT].

48. INVERSIONES GRAME LTDA., Factoria La Rivera, La Union, Valle, Colombia; NIT # 891903520–7 (Colombia) [SDNT].

49. INVERSIONES LOS POSSO LTDA. S.C.S., Factoria La Rivera, La Union, Valle, Colombia; NIT # 891903760–8 (Colombia) [SDNT].

50. INVERSIONES SANTA CECILIA S.C.S., Factoria La Rivera, La Union, Valle, Colombia; NIT # 891903795–5 (Colombia) [SDNT].

51. INVERSIONES SANTA MONICA LTDA., Factoria La Rivera, La Union, Valle, Colombia; NIT # 800042933–9 (Colombia) [SDNT].

52. JEHOVA LTDA., Calle 28 No. 27–18, Tulua, Valle, Colombia; NIT # 800112196–8 (Colombia) [SDNT].

53. JOSAFAT S.A., Calle 28 No. 27–18, Tulua, Valle, Colombia; NIT # 800112217–4 (Colombia) [SDNT].

54. JOSE PIELES, Km. 4 via Caucasia Caceres, Hda. Contadora, Caucasia, Antioquia, Colombia; Matricula Mercantil No 54369602 (Medellin) [SDNTK].

55. KUTRY MANAGEMENT INC., Torre Universal Building, 3rd Floor, Federico Boyd Avenue and 51st Street, Panama City, Panama; RUC # 34407212255995 (Panama) [SDNT].

56. LA ALIANZA GANADERA LTDA. (a.k.a. LA ALIANZA GANADERA S.A.S.), Calle 7 Sur 42 70, Of. 603, Medellin, Antioquia, Colombia; NIT # 900185737–8 (Colombia) [SDNTK].

57. L.GR. E.U. (a.k.a. PLATERIA L.GR. E.U.), Calle 38N No. 6N–35, Loc. 46, Cali, Colombia; NIT # 805024405–3 (Colombia) [SDNT].

58. LINEAS AEREAS ANDINAS LINCANDISA S.A. (a.k.a. LINCANDISA S.A.), Av. de los Shyris No. 35–174, Barrio Suecia, Quito, Ecuador; RUC # 1792136652001 (Ecuador) [SDNTK].

59. LOS VINEDOS DE GETSEMANI S.A. (a.k.a. HOTEL LOS VINEDOS; a.k.a. VALLE LINDO HOSTAL RESTAURANTE), Km. 1 Via a Roldanillo, La Union, Valle, Colombia; Troncal Del Pacifico Km. 1, La Union, Valle, Colombia; NIT # 800108902–6 (Colombia) [SDNT].

60. MACEDONIA LTDA., Calle 15 No. 10–52, La Union, Valle, Colombia; NIT # 800121860–9 (Colombia) [SDNT].

61. MANUFACTURAS REAL S.A. (f.k.a. MANUFACTURAS REAL LTDA.), Avenida 13 Sur No. 24C–73 Barrio

Balvanera, Bogota, Colombia; NIT # 800158181–6 (Colombia) [SDNT].

62. MELON LTDA., Unicentro Casa Grajales, Cali, Colombia; NIT # 805000581–8 (Colombia) [SDNT].

63. OBRAS Y PROYECTOS PIQUEHERVA S.L., Calle de San Jose, 20, El Boalo, Madrid 28413, Spain; C.I.F. B84244748 (Spain) [SDNTK].

64. PANAMERICANA LTDA., Carrera 9 No. 9–46, Cali, Colombia; NIT # 800091914–8 (Colombia) [SDNT].

65. RAMAL S.A., Diagonal 127A No. 17–34 Piso 5, Bogota, Colombia; NIT # 800142109–5 (Colombia) [SDNT].

66. RECREO S.A., Calle 36D Sur Nro. 27–160 CA 54, Envigado, Antioquia, Colombia; NIT # 830500371–4 (Colombia) [SDNTK].

67. SALIM S.A., Calle 15 No. 10–52, La Union, Valle, Colombia; NIT # 821001412–4 (Colombia) [SDNT].

68. SALOME GRAJALES Y CIA. LTDA., Calle 53 No. 25–30, Bogota, Colombia; NIT # 800141337–3 (Colombia) [SDNT].

69. SOCIEDAD DE NEGOCIOS SAN AGUSTIN LTDA., Factoria La Rivera, La Union, Valle, Colombia; NIT # 800042932–1 (Colombia) [SDNT].

70. SUBASTA GANADERA DE CAUCASIA S.A. (a.k.a. SUBAGAUCA S.A.), Coliseo de Ferias, Km. 1 via a Planeta Rica, Caucasia, Antioquia, Colombia; NIT # 811016451–0 (Colombia) [SDNTK].

71. TARRITOS S.A., Calle 23 BN No. 5N–37, Ofc. 202, Cali, Colombia; NIT # 805028114–3 (Colombia) [SDNT].

72. TRANSPORTES DEL ESPIRITU SANTO S.A., Calle 14 No. 4–123, La Union, Valle, Colombia; Salida a la Victoria, La Union, Valle, Colombia; NIT # 821002436–5 (Colombia) [SDNT].

73. WORLD WORKING COMERCIALIZADORA INTERNACIONAL S.A. (f.k.a. C.I. GLOS'S INTERNATIONAL S.A.; a.k.a. WORLD WORKING C.I.), Carrera 10 No. 31–01 Zona Industrial Los Mangos, Cali, Colombia; NIT # 805023286–9 (Colombia) [SDNT].

Signed: October 31, 2023.

Gregory T. Gatjanis,

Associate Director, Office of Foreign Assets Control, U.S. Department of the Treasury.

[FR Doc. 2023–24510 Filed 11–6–23; 8:45 am]

BILLING CODE 4810–25–P

DEPARTMENT OF THE TREASURY

Privacy Act, System of Records; Correction

AGENCY: Departmental Offices, Department of the Treasury.

ACTION: Notice of a modified system of records; correction.

SUMMARY: The Department of the Treasury published a document in the **Federal Register** on November 2, 2023, concerning system location addresses. The document contained incorrect addresses.

DATES: Comments should be received on or before December 4, 2023 to be assured of consideration.

FOR FURTHER INFORMATION CONTACT: Ryan Law, email: *privacy@treasury.gov,* phone: (202) 622–5710.

SUPPLEMENTARY INFORMATION:

Correction

In the **Federal Register** of November 2, 2023, in FR Doc 2023–24222, on page 75377 (third column), correct the addresses at numbers (10) and (11) to read:

SYSTEM LOCATION

* * * * *

(10) *The Office of Inspector General (OIG):* 875 15th Street NW, Washington, DC 20005.

(11) *Treasury Inspector General for Tax* Administration (TIGTA): 901 D Street SW, Suite 600, Washington, DC 20024–2169.

* * * * *

Ryan Law,

Deputy Assistant Secretary for Privacy, Transparency, and Records.

[FR Doc. 2023–24603 Filed 11–6–23; 8:45 am]

BILLING CODE 4810–AK–P

FEDERAL REGISTER

Vol. 88 Tuesday,

No. 214 November 7, 2023

Part II

Securities and Exchange Commission

17 CFR Parts 232 and 240

Modernization of Beneficial Ownership Reporting; Final Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 232 and 240

[Release Nos. 33–11253; 34–98704; File No. S7–06–22]

RIN 3235–AM93

Modernization of Beneficial Ownership Reporting

AGENCY: Securities and Exchange Commission.

ACTION: Final rule; guidance.

SUMMARY: The Securities and Exchange Commission (''Commission'') is adopting amendments to certain rules that govern beneficial ownership reporting. The amendments generally shorten the filing deadlines for initial and amended beneficial ownership reports filed on Schedules 13D and 13G. The amendments also clarify the disclosure requirements of Schedule 13D with respect to derivative securities. We also are expanding the timeframe within a given business day by which Schedules 13D and 13G must be filed, and separately requiring that Schedule 13D and 13G filings be made using a structured, machine-readable data language. Further, we discuss how, under the current rules, an investor's use of a cash-settled derivative security may result in the person being treated as a beneficial owner of the class of the reference equity security. We also are providing guidance on the application of the current legal standard found in section 13(d)(3) and 13(g)(3) of the Securities Exchange Act of 1934 to certain common types of shareholder engagement activities. Finally, we are making certain technical revisions.

DATES:

Effective dates: The amendments are effective on February 5, 2024.

Compliance dates: See section II.G.

FOR FURTHER INFORMATION CONTACT: Nicholas Panos, Senior Special Counsel, and Valian Afshar, Senior Special Counsel, Division of Corporation Finance, at (202) 551–3440, U.S. Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION: We are adopting amendments to 17 CFR 240.13d–1 (''Rule 13d–1''), 17 CFR 240.13d–2 (''Rule 13d–2''), 17 CFR 240.13d–3 (''Rule 13d–3''), 17 CFR 240.13d–5 (''Rule 13d–5''), 17 CFR 240.13d–6 (''Rule 13d–6''), 17 CFR 240.13d–101 (''Rule 13d–101''), and 17 CFR 240.13d–102 (''Rule 13d–102'') under the Securities Exchange Act of 1934 [15 U.S.C. 78a *et seq.*] (''Exchange Act'').[1] We also are adopting amendments to 17 CFR 232.13 (''Rule 13 of Regulation S–T'') and 17 CFR 232.201 (''Rule 201 of Regulation S–T'') under 17 CFR part 232 (''Regulation S–T'').[2] In addition, we are rescinding 17 CFR 240.13d–7 (''Rule 13d–7'').

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I. Introduction

We are amending certain rules within 17 CFR 240.13d–1 through 240.13f–1 (''Regulation 13D–G'')[3] and Regulation S–T to modernize the beneficial ownership reporting requirements and improve their operation and efficacy. Some[4] of these amendments are based on the amendments that the Commission proposed in 2022 (''Proposed Amendments'').[5] Specifically, we are adopting revisions to the deadlines for Schedule 13D and Schedule 13G filings. We also are adopting certain related technical changes to Regulation S–T that the Commission proposed in connection with these amendments. Further, we are requiring that Schedule 13D and 13G filings be submitted using a structured, machine-readable data language.

In response to the comments we received on the Proposed Amendments,[6] however, we are making

[1] Unless otherwise noted, when we refer to the Exchange Act, or any paragraph of the Exchange Act, we are referring to 15 U.S.C. 78a of the United States Code, at which the Exchange Act is codified, and when we refer to rules under the Exchange Act, or any paragraph of these rules, we are referring to title 17, part 240 of the Code of Federal Regulations [17 CFR part 240], in which these rules are published.

[2] Unless otherwise noted, when we refer to Regulation S–T, or any paragraph of the rules thereunder, we are referring to title 17, part 232 of the Code of Federal Regulations [17 CFR part 232], in which these rules are published.

[3] Unless otherwise noted, when we refer to Regulation 13D–G, we are referring to title 17, part 240 of the Code of Federal Regulations [17 CFR part 240], in which 17 CFR 240.13d–1 through 240.13f–1 are published.

[4] See *infra* note 22 for a discussion of certain technical amendments we are adopting that the Commission did not previously propose.

[5] *See Modernization of Beneficial Ownership Reporting,* Release Nos. 33–11030; 34–94211 (Feb. 10, 2022) [87 FR 13846 (Mar. 10, 2022)] (''Proposing Release''). On Apr. 28, 2023, the Commission reopened the comment period for the Proposing Release in connection with the addition to the comment file of a memorandum prepared by staff of the Commission's Division of Economic and Risk Analysis. *See Reopening of Comment Period for Modernization of Beneficial Ownership Reporting,* Release Nos. 33–11180; 34–97405 (Apr. 28, 2023) [88 FR 28440 (May 4, 2023)] (''Reopening Release''). That memorandum provided supplemental data and analysis related to certain economic effects of the Proposed Amendments. *See* Memorandum of the Staff of the Division of Economic and Risk Analysis, *Supplemental data and analysis on certain economic effects of proposed amendments regarding the reporting of beneficial ownership* (Apr. 28, 2023), *available at https://www.sec.gov/comments/s7-06-22/s70622-20165251-334474.pdf* (''DERA Memorandum'').

[6] *See generally* letters submitted in connection with the Proposed Amendments, *available at*

certain adjustments from the proposal. For example, we are not adopting proposed 17 CFR 240.13d–3(e) (''Rule 13d–3(e)'') to deem certain holders of cash-settled derivative securities [7] as beneficial owners of the reference covered class.[8] Instead, we discuss how, under current Rule 13d–3, persons using these types of derivative securities may already be subject to regulation as beneficial owners. We also are not adopting many of the proposed amendments to Rules 13d–5 [9] and 13d–6. Instead, we are issuing guidance on the application of the current legal standard found in sections 13(d)(3) and 13(g)(3) to certain common types of shareholder engagement activities.

With respect to the Schedule 13D and Schedule 13G filing deadlines, we are amending the following rules:

- 17 CFR 240.13d–1(a) (''Rule 13d–1(a)''): Shortening the filing deadline for the initial Schedule 13D to within five business days [10] after the date on which a person acquires beneficial ownership of more than five percent of a covered class; [11]
- 17 CFR 240.13d–1(e), (f), and (g) (''Rule 13d–1(e), (f), and (g)''): Shortening the filing deadline for the initial Schedule 13D required to be filed by certain persons who become ineligible to report on Schedule 13G in lieu of Schedule 13D to five business days after the event that causes the ineligibility;
- 17 CFR 240.13d–1(b) and (d) (''Rule 13d–1(b) and (d)''): Shortening the deadline for the initial Schedule 13G filing for Qualified Institutional Investors (''QIIs'') [12] and Exempt Investors [13] to within 45 days [14] after the end of the calendar quarter in which beneficial ownership first exceeds five percent of a covered class; [15]
- 17 CFR 240.13d–1(c) (''Rule 13d–1(c)''): Shortening the deadline for Passive Investors [16] to file an initial Schedule 13G in lieu of Schedule 13D to within five business days after the date on which they acquire beneficial ownership of more than five percent of a covered class;
- 17 CFR 240.13d–2(a) (''Rule 13d–2(a)''): Revising the deadline for filing amendments to Schedule 13D to two business days after the date on which a material change occurs;

https://www.sec.gov/comments/s7-06-22/s70622.htm. Unless otherwise specified, all references in this release to comment letters are to comments submitted on the Proposed Amendments. Further, on June 22, 2023, the Commission's Investor Advisory Committee (''IAC'') adopted recommendations (''IAC Recommendations'') with respect to the Proposed Amendments. *See* U.S. Securities and Exchange Commission Investor Advisory Committee, Recommendation of the Market Structure Subcommittee of the SEC Investor Advisory Committee on SEC Proposed Amendments to Regulation 13D–G, Proposed Rule 10B–1, and Proposed Rule 9j–1 (June 22, 2023), *available at https://www.sec.gov/files/spotlight/iac/20230622-recommendation-regarding-sec-proposed-amendments-regulation-13d-g-proposed-rule-10b-1-and.pdf.* The IAC was established in Apr. 2012 pursuant to section 911 of the Dodd-Frank Wall Street Reform and Consumer Protection Act [Pub. L. 111–203, sec. 911, 124 Stat. 1376, 1822 (2010)] (''Dodd-Frank Act'') to advise and make recommendations to the Commission on regulatory priorities, the regulation of securities products, trading strategies, fee structures, the effectiveness of disclosure, and initiatives to protect investor interests and to promote investor confidence and the integrity of the securities marketplace. We discuss the IAC Recommendations in connection with the comments received on the Proposed Amendments below. *See infra* sections II.A.1.b, II.A.2.b, II.B.2, and II.C.1.b. In addition, on Sept. 21, 2022, the IAC held a meeting that included a panel discussion on the Proposed Amendments. See the agenda for that meeting, including the panelists that discussed the Proposed Amendments, at *https://www.sec.gov/spotlight/investor-advisory-committee/iac092122-agenda.htm.*

[7] As used in this release (including for purposes of proposed Rule 13d–3(e)), the term ''derivative security'' has the meaning set forth in 17 CFR 240.16a–1(c) (''Rule 16a–1(c)''). *See* Rule 16a–1(c) (defining ''derivative securities'' as including certain rights, such as options, warrants, convertible securities, stock appreciation rights, or similar rights ''with an exercise or conversion privilege at a price related to an equity security, or similar securities with a value derived from the value of an equity security,'' excluding certain enumerated rights, obligations, interests, and options). For purposes of proposed Rule 13d–3(e), the term ''derivative security'' would not have included a security-based swap, as defined in section 3(a)(68) of the Exchange Act and the rules and regulations thereunder (''SBS''). As the context requires, references to ''SBS'' in this release includes both the singular (''security-based swap'') and plural (''security-based swaps'') form. *See* Proposing Release at 13864 & nn.110–114.

[8] As used in this release, a ''covered class'' is a class of equity securities described in section 13(d)(1) of the Exchange Act and Rule 13d–1(i) and generally means, with limited exception, a voting class of equity securities registered under section 12 of the Exchange Act.

[9] See *infra* note 22 and sections II.C.2 and II.C.3 for a discussion of the proposed amendments to Rule 13d–5 that we are adopting.

[10] The term ''business day'' currently is not defined in section 13(d) or 13(g) or any rule of Regulation 13D–G. Accordingly, we are amending 17 CFR 240.13d–1(i) (''Rule 13d–1(i)'') by adopting a new paragraph (i)(2) that defines ''business day'' for purposes of Regulation 13D–G to mean any day, other than Saturday, Sunday, or a Federal holiday, from 12 a.m. to 11:59 p.m. Eastern Time. See *infra* notes 14 and 134 for further discussion of our new definition of ''business day.''

[11] Throughout this release, we refer to an initial Schedule 13D filing obligation as being incurred under Rule 13d–1(a) when a person ''acquires beneficial ownership of more than 5% of a covered class,'' among other similar formulations. These formulations refer to the requirement in Rule 13d–1(a), which currently states that ''[a]ny person who, after acquiring directly or indirectly the beneficial ownership of any equity security of a [covered class], is directly or indirectly the beneficial owner of more than five percent of the class shall, within 10 days after the acquisition, file with the Commission, a . . . Schedule 13D.''

[12] The institutional investors qualified to report on Schedule 13G, in lieu of Schedule 13D and in reliance upon Rule 13d–1(b), include a broker or dealer registered under section 15 of the Exchange Act, a bank as defined in section 3(a)(6) of the Exchange Act, an insurance company as defined in section 3(a)(19) of the Exchange Act, an investment company registered under section 8 of the Investment Company Act of 1940, a person registered as an investment adviser under section 203 of the Investment Advisers Act of 1940, a parent holding company or control person (if certain conditions are met), an employee benefit plan or pension fund that is subject to the provisions of the Employee Retirement Income Security Act of 1974, a savings association as defined in section 3(b) of the Federal Deposit Insurance Act, a church plan that is excluded from the definition of an investment company under section 3(c)(14) of the Investment Company Act of 1940, non-U.S. institutions that are the functional equivalent of any of the institutions listed in Rule 13d–1(b)(1)(ii)(A) through (I), so long as the non-U.S. institution is subject to a regulatory scheme that is substantially comparable to the regulatory scheme applicable to the equivalent U.S. institution, and related holding companies and groups (collectively, ''Qualified Institutional Investors'' or ''QIIs''). 17 CFR 240.13d–1(b)(1)(ii). In addition, under Rule 13d–1(b), in order to qualify to report on Schedule 13G in lieu of Schedule 13D, a QII must have acquired securities in the covered class in the ordinary course of business and not with the purpose nor with the effect of changing or influencing the control of the issuer, nor in connection with or as a participant in any transaction having such purpose or effect. 17 CFR 240.13d–1(b)(1)(i).

[13] The term ''Exempt Investor'' as used in this release refers to persons holding beneficial ownership of more than 5% of a covered class, but who have not made an acquisition of beneficial ownership subject to section 13(d). For example, persons who acquire all of their securities prior to the issuer registering the subject securities under the Exchange Act are not subject to section 13(d). In addition, persons who acquire no more than 2% of a covered class within a 12-month period are exempted from section 13(d) by section 13(d)(6)(B). In both cases, however, those persons are subject to section 13(g). Amendments to Beneficial Ownership Reporting Requirements, Release No. 34–39538 (Jan. 12, 1998) [63 FR 2854, n.8 (Jan. 16, 1998)]; *see also* Proposing Release at 13856, n.55.

[14] Any reference to ''day'' in this release means ''calendar day,'' and those terms may be used interchangeably. Any reference to ''business day'' means ''business day,'' as we are defining that term. See *supra* note 10 and *infra* note 134 for discussions of our new definition of ''business day.''

[15] In addition, we are retaining the requirement in Rule 13d–1(b)(2) that a QII file its initial Schedule 13G on a more expedited basis if its beneficial ownership exceeds 10% of a covered class. 17 CFR 240.13d–1(b)(2). We are amending that rule, however, to require that such an initial Schedule 13G be filed within five business days after the end of the first month in which the QII's beneficial ownership exceeds 10% of a covered class, computed as of the last day of the month, rather than the current requirement of 10 calendar days after month-end.

[16] The term ''Passive Investors'' as used in this release refers to beneficial owners of more than 5% but less than 20% of a covered class who can certify under Item 10 of Schedule 13G that the subject securities were not acquired and are not held for the purpose or effect of changing or influencing the control of the issuer of such securities and were not acquired in connection with or as a participant in any transaction having such purpose or effect. *Amendments to Beneficial Ownership Reporting Requirements,* Release No. 34–39538 (Jan. 12, 1998) [63 FR 2854, n.9 (Jan. 16, 1998)]. These investors are ineligible to report beneficial ownership pursuant to Rule 13d–1(b) or (d) but are eligible to report beneficial ownership on Schedule 13G in reliance upon Rule 13d–1(c).

• 17 CFR 240.13d–2(b) (''Rule 13d–2(b)''): Shortening the deadline for Schedule 13G amendments filed pursuant to that provision to 45 days after the end of the calendar quarter in which a reportable change occurs;

• 17 CFR 240.13d–2(c) (''Rule 13d–2(c)''): Shortening the filing deadline for Schedule 13G amendments filed pursuant to that provision to five business days after the end of the month in which beneficial ownership first exceeds 10 percent of a covered class, and thereafter upon any deviation by more than five percent of the covered class, with these requirements applying if the thresholds were crossed at any time during a month; and

• 17 CFR 13d–2(d) (''Rule 13d–2(d)''): Revising the deadline for Schedule 13G amendments filed pursuant to that provision to two business days after the date on which beneficial ownership exceeds 10 percent of a covered class, and thereafter upon any deviation by more than five percent of the covered class.

In addition, we are amending Rule 13d–2(b) to require that an amendment to a Schedule 13G be filed only if a ''material change'' occurs (replacing the current rule text that requires an amendment upon the occurrence of ''any change'' in the facts previously reported). Further, we are amending 17 CFR 232.13(a) (''Rule 13(a) of Regulation S–T'') to permit Schedules 13D and 13G, and any amendments thereto, that are submitted by direct transmission commencing on or before 10 p.m. Eastern Time [17] on a given business day to be deemed to have been filed on the same business day.[18] This amendment should provide additional time for beneficial owners to prepare and submit their Schedule 13D or 13G filings.[19] The following table summarizes the changes we are adopting with respect to Schedule 13D and 13G filings, as described more fully in section II.A:

Issue	Current Schedule 13D	New Schedule 13D	Current Schedule 13G	New Schedule 13G
Initial Filing Deadline	Within 10 days after acquiring beneficial ownership of more than 5% or losing eligibility to file on Schedule 13G. Rule 13d–1(a), (e), (f), and (g).	Within five business days after acquiring beneficial ownership of more than 5% or losing eligibility to file on Schedule 13G. Rule 13d–1(a), (e), (f), and (g).	*QIIs & Exempt Investors:* 45 days after calendar year-end in which beneficial ownership exceeds 5%. Rule 13d–1(b) and (d). *QIIs:* 10 days after month-end in which beneficial ownership exceeds 10%. Rule 13d–1(b). *Passive Investors:* Within 10 days after acquiring beneficial ownership of more than 5%. Rule 13d–1(c).	*QIIs & Exempt Investors:* 45 days after calendar quarter-end in which beneficial ownership exceeds 5%. Rule 13d–1(b) and (d). *QIIs:* Five business days after month-end in which beneficial ownership exceeds 10%. Rule 13d–1(b). *Passive Investors:* Within five business days after acquiring beneficial ownership of more than 5%. Rule 13d–1(c).
Amendment Triggering Event	Material change in the facts set forth in the previous Schedule 13D. Rule 13d–2(a).	*Same as current Schedule 13D:* Material change in the facts set forth in the previous Schedule 13D. Rule 13d–2(a).	*All Schedule 13G Filers:* Any change in the information previously reported on Schedule 13G. Rule 13d–2(b). *QIIs & Passive Investors:* Upon exceeding 10% beneficial ownership or a 5% increase or decrease in beneficial ownership. Rule 13d–2(c) and (d).	*All Schedule 13G Filers:* Material change in the information previously reported on Schedule 13G. Rule 13d–2(b). *QIIs & Passive Investors:* Same as current Schedule 13G: Upon exceeding 10% beneficial ownership or a 5% increase or decrease in beneficial ownership. Rule 13d–2(c) and (d).
Amendment Filing Deadline	Promptly after the triggering event. Rule 13d–2(a).	Within two business days after the triggering event. Rule 13d–2(a).	*All Schedule 13G Filers:* 45 days after calendar year-end in which any change occurred. Rule 13d–2(b). *QIIs:* 10 days after month-end in which beneficial ownership exceeded 10% or there was, as of the month-end, a 5% increase or decrease in beneficial ownership. Rule 13d–2(c). *Passive Investors:* Promptly after exceeding 10% beneficial ownership or a 5% increase or decrease in beneficial ownership. Rule 13d–2(d).	*All Schedule 13G Filers:* 45 days after calendar quarter-end in which a material change occurred. Rule 13d–2(b). *QIIs:* Five business days after month-end in which beneficial ownership exceeds 10% or a 5% increase or decrease in beneficial ownership. Rule 13d–2(c). *Passive Investors:* Two business days after exceeding 10% beneficial ownership or a 5% increase or decrease in beneficial ownership. Rule 13d–2(d).
Filing ''Cut-Off'' Time	5:30 p.m. Eastern Time. Rule 13(a)(2) of Regulation S–T.	10 p.m. Eastern Time. Rule 13(a)(4) of Regulation S–T.	*All Schedule 13G Filers:* 5:30 p.m. Eastern Time. Rule 13(a)(2) of Regulation S–T.	*All Schedule 13G Filers:* 10 p.m. Eastern Time. Rule 13(a)(4) of Regulation S–T.

As noted above, we are not adopting proposed Rule 13d–3(e). Instead, we discuss the circumstances in which a holder of a cash-settled derivative security, excluding SBS, may be deemed the beneficial owner of the reference covered class under Rule 13d–3. We also are not adopting the proposed exemption in 17 CFR 240.13d–6(d)

[17] When we refer to ''Eastern Time'' in this release, we mean Eastern Standard Time or Eastern Daylight Saving Time, whichever is currently in effect.

[18] This rule applies to filing deadlines expressed both in calendar days and in business days. For example, for filing deadlines expressed in calendar days, if the deadline falls on a Federal holiday, a Saturday, or a Sunday, then the filing may be made on the next business day thereafter. *See infra* note 268.

[19] *See* Rule 13(a)(2) of Regulation S–T. We also are amending 17 CFR 232.201(a) (''Rule 201(a) of Regulation S–T'') to make the temporary hardship exemption set forth in that rule—which applies to unanticipated technical difficulties preventing the timely preparation and submission of an electronic filing—unavailable to Schedules 13D and 13G, including any amendments thereto.

(''Rule 13d–6(d)''), which the Commission proposed to enable certain persons to transact in derivative securities in the ordinary course of business without concern that they had formed a group under section 13(d)(3) or 13(g)(3), in part because we are not adopting proposed Rule 13d–3(e).

To further clarify the disclosure requirements with respect to derivative securities, particularly cash-settled derivative securities, held by a person required to report on Schedule 13D, the Commission is adopting an amendment to Schedule 13D. Specifically, we are amending Item 6 of Schedule 13D, codified at Rule 13d–101, to remove any implication that a person is not required to disclose interests in all derivative securities that use a covered class as a reference security. This amendment is intended to eliminate any ambiguity regarding the scope of the disclosure obligations of Item 6 of Schedule 13D as to derivative securities, including with respect to any derivative not originating with, or offered or sold by, the issuer, such as a cash-settled option or SBS.

As noted above, we are not adopting most of the proposed substantive amendments to Rule 13d–5.[20] We also are not adopting proposed 17 CFR 240.13d–6(c) (''Rule 13d–6(c)''), which would have specified certain circumstances under which two or more persons may coordinate and consult with one another and engage with an issuer without being subject to regulation as a group. Instead, we are issuing guidance regarding the appropriate legal standard for determining whether a group is formed. This guidance is intended to provide clarity on the circumstances under which a person may be deemed to have formed a group with another person or persons within the meaning of sections 13(d)(3) and 13(g)(3).

We are adopting the proposed requirement that Schedules 13D and 13G be filed using a structured, machine-readable data language. We are, therefore, now requiring that all disclosures, including quantitative disclosures, textual narratives, and identification checkboxes, on Schedules 13D and 13G be filed using an XML-based language.[21] This requirement is intended to make it easier for investors and other market participants to access, compile, and analyze information that is disclosed on Schedules 13D and 13G.

Finally, we also are adopting certain technical revisions, some of which were not included among the Proposed Amendments.[22]

II. Discussion of the Final Amendments

A. Amendments to Rules 13d–1 and 13d–2 and Rules 13 and 201 of Regulation S–T To Revise Filing Deadlines and Filing Date Assignment

We are adopting a series of amendments to the deadlines for filing initial and amended beneficial ownership reports on Schedules 13D and 13G and expanding the timeframe within a given business day in which such filings may be timely made. These amendments are listed in section I above and discussed in more detail below.

1. Rule 13d–1(a), (e), (f), and (g)

Section 13(d)(1) of the Exchange Act requires a disclosure statement to be filed ''within ten days after [acquiring beneficial ownership of more than five percent of a covered class] or within such shorter time as the Commission may establish by rule.'' [23] Consistent with this provision, Rule 13d–1(a) sets forth the 10-day filing deadline for the initial Schedule 13D.[24] Although the Dodd-Frank Act amended section 13(d)(1) to grant the Commission the authority to shorten the deadline for filing the initial Schedule 13D, the 10-day deadline has not been updated since it was enacted more than 50 years ago.[25]

Rule 13d–1(e), (f), and (g) set forth the initial Schedule 13D filing obligations for investors who are no longer eligible to rely upon Rule 13d–1(b) [26] or (c) [27] (which permit investors to file the more abbreviated Schedule 13G in lieu of the longer-form Schedule 13D). Rule 13d–1(e), (f), and (g) ensure that initial Schedule 13D filings uniformly are subject to a 10-day deadline, regardless of whether the beneficial owners were previously eligible to file a Schedule 13G in lieu of the Schedule 13D.

Rule 13d–1(e) applies to persons who have been filing a Schedule 13G in lieu of Schedule 13D in reliance upon either Rule 13d–1(b) or (c). Rule 13d–1(b) and (c) both provide that a person may not rely on those provisions if he or she beneficially owns the relevant equity securities with the purpose or effect of changing or influencing the control of the issuer.[28] Institutional and non-institutional beneficial owners who are unable to certify that they do not hold beneficial ownership for the purpose of or with the effect of changing or influencing the control of the issuer or in connection with any transaction that would have such purpose or effect, as described more fully under Item 10 of Schedule 13G, or certain institutional investors that also acquire or hold beneficial ownership outside of the ordinary course of business, are considered to have, for purposes of this release, a ''disqualifying purpose or effect.'' [29] Rule 13d–1(e)(1) requires

[20] *But see infra* note 22 and sections II.C.2 and 3 for a discussion of the proposed amendments to Rule 13d–5 that we are adopting.

[21] Under this structured data requirement, only the exhibits to Schedules 13D and 13G will remain unstructured.

[22] Specifically, as proposed, we are: (1) changing the title of Rule 13d–5 from ''Acquisition of securities'' to ''Acquisition of beneficial ownership''; (2) revising 17 CFR 240.13d–5(a) (''Rule 13d–5(a)'') to conform the text to the new title; (3) redesignating current Rule 13d–6 as new 17 CFR 240.13d–6(a) (''Rule 13d–6(a)''); and (4) redesignating current 17 CFR 240.13d–5(b)(2) (''Rule 13d–5(b)(2)'') as new 17 CFR 240.13d–6(b) (''Rule 13d–6(b)''). The Commission did not receive any substantive comments on these amendments, so we are adopting them as proposed for the reasons set forth in the Proposing Release. We also are making other technical changes not included in the Proposing Release, namely: (1) rescinding in its entirety Rule 13d–7 because Congress already repealed the statutory requirements under sections 13(d)(1), (d)(2), (g)(1), and (g)(2) for beneficial owners to deliver a copy of a Schedule 13D or 13G, and any amendments thereto, to the issuer of the covered class and any national securities exchanges where such equity securities are listed, *see* Public Law 111–203, 124 Stat. 1900 929R(a)(1)(B) through (4)(B) (2010); (2) making conforming amendments to Schedules 13D and 13G to remove the notes in those Schedules that refer to Rule 13d–7 and its requirements; (3) correcting incorrect cross references in Item 8 of Schedule 13G; and (4) replacing the gender-based pronouns used in Rules 13d–1, 13d–3, 13d–6, 13d–101, and 13d–102 with gender-neutral phrases and making additional conforming edits to the surrounding text as necessary. Although the Commission did not propose these amendments, we find good cause, in accordance with the Administrative Procedure Act (''APA''), Public Law 79–404, 60 Stat. 237 (June 11, 1946), that, in light of their technical nature, notice and public comment in respect of these amendments is impracticable, unnecessary, or contrary to the public interest. 5 U.S.C. 553(b)(3)(B).

[23] 15 U.S.C. 78m(d)(1).

[24] 17 CFR 240.13d–1(a) (requiring that a Schedule 13D be filed ''within 10 days after the acquisition'' of beneficial ownership of more than 5% of a covered class).

[25] Section 13(d)(1) of the Exchange Act was enacted by the Ninetieth Congress in 1968 through the approval of Senate Bill 510.

[26] 17 CFR 240.13d–1(b).

[27] 17 CFR 240.13d–1(c).

[28] The provision at 17 CFR 240.12b–2 (''Rule 12b–2 of Regulation 12B'') defines the term ''control'' to mean ''the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.'' The provision at 17 CFR 240.12b–1 sets forth the scope of Regulation 12B and provides that all rules contained in Regulation 12B ''shall govern . . . all reports filed pursuant to section[ ] 13.''

[29] Whether investors are engaged in activity with the purpose or effect of changing or influencing control of an issuer, and thus holding beneficial ownership with a disqualifying purpose or effect, ordinarily is a determination that would be based upon the specific facts and circumstances. For that reason, the Commission has not provided extensive guidance on this issue. The Commission has

Continued

such persons to file their initial Schedule 13D within 10 days of losing their Schedule 13G eligibility because they beneficially own a covered class with a disqualifying purpose or effect.

Similarly, Rule 13d–1(f) applies to persons who have been filing a Schedule 13G in lieu of Schedule 13D in reliance on Rule 13d–1(c). Rule 13d–1(c) provides that persons may not rely on that provision if they beneficially own 20 percent or more of a covered class. Rule 13d–1(f)(1) currently requires that such persons file their initial Schedule 13D within 10 days of losing their Schedule 13G eligibility because they beneficially own 20 percent or more of a covered class.

Finally, Rule 13d–1(g) applies to persons who have been filing a Schedule 13G in lieu of Schedule 13D in reliance upon Rule 13d–1(b). Only QIIs may rely on Rule 13d–1(b). Further, in order to rely on Rule 13d–1(b), a QII must beneficially own the relevant equity securities in the ordinary course of its business. Rule 13d–1(g) currently requires that such persons either file their initial Schedule 13D or amend their Schedule 13G to indicate that they are now relying on Rule 13d–1(c) (assuming they are eligible to rely on that rule) within 10 days of losing their Schedule 13G eligibility under Rule 13d–1(b) because they either no longer are a QII or no longer beneficially own the relevant equity securities in the ordinary course of their business.

Rule 13d–1(e), (f), and (g) operate as regulatory safeguards that reestablish the application of Rule 13d–1(a) to beneficial owners who previously relied on Rule 13d–1(b) or (c). Under Rule 13d–1(e), (f), and (g), beneficial owners ''shall immediately become subject to'' Rules 13d–1(a) and 13d–2(a), which provisions are reinstated anew with respect to those persons the moment they become ineligible to rely upon Rule 13d–1(b) and (c).

a. Proposed Amendments

In the Proposing Release, the Commission proposed to amend Rule 13d–1(a) to require a Schedule 13D to be filed within five days after the date on which a person acquires beneficial ownership of more than five percent of a covered class. The Commission stated that the deadline for filing an initial Schedule 13D should be revised in light of advances in technology and developments in the financial markets and noted that shortening that deadline would be consistent with previous efforts to accelerate public disclosures of material information to the market.[30] The Commission also asserted that the proposed five-day deadline would maintain an appropriate balance between the requirement that material information be timely disseminated to investors and the competing interest that undue burdens not be imposed in the change of control context.[31] In addition, the Commission stated that it was mindful of the need to balance the market's demand for timely information and the administrative burden placed upon a filer to adequately and accurately prepare that information.[32] Finally, the Commission noted that the current 10-day filing deadline ''contributes to information asymmetries that could harm investors'' and stated that shortening that deadline could increase transparency and provide assurance ''that transactions are not being made based on mispriced securities caused by a prolonged lag in the dissemination of market-moving information,'' thereby improving investor confidence, market efficiency, and liquidity.[33]

In the Proposing Release, the Commission also proposed to amend the initial Schedule 13D filing deadline under Rule 13d–1(e)(1), (f)(1), and (g) for largely the same reasons that it proposed to amend Rule 13d–1(a). Specifically, the Commission proposed to make conforming revisions to Rule 13d–1(e), (f), and (g) so that persons who initially elected to report beneficial ownership on Schedule 13G, in lieu of a Schedule 13D, but subsequently lost their eligibility would be treated no differently from persons who make a Schedule 13D their initial filing.[34] Accordingly, the Commission proposed to amend Rule 13d–1(e), (f), and (g) to make the required Schedule 13D—or, in the case of Rule 13d–1(g), the amendment to Schedule 13G indicating that the filer is now relying on Rule 13d–1(c), if applicable—due no later than five days after the date on which the person became ineligible to report on Schedule 13G.[35]

b. Comments Received

Commenters[36] expressed a range of views on the proposed amendments to Rule 13d–1(a), (e), (f), and (g). A number of commenters supported shortening the deadline for filing an initial Schedule 13D from 10 days to five days.[37] Several

previously expressed the view that most solicitations in support of a proposal specifically calling for a change of control of the company (*e.g.,* a proposal to seek a buyer for the company or a contested election of directors or a sale of a significant amount of assets or a restructuring of a corporation) would clearly have that purpose and effect. For a more expansive discussion of the Commission's reasoning and factors to consider when making this determination, see *Amendments to Beneficial Ownership Reporting Requirements,* Release No. 34–39538 (Jan. 12, 1998) [63 FR 2854 (Jan. 16, 1998)].

[30] Proposing Release at 13851.

[31] *Id.*

[32] *Id.* at 13852.

[33] Proposing Release at 13850, 13852.

[34] *Id.* at 13854.

[35] *Id.*

[36] Throughout the release, in describing some of the comments we received on the Proposed Amendments, we focus on those commenters that responded to a specific request for comment or question raised in the Proposing Release or Reopening Release, or that addressed a specific Proposed Amendment. We note that several commenters expressed general support or opposition for the Proposed Amendments or raised concerns or made recommendations that are unrelated to or beyond the scope of the Proposed Amendments; we do not, however, summarize all of their comments in this release. For the sake of brevity, we also do not cite letters that substantially duplicate comments made in other letters that we cite in this release. For example, in response to the Reopening Release, a number of commenters submitted substantially identical letters generally supporting some of the Proposed Amendments and expressing concerns or making recommendations with respect to other parts of the Proposed Amendments. *See, e.g.,* Letter Type B, *available at https://www.sec.gov/comments/s7-06-22/s70622-typeb.htm;* Letter Type C, *available at https://www.sec.gov/comments/s7-06-22/s70622-typec.pdf.* We also note that several commenters submitted letters with substantially similar views as those expressed in Letter Type B, but with the letters worded sufficiently differently that they could not be consolidated with Letter Type B. *See, e.g.,* letter from Gerardo Cruz (June 27, 2023). We note the same with respect to Letter Type C. *See, e.g.,* letters from Chad Thompson (June 29, 2023); Bert Abanes (June 28, 2023). See *infra* note 37 for a discussion of Letter Type A. See *infra* note 458 for a discussion of Letter Type D and Letter Type E.

[37] *See, e.g.,* letters from Committee on Federal Regulation of Securities of the Section of Business Law of the American Bar Association (Apr. 28, 2022) (''ABA'') (expressly supporting only the proposed amendment to Rule 13d–1(a), but noting that ''[t]he Committee is not unanimous in this view'' and that ''[t]here is support among some members of the Committee to further shorten the initial filing deadline to one or two calendar days'' and that ''there are other members of the Committee that suggest a five business day deadline is more appropriate''); Brandon Rees, Deputy Director of Corporations and Capital Markets, AFL–CIO (Apr. 11, 2022) (''AFL–CIO'') (expressly supporting only the proposed amendment to Rule 13d–1(a)); Americans for Financial Reform Education Fund (Apr. 11, 2022) (''AFREF'') (same); Americans for Financial Reform Education Fund, American Federation of Labor and Congress of Industrial Organizations (AFL–CIO), Communications Workers of America (CWA), Interfaith Center on Corporate Responsibility (ICCR), Public Citizen (June 27, 2023) (''AFREF, et al.'') (same); Anonymous (Feb. 19, 2022) (''Anonymous 1''); Anonymous (Feb. 19, 2022) (''Anonymous 3''); Anonymous (Feb. 20, 2022) (''Anonymous 5''); Anonymous (Mar. 14, 2022) (''Anonymous 11''); Anonymous (Mar. 14, 2022) (''Anonymous 12''); Anthony R., Individual Investors (Feb. 18, 2022) (''Anthony R.''); Better Markets (Apr. 11, 2022) (''Better Markets I'') (same); Better Markets (June 27, 2023) (''Better Markets II'') (same); Maria Ghazal, Senior Vice President and Counsel, Business Roundtable (Apr. 11, 2022) (''BRT'') (same); Curtis Robinson (Feb. 18, 2022) (''C. Robinson''); Richard F. McMahon, Jr., Senior Vice President, Energy Supply & Finance Edison Electric Institute (Mar. 22, 2022) (''EEI''); An Investor, Engineer (Apr. 4, 2022) (''Engineer''); Mark R. Allen, Executive Vice

commenters asserted that the proposed amendments would increase the timeliness and quality of information for market participants.[38] A number of commenters asserted that the proposed amendments would increase transparency and fairness in the financial markets.[39]

Several commenters identified potential specific benefits of the proposed amendments. For example, some commenters asserted that the proposed amendments would be particularly beneficial for retail investors by providing them with additional information and transparency.[40] Another commenter stated that the proposed amendments would enable investors and the market to ''better track when beneficial owners take significant positions in covered securities for purposes of controlling or exerting influence over issuers, resulting in more informed decision-making by investors and more accurate valuation of securities by the market.'' [41]

Other commenters highlighted potential downsides of the current 10-day deadline. For example, one commenter described the 10-day deadline as costly to public companies and investors generally and based its support for the proposed amendments ''on the fundamental concept that a public company must have timely information about its owners in order to engage with them effectively and respond promptly to their concerns.'' [42] Another commenter stated that ''[i]nvestors' and market participants' abilities to prudently manage their positions and exposures is materially undermined by the arbitrary, unnecessary, discriminatory delay in reporting.'' [43]

Several commenters suggested that the proposed amendments would reduce information asymmetry among market participants.[44] Other commenters raised similar information asymmetry-based concerns regarding the 10-day filing deadline. For example, one commenter expressed concern that under the current deadline, pension funds are deprived of any short-term gains from hedge fund activism if they sell shares during the 10-day delay in disclosure of a beneficial ownership stake.[45] Another commenter asserted that the current 10-day deadline ''disadvantages selling shareholders after the 5% threshold is reached and permits activist investors to ambush public companies, often by disclosing an ownership interest that far exceeds 5% of shares outstanding.'' [46] Further, one commenter suggested that the proposed amendments could help address information asymmetries that facilitate ''stealth'' accumulations at artificially low market prices, which purportedly transfer value from public investors to those activists engaged in seeking ownership, control, or influence over the target company.[47]

Other commenters supported the proposed amendments based on changes in technology and developments in the financial markets.[48] For example, one commenter supported the proposal based on the ''increasing effectiveness of activist campaigns and their decreased cost due to advances in information technology and the rise of concentrated economic ownership in the United States,'' citing ''cost-effective activism'' due to both the fact that ''little more than 10 to 15 institutions are the target audience'' and ''the Commission's new universal proxy rule.'' [49] Similarly, other commenters described the current Schedule 13D filing deadline as ''outdated.'' [50] One commenter agreed with the expressed concern in the Proposing Release that material information about potential change of control transactions is not being disseminated to the public in a manner that would be considered timely in today's financial markets.[51] One commenter cited an April 2020 survey it conducted of its members (composed of corporate officers and investor relations consultants) indicating that 82 percent supported modernization of the Schedule 13D filing deadlines.[52]

Several commenters noted that many foreign jurisdictions require beneficial ownership reporting on a shorter deadline than currently required under Regulation 13D–G.[53] One commenter disagreed with the notion expressed in the Proposing Release that the comparison of the beneficial ownership reporting deadline in the United States to foreign jurisdictions is imperfect because U.S. corporate law permits anti-takeover provisions that are not present in those jurisdictions.[54] To the contrary, that commenter asserted that some of those foreign jurisdictions are even less

President, FedEx Corporation (Apr. 12, 2022) (''FedEx''); Freeport-McMoRan Inc./Douglas N. Currault II, Senior Vice President and General Counsel (Apr. 11, 2022) (''Freeport-McMoRan''); Tyler Gellasch, Executive Director, Healthy Markets Association (Mar. 22, 2022) (''HMA I''); Healthy Markets Association (Apr. 29, 2022) (''HMA II'') (same); Jack Pieper (Feb. 21, 2022) (''J. Pieper''); Joshua Soucie, Managing Director, Singularity Acquisitions LLC (Feb. 21, 2022) (''J. Soucie''); Jonah (Feb. 18, 2022) (''Jonah''); Juan, Relationship Banker II (Feb. 19, 2022) (''Juan''); Brandon Rees, Deputy Director of Corporations and Capital Markets, AFL–CIO (June 6, 2022) (''Labor Unions'') (same); Mark C. (Feb. 19, 2022) (''Mark C.''); Mike (Feb. 23, 2022) (''Mike''); Jeffrey S. Davis, Senior Vice President and Senior Deputy General Counsel, Nasdaq, Inc. (Apr. 12, 2022) (''Nasdaq''); National Investor Relations Institute (Apr. 15, 2022) (''NIRI'') (same); Phillip Worts (July 29, 2023) (''P. Worts''); Marc Steinberg, Radford Chair in Law and Professor of Law, Southern Methodist University (Feb. 22, 2022) (''Prof. Steinberg'') (same); Society for Corporate Governance (Apr. 13, 2022) (''SCG'') (same); Christina Maguire, President and Chief Executive Officer, Society for Corporate Governance and Matthew D. Brusch, President and CEO, National Investor Relations Institute (July 7, 2023) (''SCG & NIRI'') (same); Tammy Baldwin, Sherrod Brown, Bernard Sanders, Elizabeth Warren, Tammy Duckworth, and Jeffrey A. Merkley, United States Senators (July 18, 2022) (''Sen. Baldwin, et al.'') (same); SIFMA Asset Management Group, William Thurn, Managing Director, SIFMA AMG (Apr. 11, 2022) (''SIFMA AMG'') (same); Theodore N. Mirvis, Adam O. Emmerich, David A. Katz, Sabastian V. Niles, Jenna E. Levine, and Carmen X. W. Lu (Feb. 10, 2022) (''T. Mirvis, et al.''); Taj Reilly (Feb. 19, 2022) (''T. Reilly''); TIAA (Apr. 11, 2022) (''TIAA'') (same); Todd (Feb. 19, 2022) (''Todd''); Wachtell, Lipton, Rosen & Katz (Apr. 11, 2022) (''WLRK I'') (same); Wachtell, Lipton, Rosen & Katz (Oct. 4, 2022) (''WLRK II''); *see also* Letter Type B; Letter Type C. We note that commenters submitted a substantively identical version of the letter from Sen. Baldwin, et al. an additional 16 times. *See* Letter Type A, *available at https://www.sec.gov/comments/s7-32-10/s73210-typeb.pdf.* As such, every citation to the letter from Sen. Baldwin, et al. in this release should also be read as a citation to those additional 16 submissions of the substantively identical letter.

[38] *See, e.g.,* letters from ABA; Anthony R.; FedEx; Freeport-McMoRan; Jonah; P. Worts; T. Mirvis, et al.

[39] *See, e.g.,* letters from ABA; AFREF, et al.; Anonymous 5; Anonymous 12; Better Markets I; FedEx; Freeport-McMoRan; Labor Unions; Nasdaq; P. Worts; Sen. Baldwin, et al.

[40] *See, e.g.,* letters from C. Robinson (''I welcome all rules that require more disclosure and faster times to report[ ].''); J. Soucie; P. Worts.

[41] *See* letter from TIAA; *see also* letter from P. Worts.

[42] *See* letter from SCG; *see also* letter from NIRI (stating that the proposal ''would also ensure that public companies are not ambushed and are better prepared to respond to an activist investor who has accumulated a significant position over a relatively short period of time'').

[43] *See* letter from HMA I.

[44] *See, e.g.,* letters from ABA; AFREF; AFREF, et al.; Better Markets II; Freeport-McMoRan; Nasdaq; NIRI; SCG; SCG & NIRI; *see also* Letter Type C. One of these commenters stated that ''if the filing window is shortened, institutional investors will be better able to manage liquidity shocks in a way that serves their ultimate beneficiaries, instead of costing them money by unknowingly selling undervalued shares.'' *See* letter from AFREF, et al.

[45] *See* letter from Labor Unions.

[46] *See* letter from NIRI.

[47] *See* letter from Better Markets I; *see also* letter from Better Markets II.

[48] *See, e.g.,* letters from ABA; AFL–CIO; Better Markets I; BRT; C. Robinson; FedEx; Freeport-McMoRan; HMA I; HMA II; NIRI; SCG; Sen. Baldwin, et al.; T. Mirvis, et al.; T. Reilly; WLRK I; WLRK II; *see also* Letter Type B.

[49] *See* letter from WLRK II. The commenter also noted that ''successful activism campaigns have been run by stockholders with relatively small stakes, often below or well below 5%.'' *Id.*

[50] *See, e.g.,* letters from Sen. Baldwin, et al.; T. Mirvis, et al.

[51] *See* letter from BRT.

[52] *See* letter from NIRI.

[53] *See, e.g.,* letters from AFREF; Better Markets I; SCG; Sen. Baldwin, et al.; WLRK II.

[54] *See* letter from WLRK II.

''stockholder'' and ''activism'' friendly than the United States, making corporate takeovers and activism more difficult, and described the corporate laws and corporate governance practices of those foreign jurisdictions as compared to the United States (focusing, in particular, on Delaware corporate law).[55] Other commenters noted that the proposed amendments would be consistent with similar Commission efforts to accelerate filing deadlines.[56]

A number of commenters asserted that the proposed amendments would not impose significant costs or burdens on beneficial owners of more than five percent of a covered class.[57] For example, one of those commenters stated that the compliance costs of the proposed amendments ''are unlikely to be unduly burdensome, in a manner that outweighs the benefits'' of the proposal given the nature of investors that generally file a Schedule 13D and the technology available to them.[58] Another commenter agreed that the proposed amendments would be consistent in balancing investors' need for adequate disclosures with the burdens placed on filers to accurately prepare required disclosures.[59]

Several commenters stated that the proposed amendments would not significantly reduce shareholder activism.[60] For example, one commenter asserted that the proposed five-day deadline would not significantly impair the ability of activists to pursue their agendas.[61] Another commenter questioned whether there is an empirical basis for asserting that the proposed amendments would prevent shareholder activism and engagement.[62] Some commenters asserted that the proposed amendments would not interfere with shareholder activism on environmental, social, or governance (''ESG'') issues because many such activists are not Schedule 13D filers.[63] One commenter was ''not persuaded that a 10-day delay in beneficial ownership disclosure after acquiring a 5 percent stake is needed to incentivize . . . [a] large investor to be an activist investor.'' [64] And, one commenter asserted that the proposed amendments are ''more likely to adversely affect short-term behaviors than long-term oriented activism.'' [65]

In addition, a number of commenters stated that shareholder activism is not uniformly beneficial for issuers and their shareholders.[66] For example, one commenter asserted that hedge fund activism could be contributing to an emphasis on short-term gains over sustainable, long-term growth that benefits longer-term investors.[67] One commenter noted that while a Schedule 13D filing by an activist may often lead to an immediate bump in the issuer's stock price, there is no compelling evidence that activist interventions deliver long-term value to shareholders.[68] One commenter asserted that the current 10-day deadline may discourage companies from going public, inhibiting capital formation, based on the threat of activism and ''the burden of being subject to attacks by activist investors, a number of whom have short-term agendas.'' [69] One commenter stated that activist investors often pressure companies and their management to agree to their short-term demands that may or may not be in the long-term interests of shareholders, employees, and other stakeholders.[70] Further, one commenter cited a study indicating that activist hedge fund campaigns targeting public companies are associated with a reduction in jobs, research and development spending, and capital expenditures, which arguably harms employees.[71]

Finally, commenters raised a variety of other points in support of the proposed amendments. For example, one commenter stated that the balance that Congress sought to strike in the Williams Act [72] was between activist investors seeking to change companies

[55] *See id.* The commenter also presented statistics indicating that, notwithstanding the stricter beneficial ownership reporting obligations and purportedly increased inhibitions on shareholder activism, those foreign jurisdictions have experienced increased shareholder activism in recent years. *Id.* Some commenters, however, disagreed with and questioned the utility of this analysis of foreign jurisdictions. *See* letters from Jose Ceballos, Council for Investor Rights and Corporate Accountability (Dec. 20, 2022) (''CIRCA III''); Richard B. Zabel, General Counsel Chief Legal Officer, Elliott Investment Management L.P. (Nov. 21, 2022) (''EIM III''); *see also* letter from Richard B. Zabel, General Counsel Chief Legal Officer, Elliott Investment Management L.P. (June 27, 2023) (''EIM IV'') (reiterating the points made in the commenter's letter dated Nov. 21, 2022). One of those commenters asserted that ''regulatory structures, as well as cultural norms . . . mean that activism in non-U.S. markets is less prevalent than in the United States'' which is ''to the detriment of investors in those non-U.S. markets where, in many cases, there remains a lack of independent voices in the market able to hold boards and management accountable.'' *See* letter from EIM III. The commenter also stated that, because activism is less prevalent in those foreign jurisdictions than in the U.S., ''[s]ome level of increased activist engagement in a handful of non-U.S. markets . . . does not mean that the Commission should seek to emulate regulatory structures in those other jurisdictions.'' *Id.* The other commenter noted that the analysis ignores that some of the cited foreign jurisdictions offer benefits to shareholders that the United States does not. *See* letter from CIRCA III.

[56] *See, e.g.,* letters from SCG; WLRK I.

[57] *See, e.g.,* letters from ABA; Anonymous 11; BRT; Freeport-McMoRan; J. Soucie; WLRK I.

[58] *See* letter from WLRK I.

[59] *See* letter from FedEx.

[60] *See, e.g.,* letters from ABA; AFREF; Better Markets I; Better Markets II; HMA II; Labor Unions; Sen. Baldwin, et al.; WLRK I.

[61] *See* letter from Better Markets I. The commenter stated that that many Schedule 13D filers currently do not avail themselves of the full 10-day filing period, many activists are effective in their campaigns without reaching the 5% beneficial ownership reporting threshold, and the proposed five-day deadline would give activists enough time to accumulate profits before public disclosure of their goals, enabling them to offset the costs of their activism. *Id.; see also* letter from Better Markets II (reiterating the point made in its first letter and citing the data and analysis in the DERA Memorandum for support).

[62] *See* letter from HMA II.

[63] *See* letters from Labor Unions; Sen. Baldwin, et al. One of those commenters noted that some of the most impactful ESG campaigns to date have occurred in Australia, where the beneficial ownership reporting deadline for a 5% stake is two business days, which ''provides further evidence that a 10 day window is not needed to use shareholder activism to meaningfully change corporate behavior.'' *See* letter from Sen. Baldwin, et al. The Commission is not expressing any view as to whether the measures described by the commenters referenced herein would constitute activities undertaken for the purpose of changing or influencing control of an issuer. Nothing stated in this release changes or supersedes the Commission's prior guidance regarding whether certain soliciting activity has a control purpose or effect. *See supra* note 29.

[64] *See* letter from AFL–CIO.

[65] *See* letter from WLRK I.

[66] *See, e.g.,* letters from AFREF; Better Markets I; HMA II; Labor Unions; NIRI; SCG; Sen. Baldwin, et al.; WLRK I.

[67] *See* letter from AFREF. The commenter also noted that while hedge fund activism is associated with short-term increases in shareholder value, the evidence is much more mixed on the question of whether hedge fund activism results in long-term gains. *Id.; see also* letter from Better Markets I (stating that the benefits of shareholders seeking to acquire or influence corporate control and policy are mixed because some act out of short-term profit motives, not a desire to promote long-term value).

[68] *See* letter from WLRK I.

[69] *See* letter from SCG. The commenter also stated that although activists would have less time to buy additional shares after crossing 5% under the proposal, there is no shareholder protection rationale that would justify forcing other investors to subsidize activists' efforts to build larger positions in issuers. *Id.*

[70] *See* letter from NIRI.

[71] *See* letter from Labor Unions. The commenter also asserted that the proposed amendments would benefit pension funds based on a study it cited that found that while company value tends to increase in the first three years after being targeted by an activist hedge fund, these gains tend to be reversed in the fourth and fifth years. *Id.; see also* letter from Sen. Baldwin, et al. (citing the same study for the proposition that ''research . . . shows the stock price increase [associated with an activist's Schedule 13D filing] is temporary and in fact the company is often in a weaker economic position post-activist intervention''). *But see* letter from International Institute of Law and Finance (Nov. 1, 2022) (''Profs. Bishop and Partnoy II'') (critiquing the cited study, noting, among other things, that ''a simple analysis of the data, not undertaken in that study, shows that employment levels at firms targeted by activists decrease substantially in the years prior to an activist intervention, violating the parallel trends assumption that is required to make any sort of causal inference from the empirical design'').

[72] Public Law 90–439, 82 Stat. 454 (July 29, 1968).

and those companies' management—not between an activist investor and a company's other investors.[73] One commenter stated that the proposed amendments could moderate the sudden, abrupt changes in corporate governance that often occur in issuers targeted by activist investors.[74] And, one commenter noted that the proposed amendments fall ''squarely'' within the Commission's legal authority under section 929R of the Dodd-Frank Act and align with the Williams Act's intent because Congress chose a 10-day deadline to accommodate the practical challenges associated with preparing and filing a Schedule 13D.[75]

A number of commenters opposed shortening the initial Schedule 13D filing deadline to five days.[76] Several commenters expressed concern that the proposed amendments would disincentivize shareholder activism by reducing the amount of time that such shareholders have to accumulate positions in an issuer before filing a Schedule 13D, thereby depriving issuers and their shareholders of the positive benefits of such activism.[77] For example, one commenter stated that ''if active shareholders are unable to establish an economically efficient pre-disclosure ownership stake, public company shareholders (and the economy more broadly) will be less likely to benefit from the improved stock price performance that often attends the monitoring and engagement activities pursued by engaged shareholders, given that such shareholders would have difficulty justifying certain engagements with issuers.'' [78] Similarly, another commenter asserted that the proposal would ''mak[e] it more costly for blockholders to build a sufficient position to effect change'' and ''reduce the profitability of, and therefore the incentive to pursue, activist strategies,'' which would ''reduce management's accountability to shareholders and corporate governance generally.'' [79] And another commenter stated that ''although the SEC requires an activist buyer to disclose information that the buyer *has acquired,* the SEC fails to ask whether the buyer *would acquire* the information initially'' and suggested that, under the proposed deadline, ''the buyer would often be unlikely to make the original investment in information.'' [80]

In addition, one commenter expressed concern that the proposed amendments would disproportionately disincentivize shareholder activism that is targeted towards reforms other than a sale of the issuer.[81] Another commenter asserted that the proposed amendments would inhibit an activist investor's ability to make overtures to an issuer's management prior to public disclosure and to consult with other shareholders to ensure that shareholders' opinions and proposals are considered when approaching management.[82] And, one commenter stated that the proposed amendments would particularly disincentivize activism at medium- and small-cap companies because a larger economic position is needed to offset the activists' costs.[83]

Several commenters took issue with the information asymmetry concerns that the Commission expressed as a justification for the proposed amendments.[84] For example, one commenter cited data indicating that shareholders who sell during the period after an activist accumulates more than five percent beneficial ownership but before the activist files its Schedule 13D

[73] *See* letter from HMA II. The commenter also stated that there is no evidence or legitimate policy rationale to support a connection between the purported benefits of activist strategies generally on the one hand, and the purported need to preserve the ability of the small subset of investors engaged in them to be able to trade while in possession of material, non-public information to the detriment of other investors—for precisely 10 days. *Id.*

[74] *See* letter from AFREF. The commenter stated that the proposed amendments could decrease the likelihood of issuers that are not targeted by activist investors taking preemptive steps (*e.g.,* overspending on short-term shareholder payouts and forgoing investments necessary for long-term financial health and growth) to avoid becoming targets of activism. *Id.* The commenter also asserted that the proposed amendments would benefit shareholders and other market participants by facilitating sound corporate governance. *Id.* For example, the commenter stated that a shortened filing deadline would help investors ensure their asset managers are fulfilling their fiduciary duties and help inform the education and advocacy efforts of those with a stake in proxy contests, shareholder resolutions, and other important votes. *Id.*

[75] *See* letter from Better Markets I.

[76] *See, e.g.,* letters from Adrian Day, RIA (Feb. 12, 2022) (''A. Day''); Daniel Austin, Director, U.S. Policy and Regulation, Alternative Investment Management Association (Apr. 11, 2022) (''AIMA''); Ben Mason (June 26, 2023) (''B. Mason''); Bernard Sharfman (Mar. 22, 2022) (''B. Sharfman'') (expressly opposing only the proposed amendment to Rule 13d–1(a)); CIRCA (Apr. 11, 2022) (''CIRCA I'') (same); CIRCA III (same); Milan Dalal, CIRCA (June 27, 2023) (''CIRCA IV'') (same); Charles F. Pohl, Chairman, Dodge & Cox (Apr. 12, 2022) (''Dodge & Cox''); Edwin Fraser (Apr. 11, 2022) (''E. Fraser'') (same); Susan Olson, General Counsel and Sarah Bessin, Associate General Counsel, Investment Company Institute (Apr. 7, 2022) (''ICI I''); Irenic Capital Management LP (Apr. 11, 2022) (''ICM'') (same); Marcus Frampton (Mar. 16, 2022) (''M. Frampton'') (same); Managed Funds Association (Apr. 11, 2022) (''MFA'') (same); National Venture Capital Association (Apr. 11, 2022) (''NVCA'') (same); Perkins Coie LLP (Apr. 12, 2022) (''Perkins Coie''); Jeffrey N. Gordon, Professor of Law, Columbia Law School (June 20, 2022) (''Prof. Gordon'') (same); Robert Eccles and Shivaram Rajgopal (Mar. 31, 2022) (''Profs. Eccles and Rajgopal'') (same); Alan Schwartz, Sterling Professor, Yale Law School and the Yale School of Management and Steven Shavell, Samuel R. Rosenthal Professor of Law and Economics, Harvard Law School Director, John M. Olin Center for Law, Economics & Business, Harvard University (Apr. 12, 2022) (''Profs. Schwartz and Shavell I'') (same); Alan Schwartz, Sterling Professor, Yale Law School and the Yale School of Management and Steven Shavell, Samuel R. Rosenthal Professor of Law and Economics, Harvard Law School Director, John M. Olin Center for Law, Economics & Business, Harvard University (May 15, 2022) (''Profs. Schwartz and Shavell II'') (same); Edward P. Swanson, Texas A&M University, Glen M. Young, Texas State University, and Christopher G. Yust, Texas A&M University (Feb. 19, 2022) (''Profs. Swanson, Young, and Yust'') (same); Rolf Parta (Apr. 7, 2022) (''R. Parta'') (same); Allison K. Thacker, President and Chief Investment Officer, Rice Management Company, Treasurer, William Marsh Rice University (Mar. 21, 2022) (''Rice Management'') (same); Jennifer Nadborny, Simpson Thacher Bartlett LLP (Apr. 11, 2022) (''STB'') (same); Donna Anderson, Marc Wyatt, and Bob Grohowski, T. Rowe Price (Apr. 11, 2022) (''TRP'') (same).

[77] *See, e.g.,* letters from AIMA; CIRCA I; CIRCA III; CIRCA IV; Dodge & Cox; ICM; MFA; Prof. Gordon; Profs. Eccles and Rajgopal; Profs. Schwartz and Shavell I: Profs. Schwartz and Shavell II; Profs. Swanson, Young, and Yust; Rice Management; TRP.

[78] *See* letter from ICM.

[79] *See* letter from AIMA.

[80] *See* letter from Profs. Schwartz and Shavell II (emphasis in original); *see also* letter from Profs. Schwartz and Shavell I.

[81] *See* letter from Profs. Swanson, Young, and Yust. The comment letter also stated that if the proposed accelerated initial Schedule 13D filing deadline reduces activists' ability to profit from price discovery, the proposed amendments could reduce market efficiency. *Id.*

[82] *See* letter from CIRCA I. In a separate letter, this commenter also disagreed with those supporting commenters that expressed concern about the negative effects that activists may have on targeted companies and cited data indicating that activist interventions benefit all shareholders in both the short- and long-term. *See* letter from CIRCA III.

[83] *See* letter from Prof. Gordon; *see also* letter from ICM (predicting a reduction in shareholder activism and related benefits for other shareholders and stating that the predicted ''harms . . . will be most pronounced at micro-, small-, and mid-capitalization issuers . . . where the majority of active shareholder engagement occurs'').

[84] *See, e.g.,* letters from AIMA; CIRCA I; CIRCA III; CIRCA IV; Dodge & Cox; ICM; Prof. Gordon; Profs. Swanson, Young, and Yust; TRP. In addition, one commenter did not oppose the proposal but expressed concern about the information asymmetry-based justification. *See* letter from Elliott Investment Management L.P. (Apr. 11, 2022) (''EIM I''). That commenter stated, among other things, that ''the suggestion that an activist's awareness of her confidential intention to build a position in a public company should prohibit her from trading is both illogical and inconsistent with established law'' and contrasted the proposal with the ''recently proposed short sale reporting rulemaking'' in which ''the Commission . . . expressly provided an alternative that protects the confidentiality of short sellers and their strategies, in recognition that disclosure would vitiate the value of their research.'' *Id.* (citing Short Position and Short Activity Reporting by Institutional Investment Managers, Release No. 34–94313 (Feb. 25, 2022) [87 FR 14950 (Mar. 16, 2022)] (''Short Position Reporting Proposal'')); *see also* letter from Richard B. Zabel, General Counsel & Chief Legal Officer, Elliott Investment Management L.P. (Sept. 18, 2023).

still generally benefit from that activist's accumulation because the stock price generally increases prior to the Schedule 13D filing.[85] Some commenters stated that the information asymmetry described in the Proposing Release is no different from the general asymmetry that exists in the market when any investor—activist or otherwise—determines to invest the time and resources to develop and then implement an investment thesis.[86] Similarly, some commenters asserted that information asymmetry is a quintessential element of the U.S. capital markets where investors are, and should be, entitled to profit from their analysis, hard work, and risk taking.[87] Other commenters stated that selling shareholders are not forced to sell their shares and do so voluntarily, either seeking liquidity or because they have doubts about the issuer's prospects, and noted that such shareholders have the same access as the Schedule 13D filer to disclosures from both the issuer and insiders.[88] Some commenters asserted that the Commission ignored the fact that although some investors may miss out on selling at an appreciated price once the Schedule 13D is filed, a larger number of investors generally will benefit from the efforts of an activist.[89] Finally, one commenter asserted that the Williams Act was not intended to address information asymmetry-based concerns or the interests of shareholders who elect to sell prior to the disclosure of an initial Schedule 13D and cited to the legislative history and a U.S. Supreme Court decision to support such assertion.[90]

A number of commenters also disagreed with the Commission's technological advancement- and financial market development-based justifications for the proposed acceleration of the beneficial ownership reporting deadlines.[91] For example, some commenters asserted that neither Congress nor the Commission previously suggested that technological ability to file is or should be the primary basis to determine the appropriate filing deadlines for Schedules 13D and 13G.[92] One commenter asserted that the Commission has not made significant technological advances over the years to its own systems that market participants rely on to prepare Schedules 13D and 13G, making it challenging and costly for investors to gather the information about beneficial ownership they need to file Schedules 13D and 13G.[93] One commenter asserted that technological advances do not support shortening the filing deadline as proposed because despite advances in technology, the filing process still has numerous operational components that take time to complete.[94] Another commenter stated that recent trends indicate that activist investors are having a moderate and declining impact in the United States and, therefore, the Commission should ''encourage new forms of activism, not suppress them.'' [95]

Several commenters expressed concerns that the proposed amendments do not align with the purpose or objectives of the Williams Act. For example, one commenter asserted that the proposed amendments ''would necessarily be considered to be beyond [the Commission's] statutory authority and an 'abuse of discretion,' if not 'arbitrary and capricious' under the APA'' because the proposed rule does not connect the proposed reduction in filing time with what the commenter described as the ''sole purpose'' of the Williams Act under Supreme Court precedent, namely the protection of shareholders confronted with a cash tender offer.[96] Another commenter stated that not all of the investors who file on Schedule 13D are activist investors engaging in the types of activities the Williams Act seeks to regulate.[97] Other commenters expressed concern that the proposed amendments would disrupt the balance that the Williams Act sought to strike.[98]

Some opposing commenters detailed the potential compliance burdens that the proposed amendments could impose. For example, some commenters expressed concern that the proposed five-day deadline would be unduly burdensome for smaller and non-institutional beneficial owners.[99] Other commenters asserted that the proposed amendments would present compliance challenges [100] and create significant reporting and monitoring burdens.[101] One commenter expressed concern that the proposed amendments could negatively impact the ability of investors and their advisors to draft meaningful disclosures and engage in thoughtful analysis.[102]

Other commenters raised various other concerns regarding the proposed

[85] *See* letter from Profs. Swanson, Young, and Yust.

[86] *See, e.g.,* letters from CIRCA I; ICM; Prof. Gordon. These commenters also asserted that the Commission has long recognized the legitimacy of this asymmetry, including by allowing confidential treatment in Form 13F filings and in other contexts. *Id.*

[87] *See, e.g.,* letters from CIRCA I; ICM; Prof. Gordon.

[88] *See, e.g.,* letters from AIMA; ICM. Similarly, one commenter noted the absence of data indicating that shareholders are harmed by the timing of when they sell a security under the current Schedule 13D reporting regime and posited that shareholders selling during the 10-day period are generally sophisticated, non-retail investors seeking liquidity based on an investment strategy which is unrelated (and indifferent) to disclosure indicating whether an activist has a stake in the company. *See* letter from CIRCA III.

[89] *See* letters from AIMA; TRP.

[90] *See* letter from ICM (citing *Rondeau* v. *Mosinee Paper Corp.,* 422 U.S. 49 (1975)); *see also* letters from B. Sharfman (''[T]he U.S. Supreme Court has repeatedly and unambiguously stated that the 'sole purpose' of the Williams Act was for the protection of investors who are confronted with a *cash tender offer.*'' (citing *Piper et al.* v. *Chris-Craft Industries, Inc.,* 430 U.S. 1 (1977)); EIM IV (citing *Rondeau,* 422 U.S. 49, for the same proposition, but not expressly opposing the proposal).

[91] *See, e.g.,* letters from AIMA; CIRCA IV; Dodge & Cox; ICI I; ICM; Robert E. Bishop, Fellow, UC Berkeley School of Law Center for Law and Business, Frank Partnoy, Adrian A. Kragen Professor of Law, UC Berkeley School of Law (Apr. 11, 2022) (''Profs. Bishop and Partnoy I''); STB; *see also* letter from Investment Adviser Association (Apr. 11, 2022) (''IAA'') (neither clearly supporting nor opposing the proposed amendments, but expressing certain concerns and making certain recommendations regarding the proposed amendments).

[92] *See, e.g.,* letters from AIMA; ICI I; ICM; STB.

[93] *See* letter from ICI I.

[94] *See* letter from IAA. The commenter cited legal developments since 1968, including various anti-takeover mechanisms and the adoption of section 13(f) and Form 13F, as well as certain technological developments that provide public companies with the benefit of nearly-contemporaneous insight into their shareholder base and that have facilitated management entrenchment as offsetting factors to any technological advancements during that time period that would increase the ease of making a Schedule 13D filing. *Id.*

[95] *See* letter from Profs. Bishop and Partnoy I. The commenter further said that ''given the development of poison pills, public company boards are no longer monitored by hostile takeovers, so activism is the remaining recourse.'' *Id.*

[96] *See* letter from B. Sharfman.

[97] *See* letter from STB. The commenter noted that many Schedule 13D filers are former Exempt Investors who became disqualified to file on Schedule 13G because they acquired more than 2% beneficial ownership in a 12-month period. *Id.* The commenter also noted that many Schedule 13D filers are investors who seek a minority position and potentially a board seat (given their desire to more actively monitor their sizeable investment), but seek to work cooperatively with the issuer, with the goal of building shareholder value for all investors, and possess no intent to replace a majority of the board of directors, launch a tender offer, or make an offer to take the company private. *Id.*

[98] *See* letters from CIRCA IV; ICM.

[99] *See* letters from A. Day; E. Fraser.

[100] *See* letter from NVCA.

[101] *See* letter from Perkins Coie; *see also* letter from Jennifer W. Han, Executive Vice President, Chief Counsel & Head of Global Regulatory Affairs, Managed Funds Association and National Association of Private Fund Managers (July 24, 2023) (''MFA & NAPFM'') (describing potential costs associated with the Proposed Amendments, but not expressly opposing the Proposed Amendments).

[102] *See* letter from STB. For example, the commenter suggested that in order to avoid making a ''late'' filing with the Commission, beneficial owners may shift to boilerplate disclosures in their Schedule 13D filings, which can be prepared more quickly but are less useful to investors and regulators. *Id.*

amendments. For example, a number of commenters expressed concerns that the proposed amendments would increase management entrenchment and reduce shareholder engagement and corporate accountability.[103] One commenter stated that although ''some purchasers may file within fewer than the required 10 days for Schedule 13D,'' that ''does not justify accelerating the reporting timeline.'' [104] One commenter also noted that the proposed accelerated initial Schedule 13D filing deadline could result in activist investors relying more heavily on derivatives, such as total return swaps and call options.[105] One commenter asserted that the Commission has not provided a compelling justification for the proposed amendments or provided evidence to support its concerns regarding information asymmetries and reporting gaps that would warrant the proposed acceleration of the beneficial ownership reporting deadlines.[106] One commenter expressed concern that the proposed amendments would induce a front-running effect that would distort market pricing and increase market volatility.[107] Other commenters asserted that investors already have access to all of the volume and price data for publicly traded companies that they need to take appropriate action and, therefore, do not need additional information regarding holdings by significant beneficial owners.[108]

In addition, one commenter expressed concern that the Commission has not cited a market event or failure related to the existing beneficial ownership regime to support the proposed amendments.[109] That commenter distinguished the proposed amendments from other congressional efforts to accelerate public disclosures based on the fact that the proposed amendments apply to unrelated, third-party investors rather than issuers or insiders.[110] Finally, one commenter asserted that the proposed amendments conflict with contract law in the United States, which generally refrains from imposing disclosure obligations on buyers of property.[111]

Some of the commenters that generally supported the proposed amendments also made various recommendations to the Commission. For example, one commenter recommended that the Commission require that an initial Schedule 13D be filed by the end of the day on which a person acquires beneficial ownership of more than five percent of a covered class.[112] Another recommended that the Commission require that an initial Schedule 13D be filed within one calendar day of a person acquiring three percent, rather than more than five percent, of a covered class and that a person be prohibited from acquiring more than three percent until one business day after filing a Schedule 13D.[113] Similarly, one commenter recommended that the Commission require that an initial Schedule 13D be filed within one business day after crossing the five percent threshold and institute a moratorium on the acquisition of beneficial ownership of additional equity securities of an issuer by any acquirer required to file a Schedule 13D that would be in effect from the acquisition of a five percent beneficial ownership stake until two business days after filing the Schedule 13D.[114]

Other supporting commenters recommended that the Commission require that an initial Schedule 13D be filed within two business days, consistent with the filing deadline for a Form 4.[115] One supporting commenter recommended that the Commission require that an initial Schedule 13D be filed within three days rather than five days.[116] Other supporting commenters recommended that the Commission consider further shortening the beneficial ownership reporting deadlines without specifying an alternative filing deadline.[117]

In addition, some of the commenters that generally opposed the proposed amendments made various recommendations to the Commission. For example, one recommended that rather than shortening the Schedule 13D filing deadline, the Commission should impose a prohibition on tipping by an activist as soon as it reaches the five percent threshold until it files a Schedule 13D.[118] Another recommended that the Commission include an assets under management-based threshold for the proposed accelerated Schedule 13D filing deadlines.[119]

Other opposing commenters recommended that the Commission consider a ''tiered approach'' to Rule 13d–1(a).[120] For example, one commenter suggested a tiered approach designed to vary the reporting deadline for an initial Schedule 13D based on the issuer's market capitalization without any limitation on acquisitions during the period between the time that the investor acquires more than five percent of a covered class and the time that the initial Schedule 13D is filed.[121] Another opposing commenter recommended that the Commission require those who cross certain thresholds (*e.g.,* 10 percent) or accumulate certain amounts after crossing five percent (*e.g.,* an additional three percent) to file on the more accelerated timeline, but allowing investors who trigger Schedule 13D filings for more technical reasons and who are not accumulating stock in connection with a potential activist engagement (*e.g.,* proxy contests or intended take-private activity) to continue filing under the current regime.[122]

Some opposing commenters recommended that if the Commission revises the initial Schedule 13D filing deadline, it should adopt a different deadline than proposed. For example, one commenter recommended that the

[103] *See, e.g.,* letters from AIMA; CIRCA I; CIRCA III; Dodge & Cox; ICM; M. Frampton; MFA; Rice Management; TRP.

[104] *See* letter from AIMA. According to the commenter, ''[m]ost investors will have a total aggregate investment in mind,'' and ''[w]hen the investor reaches this level and exceeds the 5% threshold, she files her Schedule 13D,'' but ''[t]his standard market practice in no way suggests that all other holders who are continuing to accumulate shares should be required to file earlier.'' *Id.*

[105] *See* letter from Profs. Swanson, Young, and Yust.

[106] *See* letter from ICI I.

[107] *See* letter from Rice Management.

[108] *See* letters from ICM; R. Parta.

[109] *See* letter from AIMA.

[110] *Id.* The commenter also stated that although some beneficial owners file a Schedule 13D before the end of the 10-day deadline, this does not support shortening the deadline because the decision as to when to file is based on each investor's target accumulation level. *Id.*

[111] *See* letter from Profs. Schwartz and Shavell I.

[112] *See* letter from Corey (Feb. 19, 2022) (''Corey'').

[113] *See* letter from Prof. Steinberg.

[114] *See* letter from WLRK I. The commenter asserted that the proposed five-day deadline will still substantially fail to serve the purpose of the Williams Act to require the timely release of information to the investing public with respect to the accumulation of substantial ownership of an issuer's voting securities. *Id.* According to the comment, this will ''provide hedge funds and activist shareholders ample time to accrue significant stakes in an issuer and ''improperly exploit, and profit from, information asymmetries at the expense of other public investors.'' *Id.* The commenter also stated that the moratorium is necessary to address information asymmetries and ensure the markets have time to assess impact of Schedule 13D filing and likened it to the 10-business day cooling off period applicable to Passive Investors switching from Schedule 13G filers to Schedule 13D filers. *Id.*

[115] *See, e.g.,* letters from NIRI; SCG; SCG & NIRI; *see also* Letter Type C; letter from PL Salvati (Aug. 9, 2023) (''PL Salvati'') (neither clearly supporting nor opposing the proposal, but recommending a two-business day deadline).

[116] *See* letter from T. Reilly.

[117] *See, e.g.,* letters from AFREF; Freeport-McMoRan; HMA I.

[118] *See* letter from Prof. Gordon.

[119] *See* letter from A. Day.

[120] *See* letters from ICM; STB.

[121] *See* letter from ICM.

[122] *See* letter from STB.

Commission consider extending the filing deadline (*e.g.,* to 15 or 30 days) rather than accelerating it.[123] One commenter recommended that the Commission require an initial Schedule 13D be filed within eight days rather than the proposed five days.[124] Other commenters recommended that the Commission require an initial Schedule 13D be filed in five business days rather than five calendar days.[125] Some of those commenters suggested that a five-business day deadline would be more appropriate in light of the steps required to prepare and file an accurate Schedule 13D,[126] and one commenter noted that most analogous securities laws governing reporting of material changes (*e.g.,* Form 8–K and Exchange Act section 16 filings) require filings within time periods designated in business days rather than calendar days.[127]

Finally, some commenters that neither clearly supported nor opposed the proposed amendments made recommendations to the Commission. Several commenters recommended an alternative filing deadline than proposed, with some suggesting that the Commission require an initial Schedule 13D be filed within one day,[128] within two days,[129] five business days,[130] or on the same day as the event triggering the filing obligation.[131] Some commenters expressed a general preference for a deadline expressed in ''business days'' rather than ''calendar days.'' [132] And, one commenter recommended that to the extent the Commission is concerned about Schedule 13D filers acquiring additional shares after crossing the five percent threshold without public disclosure, it should prohibit trading after crossing the five percent threshold rather than accelerating the filing deadlines.[133]

c. Final Amendments

We are amending Rule 13d–1(a), (e), (f), and (g) to shorten the initial Schedule 13D filing deadline. We are adopting a five-business day [134] deadline, however, rather than the proposed five-calendar day deadline based on the input we received from commenters.

As noted above, Rule 13d–1(a) currently requires an initial Schedule 13D to be filed within 10 days after the date on which a person acquires beneficial ownership of more than five percent of a covered class.[135] We are amending Rule 13d–1(a) to require a Schedule 13D to be filed within five business days after the date [136] of such acquisition. Similarly, as discussed above, Rule 13d–1(e), (f), and (g) currently require an initial Schedule 13D to be filed within 10 days after the date on which a person loses its Schedule 13G eligibility. We are

[123] *See* letter from E. Fraser. The commenter also recommended that the Commission consider a provision for when a shareholder's position goes over the 5% threshold because of ordinary corporate actions that result in the number of outstanding shares to drop such that the shareholder unwittingly holds over the 5% of outstanding shares and recommended that the Commission consider increasing the threshold from greater than 5% beneficial ownership to 10%. *Id.*

[124] *See* letter from MFA.

[125] *See, e.g.,* letters from Dodge & Cox; ICI I; SIFMA AMG; STB; *see also* IAC Recommendations (recommending that the Commission adopt a five-business day deadline, rather than a five-calendar day deadline, for an initial Schedule 13D filing).

[126] *See* letters from Dodge & Cox; ICI I.

[127] *See* letter from STB; *see also* IAC Recommendations.

[128] *See, e.g.,* letters from Jason Dunlop, Software Developer for the FAA (Feb. 19, 2022) (''J. Dunlop''); John Kennedy, Tax Paying American Citizen (Feb. 22, 2022) (''J. Kennedy''); Phillip, Retail Investor (Feb. 19, 2022) (''Phillip''). These commenters suggested that all beneficial ownership reports should be filed within one day. *See also* letter from Juan B. (Aug. 14, 2023) (''Juan B.'') (recommending that the initial Schedule 13D and 13G filing deadlines under Rule 13d–1(a), (b), and (d) be shortened to one day).

[129] *See* letter from Charles Jacobs, USCG (Feb. 20, 2022) (''C. Jacobs'').

[130] *See* letters from IAA; Profs. Bishop and Partnoy II; Robert Bishop, Associate Professor, Duke Law School, and Frank Partnoy, Adrian A. Kragen Professor of Law, UC Berkeley School of Law, Berkeley Haas (Affiliated Faculty) (June 27, 2023) (''Profs. Bishop and Partnoy III''). One of these commenters asserted that five calendar days would be extremely challenging for filers to obtain and verify all the information needed to ensure the accuracy and completeness of an initial Schedule 13D filing. *See* letter from IAA.

[131] *See, e.g.,* letters from Chris McEntee, Retail Investor (Mar. 14, 2022) (''C. McEntee''); David Choate (Aug. 2, 2023) (''D. Choate''). These commenters suggested that all beneficial ownership reports should have a same-day filing deadline.

[132] *See, e.g.,* letters from IAA; Profs. Bishop and Partnoy III. One of these commenters recommended that the Commission use business days to give filers sufficient time to analyze and prepare Schedules 13D and 13G and make it more likely that the Commission, issuers, and the marketplace will receive beneficial ownership information that is accurate and complete and asserted that the use of business days instead of calendar days when establishing the filing deadlines will not have a detrimental impact on the proposed benefits of shorter deadlines. *See* letter from IAA. Another of these commenters expressed the belief that ''there is now a broad consensus that the final rule should be framed in terms of business (or trading) days.'' *See* letter from Profs. Bishop and Partnoy III.

[133] *See* letter from Committee on Securities Law of the Business Law Section of the Maryland State Bar Association (Apr. 11, 2022) (''MSBA'').

[134] The term ''business day'' is not defined in section 13(d) or 13(g) or any rule of Regulation 13D–G. Accordingly, in the Proposing Release, the Commission proposed to define ''business day'' for purposes of Regulation 13D–G to mean any day, other than Saturday, Sunday, or a Federal holiday, from 6 a.m. to 10 p.m. Eastern Time. Proposing Release at 13847, n.5. One commenter addressed this proposal, expressing concern that the proposed definition of ''business day'' could raise confusion as to on which business day a material change occurred if the event took place outside of the hours set forth in that definition (*i.e.,* 6 a.m. to 10 p.m. Eastern Time). *See* letter from EIM I. Accordingly, the commenter recommended that the ''business day'' definition comprise the full 24-hour period of any given day based on the customary definition of the term. *Id.* To avoid the concern expressed by this commenter, we are adopting the commenter's recommendation. As such, the term ''business day'' for purposes of Regulation 13D–G will be defined to mean any day, other than Saturday, Sunday, or a Federal holiday, from 12:00 a.m. to 11:59 p.m. Eastern Time. We believe this will avoid any confusion as to the date on which a beneficial ownership report is due if, for example, a person incurs a filing obligation before 6 a.m. or after 10 p.m. on a day that is not a Saturday, Sunday, or Federal holiday. It is important to note, however, as stated at the outset of Regulation 13D–G, that Regulation S–T governs the preparation and submissions of filings in electronic format and should be read in conjunction with the rules contained within Regulation 13D–G, including Rules 13d–1 and 13d–2. Thus, even though the definition of ''business day'' encompasses an entire day, a Schedule 13D or 13G must be submitted by direct transmission to the Commission in accordance with the times set forth in Rule 13(a) of Regulation S–T in order to be deemed to have been filed on that day. See *infra* section II.A.5 for a more detailed discussion of Rule 13(a) of Regulation S–T, including the amendments we are adopting to extend the filing ''cut-off'' time for Schedules 13D and 13G.

[135] Under section 21 of the Exchange Act, the Commission has the authority to investigate and enforce violations of section 13(d)(1) and Rule 13d–1(a) and may seek to impose various remedies for late filings, such as injunctive relief, cease-and-desist orders or civil monetary penalties. Importantly, no state of mind requirement exists for violations of section 13(d)(1) and corresponding Rule 13d–1(a). *See SEC* v. *Levy,* 706 F. Supp. 61, 63–69 (D.D.C. 1989) (holding a defendant liable notwithstanding the defendant's assertion that his attorney ''misinformed defendant about his obligation to disclose'' information on Schedule 13D because scienter is not an element of such violations); *see also SEC* v. *Savoy Indus., Inc.,* 587 F.2d 1149, 1167 (D.C. Cir. 1978) (''Indeed, the plain language of section 13(d)(1) gives no hint that intentional conduct need be found, but rather, appears to place a simple and affirmative duty of reporting on certain persons. The legislative history confirms that Congress was concerned with providing disclosure to investors, and not merely with protecting them from fraudulent conduct.''); *Oppenheimer & Co., Inc.,* 47 SEC 286, 1980 WL 26901, at *1–2 (May 19, 1980) (''We have previously held that the failure to make a required report, even though inadvertent, constitutes a willful violation.''). To the extent a person willfully fails to comply with section 13(d), a beneficial owner also has exposure to criminal liability under section 32(a) of the Exchange Act.

[136] We also are revising Rule 13d–1(a) to state that the initial Schedule 13D must be filed within five business days ''after the date of such acquisition'' rather than the current formulation of ''after such acquisition.'' This modification, which the Commission proposed, is intended to clarify that, for purposes of determining the filing deadline, the first day in the five-business day count towards reaching the deadline is the day *after* the date on which beneficial ownership of more than 5% is acquired (rather than the date of such acquisition). We also are adopting similar changes to Rule 13d–1(c) and (f)(1), as those rules currently contain language similar to the ''after such acquisition'' formulation currently in Rule 13d–1(a). We do not believe that a similar change is required for Rule 13d–1(e) and (g), as those rules use different formulations. *See* 17 CFR 240.13d–1(e)(1) and (g) (currently requiring an initial Schedule 13D be filed ''within 10 days'' of the filing trigger date).

amending those rules to require such Schedule 13D to be filed within five business days after such date.

For purposes of determining the filing deadline under these amendments, the Commission must receive the filing by the fifth business day *after* the date on which the initial Schedule 13D filing obligation arises—*i.e.,* the date on which a person acquires beneficial ownership of more than five percent of a covered class under Rule 13d–1(a) or the date on which a person loses eligibility to file on Schedule 13G under Rule 13d–1(e), (f), and (g)—in order for the filing to be considered timely. Pursuant to our amendment to Rule 13(a)(4) of Regulation S–T, discussed in section II.A.5 below, the filing will have to be submitted by direct transmission commencing on or before 10 p.m. Eastern Time on the due date.[137]

We believe the current 10-day filing deadline for an initial Schedule 13D filing should be revised to ensure investors receive material information in a manner that is considered timely in light of advancements in technology and developments in the financial markets that have occurred since that deadline was enacted in 1968. Those technological advancements include, for example, market professionals' use of information technologies to compile the necessary data and prepare a filing,[138] as well as their ability to submit filings electronically through the Commission's Electronic Data Gathering, Analysis, and Retrieval (''EDGAR'') system.[139] In addition, the use of modern information technology and other developments in the financial markets may facilitate an investor's accumulation of a large equity stake more quickly than at the time Congress enacted the Williams Act.[140] Before 1993, ''the prevailing practice'' was to ''settl[e] securities transactions within five business days of trade date.'' [141] Since then, the Commission has shortened the settlement cycle three times, most recently adopting rule amendments this year that require settlement of most transactions in securities within one business day after the trade date (with which compliance will be required by May 28, 2024).[142] Because a shortened settlement cycle enables investors to access the proceeds of their transactions more quickly, investors also may be able to acquire a significant equity stake more quickly than when settling their transactions within five business days of trade date.[143] Congress, in the Dodd-Frank Act, expressly empowered the Commission to shorten the deadline for filing the initial Schedule 13D.[144] Because of those advances in technology and developments in the financial markets, we are now exercising that authority to shorten the initial Schedule 13D filing deadline.

We note that our shortening of the initial filing deadline for Schedule 13D is consistent with previous congressional and Commission efforts to accelerate public disclosures of material information to the market.[145] For example, in 2002, when the Commission accelerated the deadlines for issuers to submit their periodic reports, it reasoned that ''[s]ignificant technological advances over the last three decades have both increased the market's demand for more timely corporate disclosure and the ability of companies to capture, process and disseminate this information.'' [146]

[137] *See infra* section II.A.5 for a discussion of our amendment to Rule 13(a)(4) of Regulation S–T, which extends the filing ''cut-off'' time for Schedules 13D and 13G from 5:30 p.m. Eastern Time to 10 p.m. Eastern Time.

[138] *See, e.g.,* letters from Better Markets I (noting ''technological advancements over the last 54 years [that] have reduced the need for a 10-day reporting period,'' including ''vastly more efficient data compilation methods''); SCG (noting that ''[e]very fund manager with the resources to amass a 5% stake in a company should have sufficient record-keeping technology to determine'' the amount of their beneficial ownership in a rapid manner); Leo E. Strine, Jr., *Who Bleeds When the Wolves Bite? A Flesh-and-Blood Perspective on Hedge Fund Activism and Our Strange Corporate Governance System,* 126 Yale L.J. 1870, 1895, 1960–61 (2017) (describing the ''disclosure regime under Section 13 of the Securities Exchange Act'' as ''antiquated'' and stating that ''[i]t seems entirely clear to me that the idea of Section 13 was that an investor should come public as soon as reasonably possible after hitting the 5% threshold and that the reporting deadline was due to what it took to type up, proof, and deliver to Washington the required filing in 1968, when word processors and electronic filing with a button push did not exist'').

[139] In mandating that all Schedules 13D and 13G be filed electronically, the Commission reasoned that such a transition was necessary to facilitate ''more rapid dissemination of, and easier access to, financial and other material information . . . than under our current paper filing system'' and cited to ''increased efficiencies in the filing process, which will significantly reduce the filing time required under traditional methods of paper delivery.'' *See Rulemaking for EDGAR System,* Release No. 34–35113 (Dec. 19, 1994) [59 FR 67752 (Dec. 30, 1994)]; *Mandated EDGAR Filing for Foreign Issuers,* Release No. 34–45922 (May 14, 2002) [67 FR 36678 (May 24, 2002)]; *see also* Adam O. Emmerich et al., *Fair Markets and Fair Disclosure: Some Thoughts on the Law and Economics of Blockholder Disclosure, and the Use and Abuse of Shareholder Power,* 3 Harv. Bus. L. Rev. 135, 143 (2013) (noting that the 10-day Schedule 13D filing deadline reflected ''commercial and technological realities that existed in 1968, [which] would have included the time required to mail the Schedule 13D to the SEC's office''); letter from Wachtell, Lipton, Rosen & Katz to Elizabeth M. Murphy, Sec'y, U.S. Sec. & Exch. Comm'n (Mar. 7, 2011) (''Wachtell Petition'') at 1–7, *available at https://www.sec.gov/rules/petitions/2011/petn4-624.pdf* (petitioning the Commission to propose amendments to the beneficial ownership reporting rules to, among other things, shorten the Schedule 13D filing deadline from 10 days to one business day based, in part, on ''[c]hanges in technology, acquisition mechanics and trading practices [that] have given investors the ability to make these types of reports with very little advance preparation time'' and the fact that ''the markets rely on the expectation that material information wil1 be disseminated promptly and widely, in no small part due to the impact of the internet and online information exchange'').

[140] *See, e.g.,* letter from SCG. This commenter noted, for example, that ''investment managers [in 1968] didn't have access to email, instant messaging, fax machines, market data terminals, computer-assisted trading technology, or alternative 'dark pool' trading venues that help facilitate the accumulation of significant positions.'' *Id.* The commenter also noted that ''[d]aily trading volumes on U.S. exchanges, which averaged 22 million shares in 1968, have grown by more than 1,000 times.'' *Id.*

[141] *Shortening the Securities Transaction Settlement Cycle,* Release No. 34–96930 (Feb. 15, 2023) [88 FR 13872, 13873 (Mar. 6, 2023)].

[142] *Id.* at 13873, 13916.

[143] *See* letter from SCG (''Fifty-four years ago, there was no standard period for settling securities trades; today the settlement cycle is two business days and the Commission recently proposed shortening that period further to 'T+1' (one business day) by 2024 to reduce risks to investors.''). See also *infra* text accompanying note 677 for further discussion of some ways in which investors may be able to acquire a significant equity stake more quickly in today's financial markets.

[144] Public Law 111–203, 124 Stat. 1900 929R(a)(1)(A) (2010).

[145] For example, the Sarbanes-Oxley Act of 2002 (''Sarbanes-Oxley Act'') amended section 16(a) of the Exchange Act to require that change of beneficial ownership reports under section 16(a) of the Exchange Act be filed by officers, directors and beneficial owners of more than 10% of a covered class ''before the end of the second business day following the day on which the subject transaction has been executed.'' On Aug. 27, 2002, the Commission adopted amendments to implement the accelerated deadline for Form 4 filings, shortening the deadline from 10 days after the close of each calendar month to two business days after a filing obligation is triggered. *See Ownership Reports and Trading by Officers, Directors and Principal Security Holders,* Release No. 34–46421 (Aug. 27, 2002) [67 FR 56461 (Sept. 3, 2002)]. On Mar. 16, 2004, the Commission amended Form 8–K to generally require that such filings be made within four business days of a triggering event. In adopting the accelerated timeline, the Commission explained the amended requirement ''should enhance investor confidence in the financial markets.'' *Additional Form 8–K Disclosure Requirements and Acceleration of Filing Date,* Release No. 34–49424 (Mar. 16, 2004) [69 FR 15593 at 15611 (Mar. 25, 2004)]. The Commission further explained that ''[t]he requirement of enhanced, timely disclosure should raise investors' expectations regarding the amount and timing of information that reporting companies must make available to the public'' and that ''[c]onfidence in the expectation of such enhanced disclosure should provide more certainty to those investors that they are making investment decisions in a more transparent market, which should reduce market volatility as a result of uncertainty of the availability of accurate timely information about public companies.'' *Id.*

[146] *Acceleration of Periodic Report Filing Dates and Disclosure Concerning website Access to Reports,* Release No. 34–46464 (Sept. 5, 2002) [67 FR 58479 (Sept. 16, 2002)]. We recognize that these accelerated deadlines applied to periodic filings made by issuers, whereas sections 13(d) and (g) relate to filings made by investors. *See supra* note

Continued

Similarly, the Commission has long recognized the benefits of more expedient reporting, stating, for example, that ''a lengthy delay before . . . information becomes available makes the information less valuable to investors.'' [147]

Despite those efforts to accelerate various other reporting deadlines, the initial Schedule 13D filing deadline has remained unchanged since its enactment in 1968. As a number of commenters pointed out, there have been significant changes in technology and developments in the financial markets in the intervening years that have rendered the 10-day deadline ''outdated.'' [148] Commenters also highlighted some costs that the current 10-day deadline may be imposing on market participants (*i.e.,* by delaying the disclosure of potentially material information) [149] and identified some potential benefits of shortening that deadline, including increased timeliness of information and improved transparency and fairness in the financial markets.[150] We agree with those commenters that shortening the initial Schedule 13D filing deadline will increase the timeliness of the disclosure of material information, thereby improving market transparency, facilitating better-informed decision-making by investors, and enhancing the efficiency of resource allocation (*i.e.,* the direction of capital and other resources to their most productive uses) across the economy.[151]

We recognize that several commenters opposed the proposed amendments to Rule 13d–1(a), (e), (f), and (g). Some commenters asserted that neither Congress nor the Commission previously suggested that technological ability to file should be the primary basis to determine the appropriate initial Schedule 13D filing deadline.[152] There is some indication, however, that when enacting the 10-day deadline, Congress considered the amount of time a beneficial owner would need to prepare and submit a filing.[153] As noted above, there have been significant technological advancements since 1968 that have made it easier to prepare and file a Schedule 13D more quickly.[154] There also is some indication that Congress enacted section 13(d), in part, to provide shareholders with material information regarding potential changes in control in a timely manner to facilitate their investment decisions.[155] Because changes in technology and developments in the financial markets since 1968 have facilitated investors' abilities to rapidly accumulate beneficial ownership,[156] we believe it is appropriate to shorten the initial Schedule 13D deadline so that the rate at which shareholders become aware of such accumulations keeps pace.[157]

Many commenters also expressed concern that shortening the initial Schedule 13D filing deadline could, among other things, disincentivize shareholder activism by reducing the amount of time such shareholders have to accumulate positions in an issuer's covered class before filing a Schedule 13D.[158] According to those commenters, this reduction of time could deprive issuers and their shareholders of the positive benefits of such activism, thereby increasing management entrenchment and reducing shareholder engagement and corporate accountability.[159]

Although we primarily are concerned with ensuring that investors receive material information in a timely manner, we agree that we should remain conscious of the competing interest that undue burdens not be imposed on shareholders engaging in change of

110 and accompanying text. We also recognize that the acceleration of these deadlines was prompted, in part, by section 409 of the Sarbanes-Oxley Act, which ''added Section 13(l) of the Exchange Act . . . [to] require[ ] disclosure on a *rapid and current* basis of such additional information concerning material changes in the financial condition or operations of the issuer,'' *id.* at n.15 and accompanying text (emphasis added), whereas no such ''rapid and current'' language exists in sections 13(d) and 13(g). Nonetheless, the technological advances that have increased both the market's demand for more timely disclosure and the ability of issuers to file more rapidly are equally applicable to the information disclosed on Schedule 13D and available to investors making Schedule 13D filings. For example, Congress recognized the market's demand for more timely disclosure of non-issuer filings by accelerating the deadline for section 16 filings in the Sarbanes-Oxley Act. *See supra* note 145. As such, we believe that these technological advances and market practices also support accelerating the initial Schedule 13D filing deadline.

[147] *Acceleration of Periodic Report Filing Dates and Disclosure Concerning Website Access to Reports,* Release No. 34–46464 (Sept. 5, 2002) [67 FR 58479, 58483 (Sept. 16, 2002)]; *see also* H.R. Rep. 90–550 (1967) (''The persons seeking control, however, have information about themselves and about their plans which, if known to investors, might substantially change the assumptions on which the market price is based. The bill is designed to make relevant facts known so that shareholders have a fair opportunity to make their decision.'').

[148] *See supra* notes 48–52 and accompanying text.

[149] *See supra* notes 42–43 and accompanying text.

[150] *See supra* notes 38–41 and accompanying text.

[151] *See infra* section IV.C.1.a.ii.

[152] *See supra* note 92 and accompanying text.

[153] *See, e.g.,* Full Disclosure of Corporate Equity Ownership and in Corporate Takeover Bids: Hearing on S. 510 Before the Subcomm. on Securities of the S. Comm. on Banking and Currency, 90th Cong. 136 (1967) (statement of Stanley Kaplan, Professor, University of Chicago) (stating that ''[r]equiring the filing . . . within seven days after acquisition of 10% of equity securities seems to provide an unduly short time for preparation of a document of that magnitude and significance'' and noting that ''[i]t will take longer to prepare and check such a document properly'').

[154] *See supra* notes 138–139 and accompanying text.

[155] *See* Full Disclosure of Corporate Equity Ownership and in Corporate Takeover Bids: Hearing on S. 510 Before the Subcomm. On Securities of the S. Comm. On Banking and Currency, 90th Cong. 25 (1967) (statement of Manuel F. Cohen, Chairman, Securities and Exchange Commission) (''We think that this bill would improve our ability to elicit . . . information [regarding changes of control] . . . in a timely way, that is necessary for appropriate investor information and judgment.''); *see also id.* at 70 (statement of Donald J. Calvin, Vice President, New York Stock Exchange) (noting that Senator Harrison A. Williams, Jr. stated that ''[t]he primary objective of this bill . . . is to provide full and timely disclosure to stockholders'' and stating that ''[d]isclosure to stockholders of events which may affect investment decisions is and has been for many years a primary object of exchange policy'' and that ''[w]e consider timely disclosure . . . vital to the fair operation of a securities market'').

[156] *See supra* note 140 and accompanying text.

[157] We recognize that several commenters disagreed that technological advancements and other developments in the financial markets justify shortening the initial Schedule 13D deadline as proposed. *See supra* notes 91–95 and accompanying text. For example, some commenters noted that despite advances in technology, the filing process still has numerous operational components that take time to complete. *See* letter from IAA; *see also* letter from STB (stating that ''calculation of beneficial ownership remains an extremely manual process, can involve significant judgment and relies on third party information''). Others described some ways in which it may be more difficult to accumulate a significant equity stake in today's financial markets. *See infra* notes 678–679 and accompanying text. As an initial matter, we expect that the change from the proposed five-calendar day deadline to a five-business day deadline should mitigate these concerns. *See infra* note 165 and accompanying text. In addition, for the reasons discussed *infra* notes 166–168 and accompanying text, we believe that our analyses of the current timing of Schedule 13D filings and accumulations of significant equity stakes demonstrate that Schedule 13D filers are capable, utilizing modern technology and in light of the characteristics of today's financial markets, of complying with the amended five-business day deadline. This is especially so given the sophistication and size of many Schedule 13D filers. *See supra* note 58 and accompanying text. Finally, some commenters expressed concerns about filers' ability to meet the proposed deadline (as well as the other Schedule 13D and 13G filing deadlines) given the amount of time it may take to obtain EDGAR filer codes. *See, e.g.,* letters from MSBA; STB. To ensure they obtain their EDGAR filer codes in a timely manner, we generally expect filers to begin the process of applying for their EDGAR filer codes before they have incurred a filing obligation (*e.g.,* as they begin to acquire shares with a control intent but before crossing the 5% threshold). Filers should note that the Commission's staff reviews all Form ID applications, and filers should allow sufficient time for that review. Further, the Commission's staff works diligently to process Form IDs promptly upon receipt of an application.

[158] *See supra* notes 77–83 and accompanying text.

[159] *See supra* notes 77–83, 103 and accompanying text.

control transactions.[160] In the Proposing Release, the Commission ''recognize[d] the chilling effect that a shortening of the initial Schedule 13D filing deadline could have on a shareholder's ability . . . to effect changes at companies'' if the shortened deadline increases the costs and reduces the incentives for shareholders attempting to effect a change of control.[161] Yet, the Commission further stated that it did not believe ''that a shortening of the deadline would unduly disrupt that balance,'' noting that ''many Schedule 13D filers currently do not avail themselves of the full 10-day filing period.'' [162] A number of commenters similarly asserted that the proposed five-day deadline would not significantly impede shareholder activism or impose significant costs or burdens on beneficial owners of more than five percent of a covered class.[163]

Notwithstanding this support for the proposed five-calendar day deadline, we have decided to instead adopt a five-business day deadline. This change from the proposal comports with a recommendation that a number of commenters, including several that opposed the proposed amendments, made to the Commission.[164] Further, this shift to a ''business days''-based deadline also will help to address a variety of concerns that commenters expressed about the burdens associated with the proposed five-day deadline. Specifically, five business days (as compared to five calendar days) gives beneficial owners additional time to accumulate positions in an issuer before filing a Schedule 13D and to prepare and file an accurate Schedule 13D.[165] As with the proposed five-calendar day deadline, we also note that many Schedule 13D filings currently are made within the amended five-business day deadline.[166] This demonstrates that at least some Schedule 13D filers are likely to be unaffected by the shortened deadline. And, many Schedule 13D filers are sophisticated, large investors that have access to technology and resources that should allow them to prepare and file a Schedule 13D within five business days.[167] As such, we do not anticipate a five-business day deadline will be unduly disruptive for Schedule 13D filers.

With respect to shareholder activism in particular, we note that for the vast majority of campaigns, the shareholder currently accumulates at least 90 percent of its equity stake, with many accumulating 100 percent of their equity stake, within the amended five-business day deadline.[168] This demonstrates that most shareholder activists may not be affected by the shortened deadline. In addition, for those campaigns that would be affected by the amended five-business day deadline, we expect the activists will adapt to the shortened deadline and continue to pursue the campaigns.[169] For example, for those campaigns in which the shareholder has accumulated less than 90 percent of its equity stake within the amended five-business day deadline, we note that the unrealized gains attributable to the shares accumulated after the amended deadline generally represent a significantly smaller portion of the shareholder's total unrealized gains (when compared to the shares accumulated prior to the amended deadline).[170]

Finally, we note that profits from shareholder activism may not be derived solely from the increase in share price associated with the public disclosure of an activist's more than five percent beneficial ownership stake. Specifically, shareholder activists may continue to experience abnormal positive returns from activism even after filing their initial Schedule 13D. Thus, to the extent a shareholder activist seeks to profit from increases in share price after the public disclosure of its more than five percent beneficial ownership stake, we would not expect a reduction in the profits associated with such disclosure to be determinative as to whether a shareholder engages in an activist campaign.

The amended five-business day deadline reflects our attempt to ensure

[160] *See* Full Disclosure of Corporate Equity Ownership and in Corporate Takeover Bids: Hearing on S. 510 Before the Subcomm. on Securities of the S. Comm. on Banking and Currency, 90th Cong. 1 (1967) (statement of Manuel F. Cohen, Chairman, Securities and Exchange Commission) (''It must be emphasized again that in establishing requirements which will make this important information available to stockholders, we must be careful not to tip the scales to favor either incumbent management or those who would seek to oust them. We believe that the provisions of the present bill . . . reflect an appropriate balance among competing interests which, at the same time, will fulfill the need of public stockholders to be fully informed about the control and potential control of the company in which they have invested.''); H.R. Rep. No. 1711, at 4 (1968) (''The bill avoids tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid. It is designed to require full and fair disclosure for the benefit of investors while at the same time providing the offeror and management equal opportunity to fairly present their case.''); 113 Cong. Rec. 24, 664 (1967) (noting that ''takeover bids should not be discouraged, since they often serve a useful purpose by providing a check on entrenched but inefficient management'') (statement of Sen. Harrison A. Williams, Jr.).

[161] Proposing Release at 13851. The Commission noted academic research indicating that large blockholders may improve the share price and the corporate governance of the companies in which they invest and that all of a company's shareholders enjoy these benefits. Proposing Release at 13851, n.30. The Commission further recognized that shortening the initial Schedule 13D filing deadline could reduce the profitability of such investments, making large blockholders less inclined to make those investments or engage with the companies in ways that produce such benefits. *Id.* This is consistent with the concerns that many opposing commenters expressed. *See supra* notes 77–83 and accompanying text; *see also infra* section IV.C.1.b.i.

[162] *Id.*

[163] *See supra* notes 57–65 and accompanying text.

[164] *See supra* notes 125, 130 and accompanying text.

[165] The five-business day deadline, as compared to the proposed five-calendar day deadline, generally will give beneficial owners additional time before their Schedule 13D filing is due if the filing period encompasses days that are not business days (*i.e.,* Saturday, Sunday, or a Federal holiday). As an illustrative example, if a person acquires beneficial ownership of more than 5% of a covered class on a Wednesday, then under the five-business day deadline, the initial Schedule 13D is not due until the following Wednesday (assuming there are no Federal holidays during that period), giving the filer a total of seven days to prepare and submit the Schedule 13D. However, under the proposed five-day deadline, if a person acquires beneficial ownership of more than 5% of a covered class on a Wednesday, then the initial Schedule 13D will be due on the following Monday (assuming that Monday is not a Federal holiday), giving the filer a total of five days to prepare and submit the Schedule 13D. For purposes of performing this comparison of the five-business day deadline to the proposed five-day deadline, it is important to keep in mind that if the last day of a filing deadline expressed in ''days'' falls on a Saturday, Sunday, or Federal holiday, then such filing may be made on the next business day thereafter. 17 CFR 240.0–3 (''[I]f the last day on which [a filing] can be accepted as timely filed falls on a Saturday, Sunday or holiday, such [filing] may be [made] on the first business day following.'').

[166] *See infra* section IV.B.3.a.i (''Approximately 29 percent of the initial Schedule 13D filings [in 2022], representing about 41 percent of all of the initial Schedule 13D filings that were filed by the current filing deadline, were filed within the amended five-business day deadline.'').

[167] *See supra* note 58 and accompanying text.

[168] *See infra* section IV.C.1.b.i, Table 6 (noting that for approximately 208 of the 215 campaigns conducted annually, at least 90% of the equity stake is accumulated within the amended five-business day deadline); *see also* letter from Better Markets II (citing the same analysis conducted in the DERA Memorandum for the proposed five-day deadline and stating that the analysis ''indicate[s] that shortening the deadline should not significantly impede activist campaigns'').

[169] *See infra* note 847 and accompanying text.

[170] *See infra* section IV.C.1.b.i, Table 6 (noting that for the 7 campaigns conducted annually for which less than 90% of the total equity stake was accumulated by the amended five-business day deadline, and the 1 campaign conducted annually for which less than 75% of the total equity stake was accumulated by the amended five-business day deadline, the average percentages of the filer's unrealized gains on reported equity stake, as of the day after filing date, attributable to shares accumulated after amended deadline were 9.1% and 22.6%, respectively); *see also* letter from Better Markets II (citing the same analysis conducted in the DERA Memorandum for the proposed five-day deadline and stating that ''for filers who acquired less than 100% of their reported stake by the proposed deadline, only 6.8% of their unrealized gains on average were attributable to shares accumulated after the proposed deadline'').

investors receive material information in a timely manner while, at the same time, maintaining the appropriate balance between issuers of securities and the shareholders who seek to exert influence or control over issuers, especially when compared with the proposed five-calendar day deadline, which many commenters supported,[171] and the even shorter deadlines many commenters recommended.[172] We believe a five-business day deadline is sufficiently prompt and represents a more modern approach that reflects the technological advancements and other developments in the financial markets in the more than 50 years since the 10-day deadline was enacted. A five-business day deadline, as compared to the current 10-day deadline, also would more closely align the initial Schedule 13D filing deadline with the reporting deadline on Form 8–K for issuers (generally, four business days) and Form 4 for officers, directors, and beneficial owners of more than 10 percent of a covered class (two business days), both in terms of the length of the deadline and the use of ''business days,'' rather than ''days,'' to express the deadline.[173] This alignment should help to ensure that investors consistently receive prompt disclosures of material information, irrespective of the source. A five-business day deadline for the initial Schedule 13D also is more consistent in both length and form with the filing deadlines for similar beneficial ownership reports in foreign jurisdictions.[174]

Overall, because we expect that the vast majority of activist campaigns, and the value they create, will continue unabated under the amended rules,[175] we conclude that the significant benefits of the amendments outlined here and below [176] justify their costs.

Some commenters expressed other objections to the proposed amendments. For example, several commenters disagreed with the information asymmetry-based concerns in the Proposing Release as a basis for the proposed amendments.[177] We recognize that there are information asymmetries involved in any market transaction and agree that not all information asymmetries warrant a regulatory response. For example, one commenter stated that the information asymmetries described in the Proposing Release ''are simply the beneficial result of research and initiative by investors and the sign of properly functioning markets'' and expressed concern that ''[i]f activists have no economic incentive to pursue activism, other shareholders will not experience the increase in value that would have otherwise resulted from the activist's conduct.'' [178] We acknowledge that benefits may stem from the information asymmetry between a Schedule 13D filer and the market, and we recognize that the informational advantage of Schedule 13D filers results, in general, from their own expenditures on research and analysis or from their efforts and expenditures to pursue changes at the issuers in which they accumulate these shareholdings.[179] As such, although the Proposing Release referred to information asymmetries between Schedule 13D filers and selling shareholders and expressed concern that those information asymmetries ''could harm investors,'' [180] we do not focus on the reduction of these asymmetries as a justification for shortening the initial Schedule 13D deadline, as discussed in sections IV.C.1.a.iii and iv below.

Some other information asymmetries may, however, raise concerns that warrant a regulatory response. Specifically, the research and analysis prepared by the staff of the Division of Economic and Risk Analysis indicate that shortening the initial Schedule 13D deadline to five business days could meaningfully reduce information asymmetries between ''informed bystanders'' [181] and other, less-informed investors who sell their shares during the period after which an initial Schedule 13D filing obligation has been incurred but before the filing is made.[182] The informational advantage those

[171] *See supra* note 37 and accompanying text.

[172] *See, e.g.,* letters from C. McEntee (recommending a same-day initial Schedule 13D filing deadline); D. Choate (same); Corey (same); Prof. Steinberg (recommending, among other things, a one-day initial Schedule 13D filing deadline); J. Dunlop (recommending a one-day initial Schedule 13D filing deadline); J. Kennedy (same); Juan B. (same); Phillip (same); WLRK I (recommending, among other things, a one-business day initial Schedule 13D filing deadline); C. Jacobs (recommending a two-day initial Schedule 13D filing deadline); NIRI (recommending a two-business day initial Schedule 13D filing deadline); PL Salvati (same); SCG (same); SCG & NIRI (same); T. Reilly (recommending a three-day initial Schedule 13D filing deadline).

[173] *See supra* note 150; *see also* letter from STB (noting that most analogous securities laws governing reporting of material changes (*e.g.,* Form 8–K and section 16 filings) require filings within time periods designated in business days rather than calendar days). We further believe it is advisable to express all Schedule 13D filing deadlines (*i.e.,* for both initial filings and amendments) in ''business days.'' We expect that the consistent use of ''business days''—as opposed to using ''days'' or inconsistently using both ''days'' and ''business days'' to express the filing deadlines—will ease Schedule 13D filers' administrative burdens. We also anticipate that this uniform approach across the filing deadlines will make it easier for Schedule 13D filers to comply with those deadlines. In addition, as amended, all of the Schedule 13G deadlines that are less than 45 days also will be expressed in ''business days,'' consistent with one commenter's recommendation. *See* letter from IAA (recommending that the Commission express deadlines consistently in either calendar days or business days across all of the Schedule 13D and 13G initial and amendment filing deadlines, where the deadlines are less than 45 days to promote compliance by making it simpler and less confusing to keep track of the various deadlines).

[174] For example, Australia requires disclosure of any position of 5% or more within two business days if any transaction affects or is likely to affect control or potential control of the issuer. *See* Corporations Act 2001 (Cth) sec. 671B (Austl.). The United Kingdom imposes a two-trading-day deadline for disclosure of acquisitions in excess of 3% of an issuer's securities. *See* Disclosure Rules and Transparency Rules, Ch. 5 (U.K.). Germany requires a report ''immediately,'' but in no event later than four days after crossing the acquisition threshold. *See* Securities Trading Act, Sept. 9, 1998, BGBL. I at 2708, as amended, pt. 5 (Ger.). Hong Kong securities laws require a report within three business days of the acquisition of a ''notifiable interest'' under the law. *See* Part XV of the Securities and Futures Ordinance (promulgated by the Securities and Futures Commission, effective Apr. 1, 2003) (H.K.). We note that commenters disagreed as to the utility of referencing foreign jurisdictions' beneficial ownership reporting deadlines for purposes of determining the appropriate initial Schedule 13D filing deadline. *See supra* note 55 and accompanying text. Nonetheless, we believe that this comparative analysis suggests that a shortened deadline is workable based on the experiences of these foreign jurisdictions.

[175] *See infra* section IV.C.1.b.

[176] *See infra* section IV.C.a.

[177] *See supra* notes 84–90 and accompanying text.

[178] *See* letter from EIM I. Further, that commenter contrasted the proposal with the Short Position Reporting Proposal and stated that ''[t]he Commission does not explain why the research and analysis of a short seller is entitled to protection and does not constitute material non-public information about the company it is shorting, while the research and analysis of an activist is somehow characterized differently.'' *Id.; see also supra* note 84. The commenter's comparison of our shortening of the initial Schedule 13D deadline to the Short Position Reporting Proposal is inapt. We are shortening the Schedule 13D deadline in order to ensure that investors receive material information regarding potential changes in control in a timely manner to facilitate their investment decisions. This is consistent with the purpose of section 13(d), and necessarily requires public disclosure, including of the Schedule 13D filer's identity. *See supra* note 155 and accompanying text; Exchange Act section 13(d)(1)(A) (requiring a Schedule 13D filer to disclose, among other things, its ''background and identity''). The Short Position Reporting Proposal addresses a different regulatory scheme, and the reasons for those proposed amendments are discussed in that release. *See* Short Position Reporting Proposal. In addition, contrary to the commenter's suggestion that the Commission is disregarding the value of an activist's research and analysis, the amended five-business day deadline represents our attempt to maintain an appropriate balance between the requirement that material information be timely disseminated to investors and the competing interest that undue burdens not be imposed in the change of control context.

[179] *See infra* sections IV.C.1.a.iii and iv.

[180] *See* Proposing Release at 13850 & n.19, 13881 & n.214.

[181] *See infra* note 753 and accompanying text for a discussion of the term ''informed bystanders,'' as used in this release.

[182] *See infra* section IV.C.1.a.iii.

''informed bystanders'' have over the selling shareholders in these transactions and the associated wealth transfers may be perceived by some market participants to be unfair. Thus, to the extent that a shortened initial Schedule 13D filing deadline would reduce these wealth transfers, thereby addressing this perceived unfairness, this change could enhance trust in the securities markets and promote capital formation.[183]

We also note that some commenters questioned the appropriateness and legality of the proposed amendments in light of certain U.S. Supreme Court cases that the commenters cited for the proposition that the ''sole purpose'' of the Williams Act is to protect shareholders confronted with a cash tender offer.[184] In both cases, the Court made the cited statements in the limited context of determining causes of action or remedies that are available for purported violations of certain provisions of the Williams Act. Neither decision suggests that the provisions and protections of the Williams Act are available only when a cash tender offer is involved; in fact, the Court in *Rondeau* v. *Mosinee Paper Corp.* referred to the defendant-shareholder's belated compliance with section 13(d), notwithstanding the absence of a pending or threatened cash tender offer.[185] We also note statements in the legislative history indicating that Congress intended that the Williams Act would apply to any ''acqui[sition] of a substantial block of equity securities . . . by a cash tender offer . . . *or through open market or privately negotiated purchases.*'' [186] We do not believe, therefore, that our shortening of the initial Schedule 13D deadline must be tied to risks shareholders face in connection with cash tender offers.

Finally, some opposing commenters expressed other doubts regarding the Commission's authority to shorten the initial Schedule 13D deadline as proposed [187] and asserted that the Commission did not identify a market event or failure that would justify the proposed amendments.[188] As noted above, however, section 13(d)(1) of the Exchange Act clearly grants the Commission authority to shorten the initial Schedule 13D filing deadline.[189] In addition, the Commission has long recognized that acquisitions made after a person acquires beneficial ownership of more than five percent of a covered class but before the person files an initial Schedule 13D constitute a ''disclosure gap [that] may deprive security holders of a fair opportunity to adjust their evaluation of the securities of a company with respect to [a] potential change in control.'' [190] We believe that the current length of that disclosure gap, together with the information asymmetry [191] that it may facilitate and the advancements in technology and developments in the financial markets since Congress enacted the Williams Act, provide grounds to shorten the initial Schedule 13D filing deadline from 10 days to five business days.

2. Rule 13d–1(b), (c), and (d)

Congress enacted section 13(g) in 1977 [192] to address the absence of beneficial ownership reporting by persons who had accumulated large amounts of stock in a public issuer but were not required to file a beneficial ownership report under section 13(d).[193] Section 13(g) was intended to ''supplement the current statutory scheme by providing legislative authority for certain additional disclosure requirements that in some cases could not be imposed administratively.'' [194] Beneficial owners who currently report on Schedule 13G pursuant to section 13(g) and corresponding Rule 13d–1(d) are not subject to section 13(d) because they either made an exempt acquisition or an acquisition otherwise not covered by the statute. Section 13(d), in contrast to section 13(g), applies only to beneficial owners who make non-exempt acquisitions of more than five percent of a covered class. Section 13(g) was intended to close this gap.

In response to the enactment of section 13(g), the Commission adopted Schedule 13G to serve two purposes: (1) provide an optional short form disclosure statement for certain persons subject to section 13(d); and (2) provide a mandatory disclosure statement for persons subject to section 13(g).[195] Together with section 13(d), section 13(g) was intended to provide a ''comprehensive disclosure system of corporate ownership'' applicable to all persons who are the beneficial owners of more than five percent of a covered class.[196] Rule 13d–1(b), (c), and (d) provide the filing deadlines for the initial Schedule 13G. Which deadline a person is subject to for its initial Schedule 13G filing depends on whether the person is a QII, Exempt Investor, or Passive Investor.

A QII relying upon Rule 13d–1(b) currently is obligated under Rule 13d–1(b)(2) to file a Schedule 13G ''within 45 days after the end of the calendar year in which the person became obligated'' to report beneficial ownership, but only if such QII beneficially owns more than five percent of a covered class at the end of a calendar year.[197] If the QII

[183] *See id.*

[184] *See supra* notes 90, 96 and accompanying text (describing comment letters citing *Piper et al.* v. *Chris-Craft Industries, Inc.* 430 U.S. 1 (1977) and *Rondeau* v. *Mosinee Paper Corp.,* 422 U.S. 49 (1975)).

[185] 442 U.S. at 59 (noting, in relevant part, that the shareholder ''has now filed a proper Schedule 13D, and there has been no suggestion that he will fail to comply with the Act's requirement of reporting any material changes in the information contained therein'' notwithstanding the fact that the shareholder ''has not attempted to obtain control of respondent, either by a cash tender offer or any other device'').

[186] S. Rep. No. 90–550 to Accompany S. 510, (Aug. 29, 1967); *see also* Full Disclosure of Corporate Equity Ownership and in Corporate Takeover Bids: Hearing on S. 510 Before the Subcomm. on Securities of the S. Comm. on Banking and Currency, 90th Cong. 16 (1967) (statement of Manuel F. Cohen, Chairman, Securities and Exchange Commission) (stating that ''[t]he bill before you deals with stock acquisitions in three specific contexts'' including ''the acquisition by means of a cash tender offer'' and ''other acquisitions by any person or group'').

[187] *See supra* note 96 and accompanying text.

[188] *See supra* notes 106, 109 and accompanying text.

[189] 15 U.S.C. 78m(d)(1) (requiring a Schedule 13D to be filed ''within ten days . . . or within such shorter time as the Commission may establish by rule'').

[190] Report of the Securities and Exchange Commission on Beneficial Ownership Reporting Requirements pursuant to section 13(h) of the Securities Exchange Act of 1934 (June 27, 1980). Following a review of the effectiveness of section 13(d) conducted more than four decades ago, the Commission evaluated the then ''increasingly prevalent practice of [large blockholders] acquiring additional securities of [a covered] class during the 10-day period after the acquisition which results in the beneficial ownership of more than 5 percent and before the disclosure statement is required to be, and normally is, filed. . . .'' Securities and Exchange Commission Report on Tender Offer Laws, printed for the Use of the S. Comm. on Banking, Housing and Urban Affairs (Comm. Print 1980). The Commission provided multiple illustrative examples in which ''the existing notification system often does not provide shareholders with relevant information in a timely manner.'' *Id.*

[191] *See supra* notes 181–183 and accompanying text.

[192] Domestic and Foreign Investment Improved Disclosure Act of 1977, Public Law 95–214, sec. 203, 91. Stat. 1494.

[193] S. Rep. No. 114, at 13 (1977).

[194] S. Rep. No. 95–114, at 13 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 4098, 4111.

[195] *Filing and Disclosure Requirements Relating to Beneficial Ownership,* Release No. 34–14692 (Apr. 21, 1978) [43 FR 18484 (Apr. 28, 1978)] (''Filing and Disclosure Release'').

[196] *Id.* at 18486; *see also* S. Rep. No. 114, at 14 (1977).

[197] First adopted as Rule 13d–5 in 1977 and subsequently redesignated as Rule 13d–1(b)(1) in 1978, the predecessor to current Rule 13d–1(b)(2) established that an institution eligible to report on Schedule 13G had until 45 days after the end of the calendar year to report beneficial ownership to the extent the percentage beneficially owned exceeded 5% as of the end of the calendar year. *See* Filing and Disclosure Release at 18486 (explaining that

Continued

beneficially owns more than 10 percent of a covered class as of the last day of any month, then the initial Schedule 13G must be filed within 10 days after the end of that month. A QII relying on Rule 13d–1(b), therefore, may have beneficial ownership in excess of five percent throughout the calendar year without incurring a filing obligation unless the QII beneficially owns more than 10 percent of a covered class at the end of any month during that year.

Rule 13d–1(d),[198] as with Rule 13d–1(b), imposes an initial Schedule 13G filing deadline of 45 days after the end of the calendar year, but only for investors who have become beneficial owners without having made an acquisition recognized under section 13(d)(1). Given that these investors did not make the requisite acquisition that would have subjected them to section 13(d), the Commission has previously referred to this type of beneficial owner as an ''Exempt Investor.'' Unlike the QIIs and Passive Investors—discussed below, in the context of Rule 13d–1(c)—who file a Schedule 13G in lieu of Schedule 13D and at all times remain subject to section 13(d), Exempt Investors are subject to section 13(g) at the time their initial filing obligation arises. Exempt Investors reporting pursuant to Rule 13d–1(d) today may include persons such as founders of companies and early investors in an issuer's class of equity securities who made their acquisition before the class was registered under section 12 of the Exchange Act.[199] These beneficial owners may continue to influence or control the issuer. Accordingly, the Commission has emphasized that the disclosures required under section 13(g) are obtained in connection with the overall regulatory purposes served by section 13(d).[200]

Finally, a beneficial owner electing to report on Schedule 13G in lieu of Schedule 13D in reliance on Rule 13d–1(c) as a Passive Investor must file a Schedule 13G within 10 days after acquiring beneficial ownership of more than five percent of a covered class. A person is eligible to file as a Passive Investor only if such person is not seeking to acquire or influence control of an issuer and beneficially owns less than 20 percent of a covered class. Persons unable or unwilling to certify under Item 10 of Schedule 13G that they do not have a disqualifying purpose or effect because, for example, the possibility exists that they may seek to exercise or influence control, are ineligible to file a Schedule 13G and must instead file a Schedule 13D.

a. Proposed Amendments

The Commission proposed to amend Rule 13d–1(b) and (d) to shorten the filing deadline for the initial Schedule 13G to be filed by QIIs and Exempt Investors to five business days after the end of the month in which beneficial ownership exceeds five percent of a covered class. The Commission expected that the proposed acceleration of these deadlines would result in more timely disclosures while minimizing any potential additional burdens.[201] The Commission also believed that these investors should already have well-established compliance systems in place to monitor Schedule 13G ownership levels to determine whether filing obligations have been triggered.[202]

Given the proposal to shorten the initial reporting deadline to five business days after the end of the month, the Commission also recognized that the current provision of Rule 13d–1(b)(2) that operates to accelerate that initial filing deadline if beneficial ownership exceeds 10 percent at the end of any month would be unnecessary in light of Rule 13d–2(c)'s overlapping Schedule 13G amendment requirement.[203] Accordingly, the Commission proposed to further amend Rule 13d–1(b)(2) to delete the language that imposes an initial reporting obligation on QIIs after exceeding 10 percent of a covered class.

The Commission also proposed to amend the filing deadline in Rule 13d–1(c) to five days after the date the person becomes obligated to file an initial Schedule 13G. The Commission believed that it would be appropriate to amend the initial Schedule 13G filing deadline in Rule 13d–1(c) to match the proposed initial Schedule 13D filing deadline in Rule 13d–1(a) in order to maintain the historical consistency between the deadlines in Rule 13d–1(c) and (a) and to facilitate the overall goal of increasing transparency in beneficial ownership.[204]

In proposing these amendments, the Commission stated that the current initial Schedule 13G filing deadlines' length and manner of applicability to QIIs and Exempt Investors together could, in certain circumstances, frustrate the purposes of sections 13(d) and 13(g).[205] For example, the Commission noted investors reporting pursuant to current Rule 13d–1(b) and (d) may avoid beneficial ownership reporting by selling down their positions before the end of the calendar year, and, in the case of QIIs, selling down before the end of a month if ownership exceeds 10 percent.[206] The proposed amendments to the filing deadlines for initial Schedule 13G filings by QIIs and Exempt Investors, therefore, were intended to improve transparency and avoid any gaps in reporting.[207]

In addition, the Commission noted that when Rule 13d–1(c) was adopted in 1998, Passive Investors may not have had reasonable access to advanced technologies to make more immediate filings possible.[208] Consistent with its justification for proposing to shorten the initial Schedule 13D filing deadline under Rule 13d–1(a), the Commission asserted that Passive Investors today not only have gained valuable experience complying with these reporting provisions, but also have ready access to the necessary filing technology.[209] As such, the Commission proposed amending Rule 13d–1(c) in light of those technological advancements and

''the first proviso in new Rule 13d–1(b) has been added to make clear that the obligation to file a Schedule 13G . . . need be determined only on the last day of the calendar year'' and that ''filing [a] Schedule 13G to disclose a beneficial ownership interest of more than five but not more than ten percent will be required forty-five days after the end of the calendar year''); *see also Adoption of Beneficial Ownership Disclosure Requirements,* Release No. 34–13291 (Feb. 24, 1977) [42 FR 12342 (Mar. 3, 1977)] (describing the Commission's adoption of new Rule 13d–5 and related new Form 13D–5, which permitted brokers, dealers, banks, investment companies, investment advisers, and employee benefit plans to utilize an abbreviated disclosure notice).

[198] 17 CFR 240.13d–1(d).

[199] The Commission has explained that certain ''persons who are not required to file under Rule 13d–1(a) . . . would be required to file a Schedule 13G pursuant to the amendments herein proposed.'' Filing and Disclosure Release at 18502. Such persons may include ''persons who acquired not more than two percent of a class of securities within a twelve month period, who are exempt from Rule 13d–1(a) by Section 13(d)(6)(B).'' *Id.* The Commission also stated that ''Regulation 13D–G . . . would require any person 'otherwise' not required to report pursuant to Section 13(d), but who is a beneficial owner of more than five percent of a specified class of equity securities to report on Schedule 13G.'' *Id.*

[200] Filing and Disclosure Release at 18486 (stating that ''the enactment of section 13(g) has rendered moot the issue of whether obtaining'' disclosure from institutional investors in the ordinary course of their business and without any control intent ''under section 13(d)(5) is within the primary purpose of section 13(d)''). The Commission also emphasized ''the importance of disclosing to the public the location of rapidly accumulated blocks of stock, even though they have been acquired not with the purpose or with the effect of changing or influencing control'' as a predicate for its position. *Id.*

[201] Proposing Release at 13856.

[202] *Id.*

[203] *Id.*

[204] *Id.*

[205] *Id.* at 13855.

[206] *Id.*

[207] *Id.* at 13855–56.

[208] *Id.* at 13856.

[209] *Id.*

its proposed amendment to the analogous filing deadline in Rule 13d–1(a).

b. Comments Received

Commenters submitted a variety of views on the proposed amendments to Rule 13d–1(b), (c), and (d). Several commenters supported the proposed amendments.[210] Some of those commenters supported accelerating the initial Schedule 13G filing deadlines for many of the same reasons they supported accelerating the initial Schedule 13D filing deadline.[211] Another commenter asserted that the proposed amendments would benefit shareholders and other market participants by facilitating sound corporate governance.[212]

Several commenters supported the proposed amendments based on changes in technology and developments in the financial markets.[213] A number of commenters noted that some foreign jurisdictions require beneficial ownership reporting on a shorter deadline than currently required under Regulation 13D–G.[214] One commenter viewed the current Schedule 13G filing deadlines as outdated.[215] Other commenters asserted that the proposed amendments would not impose significant costs to beneficial owners of more than five percent of a covered class.[216] And, another commenter stated that the proposed amendments would be consistent in balancing the need for adequate disclosures with burdens placed on filers to accurately prepare required disclosures.[217]

Several commenters opposed the proposed amendments.[218] Some of those commenters disagreed with the Commission's technological advancement-based justifications for the proposed acceleration of the beneficial ownership reporting deadlines.[219] For example, one commenter asserted that the Commission has never suggested that technological ability to file is or should be the primary basis to determine the appropriate filing deadlines for Schedules 13D and 13G.[220] Another commenter stated that electronic filing of a Schedule 13G can take longer than physical mailing because of the time and effort required to obtain EDGAR filing codes as compared to simply making an overnight mailing or hand delivery of a paper filing.[221] Another commenter questioned why the existence of new filing technologies justify subjecting QIIs to Schedule 13G filing requirements so much shorter than the ones currently in place.[222]

Some opposing commenters acknowledged the technological advances identified in the Proposing Release but disagreed that they justify the proposed amendments. For example, one commenter stated that technological advances do not support significantly reducing filing deadlines as proposed because, despite advances in technology, the filing process still has numerous operational components that take time to complete.[223] Similarly, some commenters stated that notwithstanding any technological advancements, a month-end-based reporting deadline for Schedule 13G would be difficult to meet because much of the process is still manual and cannot be done reliably via any current technology, including exercising the judgment required to determine whether a person is a beneficial owner under the various provisions of Rule 13d–3.[224] Another commenter stated that, despite technological advancements, it is often difficult for QIIs to gather aggregate information quickly, confirm such information for accuracy, draft disclosure documents and receive approval for filing purposes, especially given that QIIs often beneficially own positions in many issuers and those positions change frequently.[225]

Opposing commenters also criticized some of the Commission's other justifications for, or the purported benefits of, the proposed amendments. For example, some commenters stated that the Commission has not provided evidence to support its concerns regarding reporting gaps and information asymmetries that would warrant the proposed acceleration of the reporting deadlines.[226] Others asserted that the Commission has not articulated how the proposed amendments will promote transparency into matters of corporate control and questioned the necessity of the proposed amendments in that respect.[227] Some of those

[210] *See, e.g.,* letters from AFL–CIO (supporting only the proposed amendment to Rule 13d–1(c)); AFREF (same); AFREF, et al. (same); Anonymous 3; Anonymous 5; Anonymous 11; Anonymous 12; Anthony R.; C. Robinson; John F. Phinney Jr, CEO & Founder, Convergence Inc. (June 15, 2023) (''Convergence'') (supporting only the proposed amendment to Rule 13d–1(b)); EEI; Engineer; FedEx; Freeport-McMoRan; Andrew Patrick White, Founder CEO of FundApps (Feb. 28, 2022) (''FundApps'') (same); HMA I; J. Pieper; J. Soucie; Jonah; Juan; Mark C.; Mike; Nasdaq; P. Worts; T. Mirvis, et al.; Todd.

[211] *See supra* notes 38–40, 43–44 and accompanying text.

[212] *See* letter from AFREF. For example, the commenter asserted that a shortened filing deadline would help investors ensure their asset managers are fulfilling their fiduciary duties and help inform the education and advocacy efforts of those with a stake in proxy contests, shareholder resolutions, and other important votes. *Id.*

[213] *See, e.g.,* letters from AFL–CIO; C. Robinson; FedEx; Freeport-McMoRan; T. Mirvis, et al.

[214] *See, e.g.,* letters from AFREF; Convergence; FundApps.

[215] *See* letter from T. Mirvis, et al.

[216] *See, e.g.,* letters from Anonymous 11; Freeport-McMoRan; J. Soucie.

[217] *See* letter from FedEx.

[218] *See, e.g.,* letters from A. Day; ABA; AIMA; B. Mason; Dodge & Cox; E. Fraser (opposing only the proposed amendment to Rule 13d–1(c)); IAA (opposing only the proposed amendments to Rule 13d–1(b) and (d)); ICI I; MFA (same); MSBA (supporting only the proposed amendments to Rule 13d–1(c) and (d)); Perkins Coie; Kenneth E. Bentsen, Jr, CEO and President, Securities Industry and Financial Markets Association (Apr. 11, 2022) (''SIFMA'') (opposing only the proposed amendments to Rule 13d–1(b) and (c)); Kyle Brandon, Managing Director, Head of Derivatives Policy, SIFMA (June 27, 2023) (''SIFMA & SIFMA AMG'') (same); State Street Corporation (Apr. 11, 2022) (''SSC'') (opposing only the proposed amendment to Rule 13d–1(b)); STB; TIAA (opposing only the proposed amendment to Rule 13d–1(b)); TRP.

[219] *See, e.g.,* letters from ABA; Dodge & Cox; IAA; ICI I; MSBA; STB; TIAA.

[220] *See* letter from ICI I. The commenter also stated that the Commission has not made significant technological advances over the years to its own systems that market participants rely on to prepare Schedules 13D and 13G, making it challenging and costly for investors to gather the information about beneficial ownership they need to file Schedules 13D and 13G. *Id.*

[221] *See* letter from MSBA. The commenter also noted that Passive and Exempt Investors generally do not have specialized technology that would make it practical for them to file a Schedule 13G on the proposed accelerated bases.

[222] *See* letter from TIAA. The commenter also asserted that the Proposing Release did not provide data showing that QIIs have as a standard matter adopted the type of technological improvements that would make it easier for them to prepare these filings on such a short timeline. *Id.*

[223] *See* letter from IAA (noting that ''an investment advisory firm's reporting process could involve receiving spreadsheets from multiple affiliates, consolidating those spreadsheets into one report, reviewing the consolidated report for errors and discrepancies, following up to correct issues, calculating beneficial ownership, preparing Schedule 13D or 13G'' and may also require them to obtain ''review by outside counsel . . . [and] signatures (including from group members if needed)'').

[224] *See* letters from STB; TIAA. For example, one of these commenters noted that notwithstanding any technological advancements, a month-end-based reporting deadline for Schedule 13G would be difficult to meet because analysis of Rule 13d–3 beneficial ownership depends on the most recently published outstanding share number from an issuer and, therefore, an investor cannot reliably determine whether it is a 5% beneficial owner of any particular stock as of a month-end reference date until the last day of such month and there is no consistent monthly disclosure requirement for an issuer's outstanding shares. *See* letter from STB.

[225] *See* letter from ABA.

[226] *See, e.g.,* letters from ICI I; SIFMA; TIAA. Those commenters also asserted that the Commission's unsubstantiated concerns about QIIs selling down positions before the end of a reporting period to avoid a Schedule 13G filing does not provide an appropriate basis for the proposed amendment to Rule 13d–1(b). *Id.*

[227] *See* letters from ABA; SIFMA; STB.

commenters expressed the view that the Commission's existing rules provide sufficient transparency into matters of corporate control with respect to QIIs and Passive Investors,[228] as well as Exempt Investors.[229] In addition, one commenter asserted that the Commission has not persuasively explained why it is appropriate to accelerate the beneficial ownership reporting deadlines as proposed.[230] Some commenters stated that the information filed on Schedule 13G by Passive and Exempt Investors is unlikely to be material information that is market-moving.[231] Other commenters asserted that the proposed amendments would provide little benefit to the market given that institutional investment managers' trading activity is already subject to significant scrutiny by the Commission and the public through the filing of Form 13F.[232]

Several commenters also expressed concern regarding administrative burdens associated with the proposed amendments to Rule 13d–1(b) and (d).[233] Some commenters noted that beneficial owners often file a Schedule 13G for multiple different issuers, which ''strains'' their filing resources at the end of the reporting period.[234] One commenter stated that a month-end-based reporting deadline applicable would burden the external resources (including outside counsel, filing agents, and the EDGAR system) needed to prepare and make these filings given that all QIIs and Exempt Investors would be performing the Schedule 13G filing analysis during the same five-business day period.[235] One commenter expressed concern that the proposed amendment to Rule 13d–1(b) could create practical difficulties for QIIs, including insufficient time to validate the data to be included in a consolidated filing for a large institutional investor with multiple entities.[236] And, one commenter expressed concern that institutional investors and other unregistered entities may lack the infrastructure and personnel to comply with the revised filing deadlines and described year-round monitoring of beneficial ownership reporting obligations and the filing deadlines that would be required under the proposed amendments as burdensome.[237]

Other commenters expressed similar concerns that the proposed amendment to Rule 13d–1(b) would increase QIIs' filing burdens significantly, without material benefit to investors.[238] Some of those commenters disagreed with the Commission's statement that QIIs already have systems in place to monitor their beneficial ownership levels and asserted that the proposed amendment would require significant changes to their operational systems and processes.[239] One commenter disagreed with the Commission's statement that the proposed amendments only would require QIIs to monitor the beneficial ownership levels on a monthly basis, suggesting instead that the proposed amendments would require daily monitoring.[240] Another commenter expressed concern that, as a practical matter, the proposed five-day deadline under Rule 13d–1(c) would be impossible to comply with in most cases.[241] The same commenter also stated that Exempt Investors that are not affiliated with the issuer are unlikely to become aware of their potential beneficial ownership reporting obligations in a timely manner and, therefore, may be unlikely to be able to comply with the proposed deadline under Rule 13d–1(d) given the practical challenges associated with making a Schedule 13G filing.[242]

Some commenters expressed concern that the proposed deadlines would be unduly burdensome for smaller and non-institutional beneficial owners,[243] with one commenter stating that by increasing overhead costs and expanding an already complex regulatory regime, the Commission's accelerated timeline will render it particularly difficult for smaller managers, who cannot readily bear the costs and administrative burden of monthly filings.[244] Some commenters also asserted that the proposed amendment to Rule 13d–1(b) raises significant concerns regarding harm to investment advisers and funds and would impose substantial unnecessary costs on their clients.[245] Similarly, some commenters stated that the proposed amendment to Rule 13d–1(b) and (d) would create a significant risk of prematurely disclosing sensitive portfolio holdings information to the market, which may result in front-running, copycatting, and other abusive trading practices that harm advisers and their clients, including funds and their investors.[246] And, more generally, one commenter expressed concern that the proposed amendments would create significant reporting and monitoring burdens for all Schedule 13G filers.[247]

Opposing commenters also highlighted some other potential risks associated with the proposed deadlines. For example, one commenter expressed concern that reporting within such a short time period under the proposed

[228] *See* letters from ABA; STB. For example, those commenters noted that QIIs and Passive Investors already are obligated to amend their Schedule 13G promptly upon crossing a 10% beneficial ownership threshold and are obligated to file an initial Schedule 13D if their control intent changes. *Id.*

[229] *See* letters from SIFMA; STB. For example, those commenters noted that Exempt Investors are largely investors who have held the shares since prior to the issuer's IPO and, as such, their original ownership is already materially disclosed in the IPO prospectus. *Id.* In addition, those commenters noted that to the extent an Exempt Investor's beneficial ownership either exceeds 10% or exceeds their pre-IPO beneficial ownership level, it will be required to make section 16 filings or make an initial Schedule 13D filing. *Id.*

[230] *See* letter from ICI I.

[231] *See* letters from ABA; MSBA. For example, those commenters noted that a Schedule 13G filed by a Passive Investor does not include information about potential changes in control and that Passive Investors must certify that they do not have a control intent. *Id.* Those commenters also noted that the proposed amendments to Rule 13d–5 include a ''tipper-tippee'' provision with respect to the filing of a Schedule 13D but not with respect to the filing of a Schedule 13G, *see* letter from MSBA, and stated that accelerating the filing deadline for Exempt Investors will provide no additional information to the market given that the vast majority of Exempt Investors become Exempt Investors following the effectiveness of a registration statement which contains all of the information, if not more, that would be included in a Schedule 13G. *See* letter from ABA.

[232] *See* letters from ABA; MFA.

[233] *See, e.g.,* letters from ABA; IAA; ICI I; Perkins Coie; SSC; STB; *see also* letter from MFA & NAPFM.

[234] *See* letters from IAA; ICI I.

[235] *See* letter from STB. The commenter also asserted that the proposed five-business day period after month-end is not enough time for outside counsel to gather the requisite information from their clients and prepare a Schedule 13G filing and expressed concern that investors may not be able to obtain EDGAR filing codes in time to meet the proposed deadlines, noting that the Commission recently has been taking three to five business days (and even longer during busy periods) to generally provide such codes. *Id.*

[236] *See* letter from SSC; *see also* letter from IAA.

[237] *See* letter from Perkins Coie.

[238] *See, e.g.,* letters from ABA; ICI I; SIFMA.

[239] *See* letters from ICI I; SIFMA.

[240] *See* letter from SIFMA.

[241] *See* letter from MSBA. For example, the commenter explained that obtaining EDGAR filing codes by making a Form ID filing requires the assistance of counsel and that such filing usually takes 7 days to be processed by the Commission, by which time the proposed deadline will have passed given that many Passive Investors are unaware of their Schedule 13G filing obligations until after they have crossed the 5% threshold. *Id.* The commenter also asserted that even if a Passive Investor is aware of its Schedule 13G filing obligation before it has crossed the 5% threshold, it is unlikely to take steps to prepare for such obligation before actually crossing the threshold. *Id.* In addition, the commenter noted that many Schedule 13G filings have multiple filing persons, which requires even more time in the preparation of the filing and the engagement of counsel to help prepare the filing. *Id.*

[242] *Id.*

[243] *See, e.g.,* letters from A. Day; E. Fraser; MFA.

[244] *See* letter from MFA.

[245] *See* letters from ICI I; MFA.

[246] *See* letters from IAA; ICI I.

[247] *See* letter from Perkins Coie.

amendment to Rule 13d–1(b) would increase the risk reported information would subsequently need to be revised through amendments to Schedule 13G, potentially confusing the market.[248] One commenter asserted that the proposed amendments would increase the number of unintentionally inaccurate filings.[249] One commenter expressed concern that the proposed amendments could negatively impact the ability of investors and their advisors to draft meaningful disclosures and engage in thoughtful analysis.[250] Another commenter stated that the proposed amendments could be more broadly disruptive to trading.[251]

Finally, several opposing commenters expressed concern that the proposed amendments do not reflect the differences between Schedule 13D and 13G filers (particularly QIIs) based on the legislative and administrative history of sections 13(d) and (g) of the Exchange Act.[252] And, other commenters expressed concern that the proposed amendment to Rule 13d–1(b) would be unprecedented and inappropriate, unnecessary to accomplish the Commission's regulatory objectives, and inconsistent with the intent and administrative history of the rules under sections 13(d) and 13(g).[253]

The opposing commenters also provided some recommendations regarding the proposed amendments. A number of those commenters suggested a quarter-end-based initial Schedule 13G filing deadline for QIIs and Exempt Investors rather than a month-end-based deadline. For example, some commenters recommended that QIIs be required to file their initial Schedule 13G within 45 days after the end of a calendar quarter as of which the QII beneficially owns more than five percent of a covered class to align with the filing timeframe under section 13(f) and better reflect the distinction the Commission has historically made between QIIs and other institutional investors.[254] Similarly, some commenters recommended that the Commission require that both QIIs and Exempt Investors file their initial Schedule 13G 45 days after the end of a calendar quarter, consistent with the Form 13F[255] filing deadline.[256] One commenter recommended that QIIs be required to file their initial Schedule 13G within 15 business days after the end of a calendar quarter as of which the QII beneficially owns more than five percent of a covered class.[257] Another commenter recommended that QIIs be required to file their initial Schedule 13G on a quarterly basis with at least a 30-day period before the filing deadline.[258]

Opposing commenters also made alternative suggestions regarding the proposed amendments. For example, one commenter recommended that QIIs and Exempt Investors be required to file their initial Schedule 13G within 10 days after the end of the month in which its beneficial ownership exceeds five percent as of month-end.[259] Another commenter recommended that to the extent the Commission is concerned about Schedule 13G filers acquiring additional shares after crossing the five percent threshold without public disclosure, it should prohibit trading after crossing the five percent threshold rather than accelerating the filing deadlines.[260] One commenter suggested that if the Commission seeks to apply the proposed amendments to a broad set of investors whose activities are largely unrelated to matters of corporate control, or where such matters may be implicated but are already subject to disclosure requirements under the existing disclosure regime, it should conduct further study and analysis to better understand what percentage of such investors ever are implicated in actual change in control scenarios—to determine the percentage of activist matters where earlier and more frequent disclosure of such investors' holding would have been materially beneficial to investors.[261] Another commenter recommended that rather than adopting the proposed amendments, the Commission should add a column to Form 13F requiring filers to explicitly note, for each listed class of securities, whether the filer has acquired over five percent beneficial ownership during the reporting period.[262] And, one commenter recommended that the Commission consider extending the filing deadline for Passive Investors (*e.g.,* to 15 or 30 days) rather than accelerating it.[263]

In addition, some supporting commenters recommended that the Commission consider further shortening the initial Schedule 13G filing deadlines.[264] Those commenters, however, did not specify alternative deadlines that the Commission should adopt.[265]

Finally, some commenters that neither clearly supported nor opposed the proposed amendments made recommendations to the Commission. One commenter expressed the view that there should not be filing differences between institutional investors and Passive Investors and suggested that certain institutional investors should have more stringent filing requirements than Passive Investors.[266] Several other commenters recommended that the Commission require Passive Investors to file an initial Schedule 13G in five business days rather than five calendar days.[267]

[248] *See* letter from ICI I.

[249] *See* letter from ABA.

[250] *See* letter from STB; *see also supra* note 102.

[251] *See* letter from TRP. Specifically, the commenter posited that there would be additional trading and volatility in certain issuers just after the reporting deadline each month, as institutional investors begin the process of accumulating or reducing positions, followed by reduced liquidity leading up to the reporting deadline, as they concluded that trading. *Id.*

[252] *See* letters from ABA; ICI I.

[253] *See id.*

[254] *See* letters from Dodge & Cox; ICI I; SIFMA.

[255] *See infra* note 280 for a discussion of Form 13F and its filing deadlines.

[256] *See* letters from IAA; MFA; *see also* IAC Recommendations (recommending that the Commission shorten the initial filing deadlines for QIIs and Exempt Investors to 45 days after the end of a calendar quarter). One of the commenters stated that a quarterly deadline would increase transparency for market participants as compared with the current annual deadline and noted that institutional investment managers are already reviewing and assessing their holdings on a quarterly basis in order to prepare Form 13F filings and are more equipped to submit accurate Schedule 13G filings with the same frequency. *See* letter from IAA. The commenter also asserted that aligning the deadlines for initial Schedule 13G filings with Form 13F filings would strike the right balance between the Commission's concerns about information asymmetry in the marketplace, and advisers' concerns about operational strains and competitive disadvantages that would come with publicly exposing their positions more frequently. *Id.*

[257] *See* letter from SSC.

[258] *See* letter from TRP.

[259] *See* letter from ABA.

[260] *See* letter from MSBA.

[261] *See* letter from STB. The commenter also suggested that if the Commission's goal is market transparency more generally, and not a targeted concern related to matters of corporate control, the Commission should consider whether more appropriate tools exist to disclose 5% beneficial ownership or material changes to such positions in a more concise and efficient manner, using Form 13F as an example. *Id.*

[262] *See* letter from MFA.

[263] *See* letter from E. Fraser. The commenter also recommended that the Commission consider a provision for when a shareholder's position goes over the 5% threshold because of ordinary corporate actions that result in the number of outstanding shares to drop such that the shareholder unwittingly has a holding over the 5% of outstanding shares and suggested recommended that the Commission consider increase the threshold from greater than 5% beneficial ownership to 10%. *Id.*

[264] *See* letters from AFREF; Freeport-McMoRan; HMA I.

[265] *Id.*

[266] *See* letter from J. Dunlop.

[267] *See* letters from ABA; Dodge & Cox; IAA; ICI I. Some of these commenters suggested that a five-business day deadline would be more appropriate in light of the steps required to prepare and file an accurate Schedule 13G. *See* letters from Dodge & Cox, IAA; ICI I; *see also supra* note 130.

c. Final Amendments

We are amending Rule 13d–1(b) and (d) to shorten the initial Schedule 13G filing deadlines under those rules, with some modifications from the proposals in response to commenter concerns. Specifically, we are adopting an initial Schedule 13G filing deadline of 45 days [268] after calendar quarter-end for QIIs and Exempt Investors. In addition, consistent with our amendment to the initial Schedule 13D deadline, we are amending Rule 13d–1(c) to require that Passive Investors file their initial Schedule 13G within five business days after the date on which the Passive Investor acquired beneficial ownership of more than five percent of a covered class.

As noted above, Rule 13d–1(b) and (d) currently require QIIs and Exempt Investors, respectively, to file an initial Schedule 13G within 45 days after calendar year-end if, as of the end of that year, they beneficially own more than five percent of a covered class. We are amending Rule 13d–1(b) and (d) to require that QIIs and Exempt Investors file their initial Schedule 13G within 45 days after calendar quarter-end if, as of the end of that quarter, their beneficial ownership exceeds five percent of a covered class (rather than five business days after the end of the month in which beneficial ownership exceeds five percent, as proposed). Further, because we are adopting the new 45 days after quarter-end deadline rather than the proposed five business days after month-end deadline, we are not adopting the proposed amendment to delete the language in Rule 13d–1(b)(2) that imposes an accelerated initial reporting obligation.[269] Instead, we are amending that rule to require that such an initial Schedule 13G be filed within five business days (instead of the current requirement of 10 days) after the end of the first month in which the QII's beneficial ownership exceeds 10 percent of a covered class, computed as of the last day of the month.

The Commission adopted the current initial Schedule 13G filing deadlines of 45 days after year-end in Rule 13d–1(b) and (d) in the late 1970s.[270] In light of the technological advancements and developments in the financial markets in the more than 40 intervening years,[271] we believe it is appropriate to shorten those deadlines to ensure beneficial ownership information disclosed in an initial Schedule 13G is reported in a manner that is considered timely by modern standards. We also expect that shortening those deadlines from year-end to quarter-end will reduce the risk that QIIs and Exempt Investors sell down their positions before the end of the year and avoid reporting altogether,[272] which should help to ensure large accumulations of beneficial ownership are reported in a timely manner, ultimately improving market transparency.[273]

In the Proposing Release, the Commission stated its expectation that the proposed initial Schedule 13G deadlines under Rule 13d–1(b) and (d) (*i.e.,* five business days after the end of the month in which beneficial ownership exceeds five percent of a covered class) would result in minimal additional burdens on filers because QIIs and Exempt Investors ''already have well-established compliance systems in place to monitor Schedule 13G ownership levels to determine whether filing obligations have been triggered.'' [274] Although some commenters agreed with this expectation,[275] several comments disagreed and asserted that the proposed deadlines would be unduly burdensome for QIIs and Exempt Investors (especially those that are smaller and non-institutional investors) given the number of tasks and amount of resources required to prepare a filing in such a limited amount of time [276] and that such burdens are not sufficiently mitigated by any technological advancements to justify adopting the proposed deadlines.[277]

Based on commenters' observations regarding the potentially significant burdens that the proposed deadlines would impose on QIIs and Exempt Investors, we have decided to take a different approach from the proposal and instead amend Rule 13d–1(b) and (d) to require an initial Schedule 13G be filed within 45 days after calendar quarter-end. This change to a quarter-end-based deadline, rather than the proposed month-end-based deadline, is consistent with the recommendations that a number of commenters made to the Commission.[278] We note that those commenters recommended various different numbers of days after quarter-end for the deadline.[279] Taking into

[268] If the deadline falls on a Federal holiday, a Saturday, or a Sunday, then the filing may be made on the next business day thereafter. 17 CFR 240.0–3 (''[I]f the last day on which [a filing] can be accepted as timely filed falls on a Saturday, Sunday or holiday, such [filing] may be [made] on the first business day following.'').

[269] *See* Proposing Release at 13856 (''Given the proposal to shorten the initial reporting deadline [in Rule 13d–1(b)] to five business days after the end of the month, the current provision of Rule 13d–1(b)(2) that operates to accelerate that initial filing deadline if beneficial ownership exceeds 10% at the end of any month would be unnecessary . . . .'').

[270] *See supra* notes 197, 199 and accompanying text.

[271] *See supra* notes 138–144 and accompanying text for some examples of those advancements and developments.

[272] *See, e.g.,* Kristin Giglia, Note, *A Little Letter, a Big Difference: An Empirical Inquiry into Possible Misuse of Schedule 13G/13D Filings,* 116 Colum. L. Rev. 105, 115–16 (2015) (explaining that the availability of Schedule 13G may allow investors to ''intentionally structure their acquisition strategies to exploit the gaps created by the current reporting regime, to their own short-term benefit and to the overall detriment of market transparency and investor confidence'' (internal quotations omitted)). QIIs in particular may be able to amass sizeable amounts of beneficial ownership without reporting such positions. Rule 13d–1(b)(2) provides in relevant part that ''it shall not be necessary to file a Schedule 13G unless the percentage of [a covered class] beneficially owned as of the end of the calendar year is more than five percent.'' 17 CFR 240.13d–1(b)(2). As such, a QII may beneficially own in excess of 5% of a covered class for the entire year, sell down its position to 5% or below on the last day of the calendar year and bypass having to report at all under the current regulatory framework assuming that its beneficial ownership continues to be held in the ordinary course of business, without a disqualifying purpose or effect, and does not exceed 10% of a covered class.

[273] We note that some commenters asserted that the Commission did not substantiate its concerns regarding reporting gaps and QIIs selling down positions before the end of a reporting period to avoid a Schedule 13G filing. *See supra* note 226 and accompanying text. Given the potential materiality of the information disclosed on Schedule 13G and its importance to the market, however, we believe it is appropriate to take action to reduce the risk of such reporting gaps, even absent evidence indicating that the practice of selling down positions to avoid a Schedule 13G filing currently is widespread. *See* Proposing Release at 13882, n.221 (noting the importance to the market of information regarding beneficial ownership, regardless of whether it is disclosed on Schedule 13D or 13G, based on evidence that the initial filing of Schedule 13G, like that of Schedule 13D, generates a positive stock price reaction, albeit smaller in magnitude). We also recognize that because the new filing deadline will be tied to a QII's beneficial ownership as of calendar quarter-end, QIIs may still be able to avoid a reporting obligation if they sell down their positions before the end of a quarter. We believe, however, that risk is lower under a quarter-end-based deadline than a year-end-based deadline because of the increased transaction costs, as well as disruptions with respect to a long-term investment strategy, that would be associated with selling down and building up positions multiple times throughout a year.

[274] Proposing Release at 13856 (noting that ''QIIs currently need to monitor beneficial ownership levels at least on a monthly basis in case their holdings exceed more than 10% at the end of the month'' and that ''Exempt Investors already need to monitor the level of their beneficial ownership continuously or periodically to ensure that the amount of their beneficial ownership does not unintentionally exceed 2% in a 12-month period'').

[275] *See supra* note 216 and accompanying text (describing and citing comment letters that asserted that the proposed amendments would not impose significant burdens on Schedule 13G filers).

[276] *See supra* notes 233–247 and accompanying text.

[277] *See supra* notes 219–225 and accompanying text.

[278] *See supra* notes 254–258 and accompanying text.

[279] *See* letters from Dodge & Cox (recommending a filing deadline of 45 days after quarter-end); IAA

account those various recommendations, believe that 45 days is the appropriate length of time because it aligns with the filing deadline for Form 13F,[280] and many institutional investment managers who file a Schedule 13G are already reviewing and assessing their holdings on a quarterly basis in order to prepare Form 13F filings.[281] In addition, although most of the other amended Schedule 13D and 13G filing deadlines will be expressed in ''business days,'' we believe the potential compliance benefits of aligning the initial Schedule 13G filing deadlines for QIIs and Exempt Investors with the Form 13F filing deadline justify using calendar days rather than business days.[282]

Even for those QIIs and Exempt Investors that are not Form 13F filers, the 45-day period after calendar quarter-end deadline will be familiar given that they currently must file their initial Schedule 13G within 45 days after calendar year-end.[283] As such, we believe that many of those beneficial owners are well-positioned to submit their Schedule 13G filings within 45 days after calendar quarter-end. This deadline, therefore, is likely to be less burdensome and should require fewer changes to QIIs' and Exempt Investors' existing compliance operations than the proposed month-end-based deadline. We also expect that the extended filing deadline (*i.e.,* 45 days rather than the proposed five business days) will address some commenters' concerns that the more compressed time period under the proposed deadlines could have negatively impacted the accuracy and usefulness of initial Schedule 13G filings.[284]

Further, a 45-day, quarter-end-based deadline (instead of the proposed five-business day, month-end-based deadline) should help mitigate concerns that some opposing commenters expressed regarding the risk of QIIs and Exempt Investors prematurely disclosing sensitive portfolio holdings information to the market (*i.e.,* ''front-running'' and ''free-riding''),[285] especially given that many of those Schedule 13G filers already are obligated to disclose their holdings via Form 13F on a quarterly basis. We also believe that, as compared with the current year-end-based deadline, a quarter-end-based deadline will increase transparency for market participants and better reflects the technological advancements and developments in the financial markets since the Commission adopted Rule 13d–1(b) and (d).[286] Thus, we believe that this deadline will address the goals that prompted the Commission's reassessment of those rules in the Proposing Release while, at the same time, avoiding inordinately burdening Schedule 13G filers.

In addition, as discussed above, Rule 13d–1(c) currently requires Passive Investors to file an initial Schedule 13G within 10 days of acquiring beneficial ownership of more than five percent of a covered class. As with our final amendment to Rule 13d–1(a), we are amending Rule 13d–1(c) to require that Passive Investors file their initial Schedule 13G within five business days after[287] acquiring beneficial ownership of more than five percent of a covered class. We believe it is appropriate to amend the initial Schedule 13G filing deadline in Rule 13d–1(c) to match the initial Schedule 13D filing deadline in Rule 13d–1(a) in order to maintain the historical regulatory consistency between the deadlines in Rule 13d–1(c) and (a) and to facilitate the overall goals of increasing transparency in beneficial ownership and ensuring that investors receive material information in a timely manner.

Consistent with our rationale for shortening the initial Schedule 13D deadline, we believe that many Passive Investors are large and sophisticated enough to prepare and file an initial Schedule 13G within five business days.[288] The change to a five-business day deadline from the proposed five-calendar day deadline should mitigate commenters' concerns regarding the burdens that a shortened deadline would impose on Passive Investors and the workability of that deadline.[289] Further, we note that research indicates that at least some beneficial owners may improperly rely on Rule 13d–1(c) to file a Schedule 13G in lieu of a Schedule 13D to obscure their control purpose.[290] Given this increased likelihood, as compared to QIIs and Exempt Investors,[291] of Passive Investors ultimately having a control purpose with respect to an issuer, we believe it is appropriate to shorten their initial Schedule 13G filing deadline to five business days in order for that deadline to continue to mirror the initial Schedule 13D filing deadline. This is consistent with the Commission's decision to require Passive Investors to file their initial Schedule 13G in 10 days, the same deadline as Schedule 13D, when it adopted Rule 13d–1(c).[292]

(same); ICI I (same); MFA (same); SIFMA (same); TRP (recommending a filing deadline of at least 30 days after quarter-end); SSC (recommending a filing deadline of 15 business days after quarter-end).

[280] Form 13F is the reporting form filed by institutional investment managers pursuant to section 13(f) of the Exchange Act. Under section 13(f)(1), institutional investment managers that use the U.S. mail (or other means or instrumentality of interstate commerce) in the course of their business and that exercise investment discretion over $100 million or more in section 13(f) securities must file Form 13F. Such institutional investment managers must submit four Form 13F filings, with the first filing due within 45 days after the end of the fourth quarter of the calendar year (*i.e.,* the quarter ending Dec. 31 of the same calendar year that the $100 million filing threshold is reached) and the three additional filings due 45 days after the end of the subsequent three calendar quarters (*i.e.,* the calendar quarters that end on Mar. 31, June 30, and Sept. 30). *See* 17 CFR 240.13f–1(a)(1); *see also* U.S. Securities & Exchange Commission, Division of Investment Management, Frequently Asked Questions About Form 13F, *available at https://www.sec.gov/divisions/investment/13ffaq.*

[281] *See infra* section IV.B.3.b, Table 4 (presenting statistics regarding the number of Schedule 13G filers that also filed Form 13F in 2022, noting that 84% of QIIs and 10% of Exempt Investors also filed Form 13F).

[282] *See* letter from IAA (recommending that the Commission express deadlines consistently in either calendar days or business days across all of the Schedule 13D and 13G initial and amendment filing deadlines, where the deadlines are less than 45 days to promote compliance by making it simpler and less confusing to keep track of the various deadlines).

[283] In addition, the amended deadline may result in the same amount of time to file as under the current rules, depending on the quarter in which the filing obligation is triggered. That is, if a QII or Exempt Investor becomes the beneficial owner of more than 5% of a covered class on or after Oct. 1 (the beginning of the fourth calendar quarter) and remains above the 5% threshold as of Dec. 31 (both calendar year-end and the end of the fourth calendar quarter), then they would have the same amount of time to prepare and submit their initial Schedule 13G filing under both the current and amended Rule 13d–1(b) and (d).

[284] *See supra* notes 248–250 and accompanying text.

[285] *See supra* note 246 and accompanying text; *see also infra* section IV.C.2.b.

[286] *See, e.g.,* letter from IAA (''A quarterly deadline significantly increases transparency for market participants as compared with the current annual deadline.'').

[287] See *supra* note 136 for a discussion of a revision we are making to Rule 13d–1(c) to clarify that the five-business day deadline is determined beginning on the day *after* the date on which a person acquires beneficial ownership of more than 5% of a covered class.

[288] See, for example, *infra* section IV.B.3.b, Table 4, which indicates that 31% of Passive Investors that filed a Schedule 13G in 2022 also filed a Form 13F (which would only be required if, among other things, they exercise investment discretion over $100 million or more in section 13(f) securities).

[289] *See supra* note 241 and accompanying text.

[290] *See* Kristin Giglia, Note, *A Little Letter, a Big Difference: An Empirical Inquiry into Possible Misuse of Schedule 13G/13D Filings,* 116 Colum. L. Rev. 105, 119 (2015) (''Activists can fly under the radar, planning to effect large changes to the issuer and even acquiring up to twenty percent ownership interest at a relatively low price, all while maintaining that their intent is still 'passive.' '').

[291] *Id.* at n.160 (noting that QIIs and Exempt Investors are less likely than Passive Investors ''to switch to a [Schedule] 13D filing'').

[292] *Amendments to Beneficial Ownership Reporting Requirements,* Release No. 34–39538 (Jan. 12, 1998) [63 FR 2854, 2854 (Jan. 16, 1998)] (stating that ''the Commission is imposing some safeguards''

Continued

3. Rule 13d–2(a) and (b)

Section 13(d)(2) requires that an amendment must be filed to the statement required under section 13(d)(1) if any material change occurs in the facts set forth in the statement filed. Section 13(d)(2) does not, however, identify a specific deadline by which such amendment must be filed. Instead, Rule 13d–2(a) provides that such amendment must be filed with the Commission ''promptly.'' [293] The obligation to file an amendment under current Rule 13d–2(a) is not limited to acquisitions. Instead, changes in the disclosure narrative that are material also must be reported in an amendment, as must material changes in the level of beneficial ownership caused by an involuntary change in circumstances, such as a reduction in the amount of beneficial ownership caused solely by an increase in the number of shares outstanding.[294]

Section 13(g)(2) requires that an amendment be filed to the statement required under section 13(g)(1) if any material change occurs in the facts set forth in the statement filed, but like section 13(d)(2), does not identify a deadline by which such amendment must be filed. Rule 13d–2(b), however, does specify a deadline and provides that for all persons who report beneficial ownership on Schedule 13G, an amendment shall be filed ''within forty-five days after the end of each calendar year if, as of the end of the calendar year, there are any changes in the information reported in the previous filing on that Schedule [13G].'' [295]

a. Proposed Amendments

In the Proposing Release, the Commission proposed to amend Rule 13d–2(a) to require that all amendments to Schedule 13D be filed within one business day after the date of the material change that triggers the amendment obligation. The Commission proposed this change from the ''promptly'' standard to establish a specified filing deadline, remove any uncertainty as to the date on which an amendment is due, and help ensure that beneficial owners amend their filings in a more uniform and consistent manner.[296] The Commission stated that it did not believe that requiring Schedule 13D amendments to be filed within one business day after the date on which a material change occurs would place those filers at a disadvantage.[297] The Commission also stated that because an amendment to a Schedule 13D only requires that the material change be reported and not a complete set of new narrative responses to each of the disclosure form's individual line items,[298] it expected that those amendments should present a lower administrative burden than the initial Schedule 13D filing.[299] In addition, the Commission noted that that the proposed amendment would be consistent with its existing view that, under the current ''promptly'' standard in Rule 13d–2(a), ''[a]ny delay beyond the date the filing reasonably can be filed may not be prompt'' and that an amendment to a Schedule 13D reasonably could be filed in as little as one day following the material change.[300]

The Commission also proposed to amend Rule 13d–2(b) to require that a Schedule 13G be amended within five business days of the end of the month in which a material change occurs in the information previously reported. The Commission stated that accelerating the deadline for amendments from the current standard of 45 days after the end of the calendar year would help ensure that the information reported would be timely and useful.[301] The Commission also noted that this proposed deadline would be consistent with the proposed five-business day deadline from the end of the month applicable to QIIs' and Exempt Investors' initial Schedule 13G filing obligations arising under Rule 13d–1(b) and (d).[302] In addition, the Commission proposed a ''business day'' standard for the proposed deadline to partially mitigate the time pressures resulting from the reduction of the current 45-day deadline.[303]

The Commission further proposed to amend Rule 13d–2(b) to substitute the term ''material'' in place of the term ''any'' to serve as the standard for determining the type of change that will trigger an amendment obligation under Rule 13d–2(b). The Commission noted that, unlike sections 13(d)(2) and 13(g)(2), Rule 13d–2(b) does not include an express materiality qualifier for Schedule 13G amendments and simply requires an amendment for ''any change.'' [304] At the time Rule 13d–2(b) was adopted, however, the Commission stated that there is a materiality standard inherent in the provisions governing Schedule 13G filings.[305] This inherent materiality standard is based on the fact that any disclosure provided by a Schedule 13G filer, in light of the infrequency of the reports and comparatively minimal statements required to be made, is effectively material.[306] The Commission's proposed change, therefore, was intended to merely codify this view in the text of Rule 13d–2(b).

b. Comments Received

The Commission received a variety of comments on the proposed amendments to Rule 13d–2(a) and (b). Several commenters supported the proposed amendments.[307] Some of those commenters supported revising the Schedule 13D and 13G amendment deadlines for many of the same reasons they supported accelerating the initial Schedule 13D and 13G filing deadlines.[308]

In addition, several commenters supported the proposed amendments to Rule 13d–2(a) and (b) based on changes in technology and developments in the

on Passive Investors, including that an ''[i]nitial Schedule 13G must be filed within 10 days (instead of year end)'' because ''a control purpose reflects the state of mind of a filing person and there are incentives to disclose less information''). The Commission also indicated that, as compared to QIIs and Exempt Investors, Passive Investors are more likely to represent ''voting blocks that have the potential of affecting or influencing control of the issuer'' which, therefore, warrants more timely notice to the market of their existence. *Id.* at 2855.

[293] 17 CFR 240.13d–2(a).

[294] *See id.* (requiring an amendment ''[i]f any material change occurs in the facts set forth in the Schedule 13D'' including ''any material increase or decrease in the percentage of the class beneficially owned'').

[295] 17 CFR 240.13d–2(b).

[296] Proposing Release at 13857.

[297] *Id.*

[298] Under Rule 13d–2(a), the Schedule 13D filer only has an obligation to ''file or cause to be filed with the Commission an amendment disclosing that [material] change.'' See also 17 CFR 240.12b–15, titled ''Amendments,'' which explains that ''[a]mendments filed pursuant to this section must set forth the complete text of each item as amended.''

[299] Proposing Release at 13857.

[300] *Id.* at n.67 (quoting *In re Cooper Laboratories,* Release No. 34–22171 (June 26, 1985)).

[301] *Id.* at 13857.

[302] *Id.*

[303] *Id.*

[304] *Id.* at 13857–58.

[305] *Id.* at 13858.

[306] *Id.* (citing Filing and Disclosure Release at 18489 (stating the Commission's belief that because ''the information required by Schedule 13G has been reduced to the minimum necessary to satisfy the statutory purpose, . . . a materiality standard is inherent in those requirements'' and ''it is unnecessary to further minimize it by the insertion of an express materiality standard'')).

[307] *See, e.g.,* letters from AFREF (supporting only the proposed amendment to Rule 13d–2(a)); Anonymous 3; Anonymous 5; Anonymous 11; Anonymous 12; Anthony R.; BRT (same); C. Robinson; Engineer; FedEx; Freeport-McMoRan; HMA I; Jonah; J. Pieper; J. Soucie; Juan; Mark C.; Mike; Nasdaq; P. Worts; SIFMA AMG (same); TIAA (same); T. Mirvis, et al. (same); Todd. In addition, one commenter, which neither clearly supported nor opposed the proposed amendment to Rule 13d–2(b), supported the proposed shift from an ''any change'' to a ''material change'' standard. *See* letter from IAA.

[308] *See supra* notes 38–41, 43–44 and accompanying text; *see also supra* note 211 and accompanying text.

financial markets.[309] One commenter agreed with the concern in the Proposing Release that material information about potential change of control transactions is not being disseminated to the public in a manner that would be considered timely in today's financial markets.[310] Other commenters asserted that the proposed amendments would not impose significant costs or burdens on beneficial owners of more than five percent of a covered class [311] and that the proposed amendments would be consistent in balancing the need for adequate disclosures to investors with burdens placed on filers to accurately prepare required disclosures.[312]

A number of commenters opposed the proposed amendments to Rule 13d–2(a) and (b).[313] Several commenters disagreed with the Commission's technological advancement-based justifications for the proposed acceleration of the beneficial ownership reporting deadlines,[314] some of whom raised many of the same concerns that they expressed with respect to the proposed acceleration of the initial Schedule 13D and 13G filing deadlines.[315] One commenter stated that filing a Schedule 13D amendment is not just a question of technology, but often a question of marshalling complex and evolving facts and making difficult disclosure judgments.[316]

Some commenters focused solely on the proposed amendment to Rule 13d–2(a), expressing concern that a one-business day deadline would be unduly burdensome and may not be enough time to prepare a Schedule 13D amendment in all circumstances.[317] For example, one commenter stated that in its experience, it generally takes two to three business days, and in some cases longer, to compile and file such amendments.[318] One commenter noted that if the Commission adopts the proposed structured data requirements,[319] this will add more time to the process of preparing a Schedule 13D amendment and may make the proposed one-business day deadline impractical.[320] Another commenter asserted that the proposed extension of the filing ''cut-off'' time to 10 p.m.[321] would not be sufficient to offset the burden associated with meeting the proposed one-business day deadline for a Schedule 13D amendment.[322]

Further, several commenters expressed concerns regarding the effect of the proposed amendment to Rule 13d–2(a) on the accuracy of Schedule 13D amendments.[323] For example, one of those commenters asserted that the proposed amendment would make filing accurate amendments nearly impossible.[324] Some commenters expressed concern that by providing Schedule 13D filers with insufficient time to prepare and file amendments, the proposed amendment would increase the likelihood of errors and risk of liability.[325] Another commenter noted that the proposed amendment to Rule 13d–2(a) could decrease transparency by increasing the risk of errors in Schedule 13D amendments.[326]

Commenters also expressed concerns about other potential downsides associated with the proposed amendment to Rule 13d–2(a). For example, some commenters expressed concern that the proposed amendment could negatively impact the ability of investors and their advisors to draft meaningful disclosures and engage in thoughtful analysis.[327] Some commenters noted that the proposed amendment to Rule 13d–2(a) may not leave adequate time to prepare the filing in the event of unforeseen circumstances, including the possibility that a necessary approver or signer may not be available.[328] And, one commenter stated that there have been very few, if any, abuses associated with the current ''promptly'' regime and asserted that it has worked well and effectively.[329]

In addition, some commenters questioned the basis for the proposed amendment to Rule 13d–2(a). For example, some commenters noted that a one-business day deadline for Schedule 13D amendments would be more restrictive than the filing deadline for a Form 8–K.[330] Similarly, some commenters noted that Form 8–K and section 16 filings do not have as restrictive filing deadlines as proposed under Rule 13d–2(a).[331] One commenter asserted that the ''promptly'' standard under Rule 13d–2(a) has ''generally been understood'' to mean within two

[309] *See, e.g.,* letters from BRT; C. Robinson; FedEx; Freeport-McMoRan; Nasdaq; T. Mirvis, et al.

[310] *See* letter from BRT.

[311] *See, e.g.,* letters from Anonymous 11; BRT; J. Soucie.

[312] *See* letter from FedEx.

[313] *See, e.g.,* letters from A. Day; ABA (opposing only the proposed amendment to Rule 13d–2(a)); AIMA; B. Mason; Dodge & Cox; EEI (same); EIM I (same); Hoak and Co. (Apr. 11, 2022) (''Hoak'') (same); ICI I; MFA; MSBA (same); NVCA (same); Perkins Coie; SIFMA (opposing only the proposed amendment to Rule 13d–2(b)); SIFMA & SIFMA AMG (same); SSC (same); STB; TRP (same).

[314] *See, e.g.,* letters from ABA; Dodge & Cox; IAA; ICI I; TIAA.

[315] *See supra* notes 92–94, 220–224 and accompanying text.

[316] *See* letter from ABA. The commenter also noted that filing a Schedule 13D amendment depends on many factors, including the complexity of the information, the pace of developments of the information, and the number of persons or parties who have an interest in the disclosure and need to review the information, contribute to its drafting, and, if they are signing the Schedule 13D, are subject to liability for the accuracy of the information. *Id.*

[317] *See, e.g.,* letters from ABA; AIMA; EIM I; Hoak; ICI I; MFA; MSBA; Perkins Coie; STB; *see also* letter from MFA & NAPFM.

[318] *See* letter from STB. The commenter also noted that while the one-business day deadline may be feasible for an investor engaged in a change of control objective, as that investor may have (1) been taking preparatory steps toward such goal, (2) an internal deal team and external advisors actively engaged in the project, and (3) built the Schedule 13D amendment obligation into its workstream, there are many situations requiring a Schedule 13D amendment in which such advance notice and planning is not possible or practical. *Id.* The commenter further asserted that practical concerns regarding the ability to file an amendment pursuant to Rule 13d–2(a) in a timely manner may cause some Schedule 13D filers to avoid filing amendments for changes in their Schedule 13D disclosures, preferring to take more risk that their determination on materiality is later questioned than risk having a ''late'' filing with the Commission. *Id.*

[319] See *infra* section II.F for a discussion of the proposed structured data requirement for Schedules 13D and 13G.

[320] *See* letter from ABA.

[321] *See infra* section II.A.5 for a discussion of the proposed extension of the filing ''cut-off'' time for Schedules 13D and 13G.

[322] *See* letter from Hoak.

[323] *See, e.g.,* letters from ABA; EEI; Hoak; MFA; NVCA.

[324] *See* letter from NVCA.

[325] *See, e.g.,* letters from EIM I; Hoak; MFA.

[326] *See* letter from Hoak.

[327] *See* letters from ABA; STB; *see also supra* note 102.

[328] *See* letters from EEI; Hoak.

[329] *See* letter from AIMA.

[330] *See* letters from EIM I; MFA. Those commenters also stated that the Commission has not justified imposing such a restrictive deadline on Schedule 13D amendments, especially given the relatively importance of a Form 8–K. *Id.* One of those commenters noted that Schedule 13D amendments often disclose agreements between the beneficial owner and the issuer, and issuers typically have four business days to publicly disclose such agreements on Forms 8–K after entering into them and often prefer to be the first to disclose in order to control the initial message to the market, and the proposed deadline would deprive issuers of this opportunity. *See* letter from MFA. The commenter also asserted that the proposed Schedule 13D amendment deadline would make it more difficult for issuers and Schedule 13D filers to coordinate their messages regarding material agreements they have entered into and may force investors to publicly disclose an agreement in principle through a Schedule 13D amendment before the terms are finalized, creating the risk of prematurely disseminating information to the market that turns out to be inaccurate or incomplete. *Id.*

[331] *See* letters from MFA; STB. Those commenters also asserted that the Form 8–K and section 16 filing deadlines acknowledge the balance between the importance of getting disclosures to investors in a timely manner, with the complexity and labor required in order to create such filings in a complete and thoughtful manner, noting that section 16 filings require even less narrative disclosure than a Schedule 13D amendment. *Id.*

business days and disagreed with the Proposing Release that Commission precedent supports a one-business day interpretation of that standard.[332]

Further, one commenter stated that the proposed amendment to Rule 13d–2(a) would ''unnecessarily sacrifice'' the flexibility that the current version of the rule provides.[333] Other commenters noted that the promptness of a Schedule 13D amendment filing obligation under Rule 13d–2(a) currently is determined by considering the facts and circumstances related to such filing and urged the Commission to continue to consider the variation in circumstances that can lead to an amendment obligation rather than applying the same standard in all circumstances.[334] One commenter asserted that the proposed amendment to Rule 13d–2(a) could lead to a large increase in the number of late Schedule 13D amendment filings.[335]

In addition, some commenters expressed concern about the costs of the proposed amendment to Rule 13d–2(a) relative to its benefits. For example, one commenter stated that the proposed amendment to Rule 13d–2(a) does not appropriately balance the need for prompt disclosure of important, market-moving events with the need to avoid imposing an undue, impracticable burden on investors making more routine filings.[336] Another commenter asserted that the burdens and risks of the proposed amendment to Rule 13d–2(a) associated with venture capital funds that make Schedule 13D filings exceed its benefits.[337]

Several commenters[338] opposed the proposed amendment to Rule 13d–2(b) for many of the same reasons that they opposed the proposed acceleration of the initial Schedule 13G filing deadlines for QIIs and Exempt Investors.[339] In addition, one commenter broadly asserted that the costs of the proposed amendment to Rule 13d–2(b) ''far outweigh any perceived benefits.''[340] Another commenter noted that many Schedule 13G filers have filing obligations with respect to multiple issuers and that the proposed amendment may require ''hundreds of filings on a monthly basis, as their investments fluctuate perpetually.''[341] And, other commenters expressed the same concerns about the proposed amendments to Rule 13d–2(a) and (b) that they expressed with respect to the proposed acceleration of the initial Schedule 13D and 13G filing deadlines.[342]

Finally, some commenters made recommendations to the Commission regarding the proposed amendments to Rule 13d–2(a) and (b). For example, some commenters that generally supported the proposed amendments recommended that the Commission consider further shortening the filing deadlines.[343] Further, specifically with respect to the proposed amendment to Rule 13d–2(a), one supporting commenter recommended that the Commission include an assets under management-based threshold for the proposed accelerated Schedule 13D filing deadlines.[344] Another commenter that generally supported revising the Schedule 13D amendment deadline recommended that the Commission require that Schedule 13D amendments be filed within three business days.[345]

Conversely, several opposing commenters recommended that the Commission retain the requirement that Schedule 13D amendments be filed promptly, but require that they be filed within no more than a specified number of days after the relevant triggering event (with recommendations varying between two and four business days).[346] One opposing commenter suggested that the Commission require that Schedule 13D amendments be filed within five business days.[347] Other commenters, which either generally opposed or neither clearly supported nor opposed the proposed amendment to Rule 13d–2(a), recommended that the Commission require that Schedule 13D amendments be filed within two business days.[348]

In addition to focusing on the Schedule 13D filing deadline, some opposing commenters made other recommendations with respect to the proposed amendment to Rule 13d–2(a). For example, one opposing commenter asserted that a Schedule 13D amendment should not be required for involuntary changes in circumstances caused by the issuer because such amendments do not relate to the Schedule 13D filer's action or intent and are already disclosed to the market by the issuer.[349] Another opposing commenter recommended that if the Commission believes that a one-business day interpretation of ''promptly'' is not being properly observed, it should clarify that in situations involving acquisition of corporate control, ''promptly'' means one business day.[350] One commenter,

[332] *See* letter from EIM I.

[333] *See* letter from ABA. The commenter stated that, as the Commission has acknowledged in the past, in order to serve the policies of the Williams Act, the timing for public filings should vary based on the circumstances. *Id.*

[334] *See* letters from MFA; STB. The commenters noted, for example, that a one-business day deadline may not be appropriate for Schedule 13D amendments with respect to material changes that do not have any nexus to a change or influence in corporate control. *Id.*

[335] *See* letter from ABA.

[336] *See* letter from MFA.

[337] *See* letter from NVCA. Specifically, the commenter asserted that the burden of inaccurate Schedule 13D amendments and the associated risks are far greater than any benefit to be gained from the information that a venture capital fund is reducing its share ownership in the ordinary course of exiting investments and providing returns to limited partner-investors. *Id.* The commenter also noted that the proposed amendment would impose substantial compliance burdens on venture capital funds that make Schedule 13D filings and expressed concern that inaccurate Schedule 13D amendments caused by the proposed accelerated deadline could result in giving the market information that is misleading, particularly to retail investors, which could reduce liquidity and negatively impact an issuer's share price, harming all investors other than short sellers. *Id.*

[338] *See, e.g.,* letters from MFA; Perkins Coie; STB; TIAA; TRP.

[339] *See supra* notes 226–228, 235–236, 251 and accompanying text.

[340] *See* letter from MFA. The commenter further stated that the benefits of the proposed amendment would be minimal because Schedule 13G filers generally do not have control intent and already disclose their holdings on Form 13F. *Id.*

[341] *See* letter from MFA.

[342] *See supra* notes 99, 106, 226, 243 and accompanying text; *see also* letter from MFA & NAPFM.

[343] *See* letters from Freeport-McMoRan; HMA I.

[344] *See* letter from A. Day.

[345] *See* letter from SIFMA AMG.

[346] *See, e.g.,* letters from ABA; Dodge & Cox; ICI I; MFA. One of those commenters also noted that to the extent that a Schedule 13D filer is able to file earlier, the filer would still be obligated to do so because the rule would still require prompt filings. *See* letter from ABA. Alternatively, the commenter suggested that the Commission require that certain categories of amendments (*e.g.,* dispositions or acquisitions of beneficial ownership of 1% or more) be filed within a specified one or two business day window. *Id.* Similarly, another commenter recommended that the Commission add a narrative setting forth its timing expectations in different situations for the filing to satisfy the ''prompt'' standard, including those where a shorter filing deadline would be required. *See* letter from MFA.

[347] *See* letter from AIMA.

[348] *See, e.g.,* letters from EEI; EIM I; Hoak; IAA; Perkins Coie. Several of those commenters asserted that two business days would be consistent with the current general understanding of the ''promptly'' standard. *See* letters from EIM I; IAA. Some commenters indicated that a one-business day deadline for Schedule 13D amendments would be too ''aggressive from an operational perspective,'' would be extremely difficult for filers to comply with, and could result in inadvertent errors, *see* letter from IAA, and that a two-business day deadline would be less onerous for investors yet would ensure the accuracy and transparency of the information in their filings. *See* letter from EEI.

[349] *See* letter from Hoak.

[350] *See* letter from STB. The commenter recommended that the Commission engage in further study to determine the percentage of Schedule 13D filers that ultimately engage in activities that impact corporate control and the number of such cases in which a Schedule 13D amendment is not filed within the one-business day timeframe. *Id.* The commenter also suggested that the Commission engage in further study regarding the different circumstances under which Schedule 13D amendments are filed and consider whether

which neither clearly supported nor opposed the proposed amendment to Rule 13d–2(a), recommended that the Commission define the percentage ownership change that is deemed a ''material change'' as the specified percentage only, and that it omit the subjective ''facts and circumstances'' part of the standard.[351]

Further, a number of opposing commenters made recommendations regarding the proposed amendment to Rule 13d–2(b). For example, several commenters recommended that the Commission require Schedule 13G amendments to be filed within 45 days after the end of a quarter in which a material change occurred, consistent with the amendment frequency for Form 13F.[352] One commenter recommended that QIIs be required to file an amended Schedule 13G within 20 business days after the end of a quarter in which a material change has occurred.[353] One commenter, which neither clearly supported nor opposed the proposed amendment to Rule 13d–2(b), recommended that the Commission require that Schedule 13G amendments be filed within 10 days after the end of the month in which a material change occurs.[354]

In addition to focusing on the Schedule 13G amendment deadline, some commenters made other recommendations with respect to Rule 13d–2(b). For example, one opposing commenter suggested that the Commission conduct further study and analysis to understand what percentage of Schedule 13G filers are involved in change in control scenarios.[355] A number of commenters, which either generally opposed or neither clearly supported nor opposed the proposed amendment to Rule 13d–2(b), also requested that the Commission clarify what constitutes a ''material change'' for Schedule 13G filers.[356] One commenter recommended that the Commission carve out QIIs from the accelerated filing deadline, including because QIIs must certify that they do not have a control intent.[357] And, one commenter recommended that the Schedule 13G amendment filing deadline be expressed in business days.[358]

c. Final Amendments

We are amending Rule 13d–2(a) and (b) to revise the Schedule 13D and 13G amendment filing deadlines under those rules. In response to commenter concerns, however, we are making some changes to the proposed deadlines. Specifically, we are adopting a Schedule 13D amendment filing deadline of two business days[359] after the date of a material change and a Schedule 13G amendment filing deadline of 45 days after calendar quarter-end. We also are amending Rule 13d–2(b) to require an amendment to a Schedule 13G be filed only if a ''material change'' occurs.

As noted above, Rule 13d–2(a) currently requires that an amendment be filed promptly if a material change occurs in the facts set forth in a Schedule 13D. Although the Commission proposed to amend Rule 13d–2(a) to replace the ''promptly'' standard with a one-business day deadline, we are instead adopting a two-business day deadline in light of the comments received. As noted in the Proposing Release, establishing a specified filing deadline for Schedule 13D amendments should remove any uncertainty as to the date on which an amendment is due and help ensure that beneficial owners amend their filings in a more uniform and consistent manner.[360] We note, however, that several commenters disagreed with the Commission's expectation that the proposed one-business day deadline would impose minimal incremental burdens on Schedule 13D filers.[361] To the contrary, those commenters expressed concerns about the workability of a one-business day deadline for filing Schedule 13D amendments and described the burdens that beneficial owners would incur trying to meet that deadline.[362]

We believe that shifting from the proposed one-business day deadline to a two-business day deadline will address those concerns and provide beneficial owners with adequate time to prepare and file a Schedule 13D amendment. Relevantly, several commenters, including some that generally opposed the proposed amendment, recommended that the Commission adopt a two-business day deadline under Rule 13d–2(a).[363] We agree with those commenters that a two-business day deadline, as compared to a one-business day deadline, would be less onerous for beneficial owners while at the same time ensuring that investors and markets are provided with material information disclosed in Schedule 13D amendments in a sufficiently prompt manner. We also believe that giving beneficial owners additional time, as compared to the proposed deadline, to prepare their Schedule 13D amendments will reduce the risk of erroneous or incomplete filings, addressing a concern that some commenters expressed with respect to the proposed one-business day deadline and helping to preserve the utility of those filings.[364]

Further, as discussed above, Rule 13d–2(b) currently requires that an amendment be filed within 45 days of calendar year-end if there were any changes to the information previously reported on Schedule 13G during that year. Similar to our amendments to the

requiring such amendments to be filed within the one business day timeframe would materially improve the information provided to investors relating to such issuer control matters. *Id.*

[351] *See* letter from IAA.

[352] *See, e.g.,* letters from Dodge & Cox; IAA; ICI I.

[353] *See* letter from SSC. The commenter also recommended that materiality be defined as more than a 5% change in beneficial ownership. *Id.*

[354] *See* letter from ABA.

[355] *See* letter from STB. The commenter also suggested that if the Commission's goal is market transparency, and not a targeted concern related to matters of corporate control, the Commission should consider whether there are more appropriate tools to disclose significant beneficial ownership positions or material changes to such positions in a more concise and efficient manner (*e.g.,* Form 13F). *Id.*

[356] *See, e.g.,* letters from ABA; IAA; ICI I; STB. Several of those commenters requested that the Commission confirm that a change in beneficial ownership of less than 5% will not be deemed ''material'' for purposes of the rule. *See* letters from IAA; ICI I; STB. Further, one of those commenters recommended that the Commission clarify whether a Schedule 13G amendment obligation would be triggered based on actual trading activity of an investor or whether such obligation could be triggered based on changes in the number of outstanding shares. *See* letter from STB. The commenter also requested clarification as to whether an investor would be permitted to ''net'' purchases and sales for purposes of the analysis. *Id.*

[357] *See* letter from TIAA.

[358] *See* letter from IAA.

[359] *See supra* note 134 for a discussion of the new definition of ''business day'' that we are adopting for purposes of Regulation 13D–G.

[360] Proposing Release at 13857; *see also* letter from EIM I (stating that replacing the ''promptly'' standard with a two-business day deadline would ''provid[e] a more objective deadline''). For that reason, we also disagree with commenters who recommended we should retain a flexible standard. *See supra* notes 333–334 and accompanying text. We note that those recommendations were made, in part, in response to the proposed one-business day deadline. *See, e.g., supra* note 334 (describing some commenters' assertion that a one-business day deadline may not be appropriate for Schedule 13D amendments with respect to material changes that do not have any nexus to a change or influence in corporate control). As such, the additional time provided by the two-business day deadline we are adopting should address some of these concerns. This view is consistent with several commenters' assertions that ''promptly'' is generally understood to mean two business days. *See supra* note 348.

[361] *Id.* (expressing the Commission's belief ''that requiring Schedule 13D amendments to be filed within one business day after the date on which a material change occurs will [not] place those filers at a disadvantage'' and noting that ''those amendments should present a lower administrative burden than the initial Schedule 13D filing'').

[362] *See supra* notes 317–322 and accompanying text.

[363] *See supra* note 348 and accompanying text.

[364] *See supra* notes 323–326 and accompanying text.

initial Schedule 13G filing deadlines under Rule 13d–1(b) and (d), we are revising Rule 13d–2(b) to require that a Schedule 13G amendment pursuant to that rule be filed within 45 days after calendar quarter-end if, during that quarter, there were any material changes to the information previously reported (rather than five business days after the end of the month in which a material change occurred, as proposed). Thus, there are two components to our amendment to Rule 13d–2(b): we are both shortening the deadline for the filing of a Schedule 13G amendment and adding an express qualifier to require an amendment only if there is a *material* change to the information previously reported.

We believe that accelerating the Schedule 13G amendment deadline will help ensure the information reported is timely and useful.[365] Numerous supporting commenters also echoed this point.[366] We note, however, that several commenters asserted that the proposed month-end-based deadline would be unduly burdensome for Schedule 13G filers and that such burdens are not sufficiently mitigated by any technological advancements to justify adopting the proposed deadline,[367] reiterating many of the concerns that were expressed about the proposed amendments to Rule 13d–1(b) and (d).[368]

To mitigate those concerns, and to conform to the initial Schedule 13G filing deadlines applicable to QIIs and Exempt Investors under Rule 13d–1(b) and (d),[369] we are instead adopting a quarter-end-based deadline for Schedule 13G amendments under Rule 13d–2(b). This change from the proposal comports with the recommendations that several commenters that opposed the proposed amendment to Rule 13d–2(b) made to the Commission.[370] Consistent with the comments provided on the proposed amendments to Rule 13d–1(b) and (d), we note that those commenters that suggested a quarter-end-based Schedule 13G amendment deadline recommended various different numbers of days after quarter-end for the deadline.[371] Taking into consideration those various recommendations, as we noted in the context of our amendments to Rule 13d–1(b) and (d),[372] we believe that 45 days is the appropriate length of time because it aligns with the filing deadline for Form 13F, and many institutional investment managers who file a Schedule 13G are already reviewing and assessing their holdings on a quarterly basis in order to prepare Form 13F filings. In addition, although most of the other amended Schedule 13D and 13G filing deadlines will be expressed in ''business days,'' we believe the potential compliance benefits of aligning the Schedule 13G amendment deadline with the Form 13F filing deadline justify using calendar days rather than business days.[373]

Even for those Schedule 13G filers that are not Form 13F filers, the 45-day period after calendar quarter-end deadline will be familiar given that they currently must file their Schedule 13G amendment 45 days after calendar year-end.[374] As such, we believe that many of those beneficial owners are well-positioned to submit their Schedule 13G filings 45 days after calendar quarter-end, and we expect that this change from the proposal will produce the same benefits and mitigate opposing commenters' concerns to the same degree as our amendments to Rule 13d–1(b) and (d).[375]

Finally, we also are revising the text of Rule 13d–2(b), as proposed, to substitute the term ''material'' in place of the term ''any'' to serve as the standard for determining the type of change that will trigger an amendment obligation under Rule 13d–2(b). As discussed in the Proposing Release, this change is merely intended to codify the Commission's previously stated view that there is an inherent materiality standard in the provisions governing Schedule 13G filings.[376] We note that several commenters requested that the Commission clarify what constitutes a ''material change,'' with some of those commenters recommending that the Commission deem a change in beneficial ownership of less than five percent to not be ''material'' for purposes of Rule 13d–2(b).[377] The term ''material,'' however, already is defined in Rule 12b–2 [378] and is a familiar, established concept in the Federal securities laws.[379] As such, we do not believe it is necessary or advisable to adopt a new materiality standard for purposes of Schedule 13G amendments under Rule 13d–2(b) or to provide an express safe harbor from the application of Rule 13d–2(b) for certain specified *de minimis* changes in beneficial ownership.

We recognize that Rule 13d–2(a) provides that a ''material change'' for purposes of that rule includes ''any material increase or decrease in the percentage of the class beneficially owned'' and provides that ''[a]n acquisition or disposition of beneficial ownership of securities in an amount equal to one percent or more of the class of securities shall be deemed 'material' for purposes of this section.'' [380] We also note, however, that these are non-exclusive circumstances in which an amendment obligation has been triggered.[381] Thus, although this

[365] Proposing Release at 13857.

[366] *See supra* note 308 and accompanying text.

[367] *See supra* notes 314–316, 338–342 and accompanying text.

[368] *See supra* section II.A.2.

[369] We believe that aligning the Schedule 13G amendment deadline under Rule 13d–2(b) with the new quarter-end Schedule 13G filing deadlines for Exempt Investors and QIIs under Rule 13d–1(b) and (d) will promote compliance with those rules, as it preserves the uniformity currently in effect with respect to the year-end filing deadlines under those rules.

[370] *See supra* notes 352–353 and accompanying text.

[371] *See* letters from Dodge & Cox (recommending a filing deadline of 45 days after quarter-end); IAA (same); ICI I (same); SSC (recommending a filing deadline of 20 business days for QIIs after quarter-end).

[372] *See supra* section II.A.2.c.

[373] *See* letter from IAA (recommending that the Commission express deadlines consistently in either calendar days or business days across all of the Schedule 13D and 13G initial and amendment filing deadlines, where the deadlines are less than 45 days to promote compliance by making it simpler and less confusing to keep track of the various deadlines).

[374] In addition, the amended deadline may result in the same amount of time to file as under the current rules, depending on the quarter in which the filing obligation is triggered. That is, if a material change occurs to the information previously reported on Schedule 13G between Oct. 1 (the beginning of the fourth calendar quarter) and Dec. 31 (both calendar year-end and the end of the fourth calendar quarter), then the filer would have the same amount of time to prepare and submit their Schedule 13G amendment under both the current and amended Rule 13d–2(b).

[375] *Id.* See *supra* note 273 for a discussion of why we believe that it is appropriate to accelerate the Schedule 13G filing deadlines, notwithstanding some commenters' assertion that the Commission did not substantiate its concerns regarding Schedule 13G reporting gaps and QIIs selling down positions before the end of a reporting period to avoid a Schedule 13G filing. *See supra* note 339 and accompanying text.

[376] *See* Proposing Release at 13858; *see also supra* note 306 and accompanying text.

[377] *See supra* note 356 and accompanying text.

[378] 17 CFR 240.12b–2 (stating that the term ''material,'' when used to qualify a requirement for the furnishing of information as to any subject, limits the information required to those matters to which there is a substantial likelihood that a reasonable investor would attach importance in determining whether to buy or sell the securities registered).

[379] *See, e.g., Basic Inc.* v. *Levinson,* 485 U.S. 224, 231–32 (1988) (noting that the U.S. Supreme Court ''explicitly has defined a standard of materiality under the securities laws'' to mean that ''there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available'' (quoting *TSC Industries, Inc.* v. *Northway, Inc.,* 426 U.S. 438, 449 (1976))).

[380] 17 CFR 240.13d–2(a).

[381] *Id.* (providing that a material change includes, ''but [is] not limited to,'' a ''material increase or decrease in the percentage of the class beneficially owned'' and that ''acquisitions or dispositions of

language in Rule 13d–2(a) provides guidance for beneficial owners to determine when a Schedule 13D amendment obligation arises under that rule, it is fundamentally different from the express safe harbor that some commenters requested with respect to the Schedule 13G amendment obligation under Rule 13d–2(b). Further, because both Rule 13d–2(a) and (b) will now share the same materiality standard for determining when an amendment is due, the language in Rule 13d–2(a), including the statement that ''[a]n acquisition or disposition of beneficial ownership of securities in an amount equal to one percent or more of the class of securities shall be deemed 'material,' '' is equally instructive for purposes of determining what changes are material under Rule 13d–2(b).

4. Rule 13d–2(c) and (d)

Rule 13d–2(c) governs the amendment obligation for QIIs whose beneficial ownership exceeds 10 percent of a covered class. Under Rule 13d–2(c), QIIs are required to file an amendment to their Schedule 13G within 10 days after the end of the first month in which their beneficial ownership exceeds 10 percent of a covered class, calculated as of the last day of the month. Once across the 10 percent threshold, QIIs are further required under current Rule 13d–2(c) to file additional amendments within 10 days after the end of the first month in which their beneficial ownership increases or decreases by more than five percent of the covered class, calculated as of the last day of the month.

Rule 13d–2(d) governs the amendment obligation for Passive Investors whose beneficial ownership exceeds 10 percent of a covered class. Under current Rule 13d–2(d), Passive Investors are required to ''promptly'' file an amendment to their Schedule 13G upon acquiring greater than 10 percent of a covered class. Once across the 10 percent threshold, Passive Investors are further required under current Rule 13d–2(d) to file additional amendments ''promptly'' if their beneficial ownership increases or decreases by more than five percent of the covered class.

The amendment obligations arising under Rule 13d–2(c) and (d) are in addition to the general amendment requirement in Rule 13d–2(b), which is discussed in more detail in section II.3 above. To comply with Rule 13d–2(c) and (d), QIIs and Passive Investors, depending on their beneficial ownership levels, may have to amend their Schedule 13G filings more frequently and do so throughout the year.

a. Proposed Amendments

In connection with the proposed amendment to Rule 13d–2(b),[382] the Commission proposed to amend Rule 13d–2(c) to require that QIIs file an amendment to their Schedule 13G within five days after the date on which their beneficial ownership exceeds 10 percent of a covered class, rather than 10 days after the end of the month. Similarly, once across the 10 percent threshold, the proposed amendment would have required QIIs to file additional amendments five days after the date on which their beneficial ownership increases or decreases by more than five percent of the covered class, rather than 10 days after the end of the month. The Commission intended that these amendments, when considered in the context of the proposed amendment to Rule 13d–2(b), would preserve the utility of Rule 13d–2(c) as a provision that provides the market with earlier notice of QIIs' beneficial ownership exceeding 10 percent of a covered class and, thereafter, upon their beneficial ownership of the covered class increasing or decreasing by more than five percent.[383] The Commission also expressed the view that the imposition of such an accelerated deadline is appropriate in the context of our proposed amendment to Rule 13d–2(c) because the high thresholds in that rule—10 percent beneficial ownership of a covered class and any subsequent five percent increase or decrease in beneficial ownership—warranted that the amendment be rapidly disseminated to the market.[384] And, consistent with its rationale for proposing to shorten the other deadlines, the Commission noted that QIIs may have access to the same technology as other Schedule 13D and 13G filers to satisfy this deadline, especially given the size and sophistication of the persons eligible to file as QIIs.[385]

The Commission also proposed to amend Rule 13d–2(d) to change the amendment filing deadline from the ''promptly'' standard to one business day after the date on which an amendment obligation arises. The Commission proposed this amendment for substantially the same reasons it proposed to shorten the filing deadline for the initial Schedule 13G[386] and change the filing deadline for Schedule 13D amendments.[387]

b. Comments Received

Commenters expressed a variety of views regarding the proposed amendments to Rule 13d–2(c) and (d). A number of commenters supported the proposed amendments.[388] Some of those commenters supported the proposed amendments for many of the same reasons they supported the revising the other Schedule 13D and 13G filing deadlines.[389]

Some supporting commenters also expressed their expectation that the proposed amendments to Rule 13d–2(c) and (d) would not impose significant costs to beneficial owners of more than five percent of a covered class.[390] One commenter asserted that the proposed amendments would be consistent in balancing the need for adequate disclosures to investors with burdens placed on filers to accurately prepare required disclosures.[391] This commenter also supported the proposed amendments based on changes in technology and developments in the financial markets.[392]

Several commenters opposed the proposed amendments to Rule 13d–2(c) and (d).[393] Some of those commenters opposed the proposed amendments for many of the same reasons they opposed revising the other Schedule 13D and 13G filing deadlines.[394]

In addition, some commenters also expressed concern that the proposed amendment to Rule 13d–2(c) would impose significant and unnecessary additional reporting burdens on QIIs, including costs related to enhancing their systems to comply with potential

less than [one percent of the class of securities] may be material, depending upon the facts and circumstances'').

[382] *See supra* section II.A.3.a.

[383] Proposing Release at 13858.

[384] *Id.*

[385] *Id.*

[386] *See supra* section II.A.2.a.

[387] *See supra* section II.A.3.a.

[388] *See, e.g.,* letters from AFREF (expressly supporting only the proposed amendment to Rule 13d–2(d)); Anonymous 3; Anonymous 5; Anonymous 11; Anonymous 12; Anthony R.; C. Robinson; Engineer; FedEx; Freeport-McMoRan; HMA I; J. Pieper; J. Soucie; Jonah; Juan; Mark C.; Mike; Nasdaq; P. Worts; Todd.

[389] *See supra* notes 38–40, 43–44 and accompanying text; *see also supra* notes 211, 308 and accompanying text.

[390] *See, e.g.,* letters from Anonymous 11; Freeport-McMoRan; J. Soucie.

[391] *See* letter from FedEx.

[392] *See id.*

[393] *See, e.g.,* letters from A. Day; ABA; AIMA; B. Mason; Dodge & Cox; EEI (opposing only the proposed amendment to Rule 13d–2(d)); ICI I; MFA; MSBA (same); Perkins Coie; SSC (opposing only the proposed amendment to Rule 13d–2(c)); TIAA (same).

[394] *See supra* notes 99, 101–102, 226, 236, 243, 247, 250, 327 and accompanying text.

intra-month reporting.[395] Another commenter asserted that retaining the current Schedule 13G amendment filing deadline under Rule 13d–2(c) would be consistent with the Commission's historical recognition that beneficial ownership by QIIs does not raise the same concerns as beneficial ownership by investors that hold positions with a control intent and, therefore, it is appropriate to minimize the reporting burdens on QIIs.[396]

With respect to the proposed amendment to Rule 13d–2(d), one commenter asserted that the proposed one business day deadline is unreasonable given that many Passive Investors require assistance of counsel and that a filing under that rule may require input by multiple parties before being filed.[397] One commenter stated that the proposed amendment would compromise the accuracy of Schedule 13G amendments and also would not allow for the possibility that a necessary approver or signer may not be available.[398]

Commenters also criticized the Commission's justifications for the proposed amendments to Rule 13d–2(c) and (d). For example, several commenters disagreed with the Commission's technological advancement-based justifications for the proposed amendments,[399] some of whom raised many of the same concerns that they expressed with respect to the proposed amendments to the other Schedule 13D and 13G filing deadlines.[400] One commenter also noted that Passive Investors generally do not have access to specialized technology that would make it practical for them to file an amended Schedule 13G on the proposed accelerated basis.[401] And, some commenters asserted that the costs of the proposed amendments to Rule 13d–2(c) and (d) would exceed their benefits.[402]

Commenters also made some recommendations regarding the proposed amendments. For example, one commenter that generally opposed the proposed amendment to Rule 13d–2(c) recommended that the Commission require that Schedule 13G amendments pursuant to that rule be filed within 45 days after the end of a quarter, consistent with the amendment frequency for Form 13F.[403]

Some commenters that opposed the proposed amendment to Rule 13d–2(d) recommended a two-business day deadline under that rule,[404] with one commenter asserting that such a deadline would be less onerous for investors yet would ensure the accuracy and transparency of the information in their filings.[405] One such commenter expressed the view that the Commission should require that Schedule 13G amendments under Rule 13d–2(d) be filed promptly, but within no more than some period of time (*e.g.,* between two and four business days).[406] Another opposing commenter suggested that the Commission require that Schedule 13G amendments pursuant to Rule 13d–2(d) be filed within 10 business days because Passive Investors ''lack control intent and certify to that effect.'' [407]

c. Final Amendments

We are amending Rule 13d–2(c) and (d) to revise the Schedule 13G amendment filing deadlines under those rules. In response to commenter concerns, however, we are making some changes from the proposed deadlines. Specifically, we are adopting a filing deadline of five business days [408] after the end of the first month in which an amendment obligation is triggered under Rule 13d–2(c) and two business days after the date on which an amendment obligation is triggered under Rule 13d–2(d).

As noted above, Rule 13d–2(c) currently requires QIIs to file a Schedule 13G amendment within 10 days after the end of the first month in which their beneficial ownership exceeds 10 percent of a covered class and, once across the 10 percent threshold, within 10 days after the first month in which their beneficial ownership increases or decreases by more than five percent. Although the Commission proposed to revise Rule 13d–2(c) to shorten the filing deadline to five days after the date on which an amendment obligation arises under that rule, we are instead retaining the month-end-based filing deadline and shortening that deadline from 10 days after month-end to five business days after month-end. The Commission based its proposed deadline under Rule 13d–2(c), in large part, on the proposal to shorten the Schedule 13G amendment deadline under Rule 13d–2(b) from a calendar year-end-based deadline to a month-end-based deadline.[409] Therefore, if we had adopted the Commission's proposed amendment to Rule 13d–2(b), then Rule 13d–2(c), in its current form—which as noted above requires that QIIs file a Schedule 13G amendment within 10 days after the end of the first month in which the triggering event occurs—would not be of any value.

As discussed above, however, we did not adopt the Commission's proposed month-end-based deadline under Rule 13d–2(b).[410] Instead, we revised Rule 13d–2(b) to require that a Schedule 13G amendment be filed within 45 days after the end of a calendar quarter in which a material change occurs to the information previously reported. Because Rule 13d–2(b) will have a quarter-end-based filing deadline, the month-end-based deadline in Rule 13d–2(c) will continue to have utility as a provision that provides the market with earlier notice of QIIs' beneficial ownership exceeding 10 percent of a covered class and, thereafter, upon their beneficial ownership increasing or decreasing by more than five percent. In addition, we expect that retaining the month-end-based deadline in Rule 13d–2(c) will address the concerns that several commenters expressed about the burdens that the proposed amendment would impose on QIIs.[411]

Notwithstanding those commenters' concerns, we believe it is appropriate to accelerate the filing deadline in Rule 13d–2(c) in order for investors to receive material information in a timely manner

[395] *See, e.g.,* letters from ABA; ICI I; MFA. One commenter noted that proposed amendment represents a radical change for QIIs as it will require them to shift from monitoring and reporting Schedule 13G positions on a monthly basis to a daily basis. *See* letter from MFA. The commenter also stated that the proposed amendment would be particularly burdensome for algorithmic traders whose investments are in a perpetual state of flux. *Id.*

[396] *See* letter from ICI I.

[397] *See* letter from MSBA.

[398] *See* letter from EEI.

[399] *See, e.g.,* letters from Dodge & Cox; IAA; ICI I; MSBA.

[400] *See supra* notes 92–94, 220, 223 and accompanying text.

[401] *See* letter from MSBA.

[402] *See* letters from ABA; MFA. One commenter stated that because QIIs do not have any control intent, the timing of their beneficial ownership reporting is not a source of meaningful concern. *See* letter from ABA.

[403] *See* letter from IAA.

[404] *See* letters from EEI; Perkins Coie.

[405] *See* letter from EEI.

[406] *See* letter from ABA.

[407] *See* letter from IAA. The commenter further noted that ''Passive Investors (and QIIs) who lose eligibility to file on Schedule 13G—for example, by changing to a control intent—currently have 10 calendar days . . . to file their initial Schedule 13D reflecting this change in intent'' and that ''[i]t seems inconsistent with the materiality of the information disclosed to require Passive Investors who remain passive to file a Schedule 13G amendment in a shorter timeline than formerly-Passive Investors who have to file a Schedule 13D.'' *Id.*

[408] *See supra* note 134 for a discussion of the new definition of ''business day'' that we are adopting for purposes of Regulation 13D–G.

[409] *See* Proposing Release at 13858 (stating that the proposed amendments to Rule 13d–2(c), ''when considered in the context of our proposed amendment to Rule 13d–2(b), preserve the utility of Rule 13d–2(c) as a provision that provides the market with earlier notice of'' significant changes in QIIs' beneficial ownership).

[410] *See supra* section II.A.3.c.

[411] *See supra* notes 394–396 and accompanying text.

in light of the technological advancements and other developments in the financial markets [412] in the more than 40 years since the 10-day deadline was adopted.[413] As such, we are shortening Rule 13d–2(c)'s filing deadline from 10 days after month-end to five business days after month-end. Because the deadline is being expressed in ''business days'' instead of ''days,'' [414] and given the size and sophistication of the persons eligible to file as QIIs, we do not expect that this new filing deadline under Rule 13d–2(c) will be unduly burdensome.

In addition, as discussed above, Rule 13d–2(d) currently requires that Passive Investors file a Schedule 13G amendment promptly upon acquiring beneficial ownership of more than 10 percent of a covered class and, once across the 10 percent threshold, promptly upon increasing or decreasing their beneficial ownership by more than five percent. As with the Schedule 13D amendment deadline under Rule 13d–2(a), the Commission proposed to change the deadline under Rule 13d–2(d) from the ''promptly'' standard to one business day.[415] For the same reasons that we changed the filing deadline for Schedule 13D amendments to two business days,[416] and to retain the historical consistency with that deadline, we also are amending Rule 13d–2(d) to change the amendment filing deadline from the current ''promptly'' standard to two business days after the date on which an amendment obligation arises.

5. Rules 13(a)(4) and 201(a) of Regulation S–T

Regulation 13D–G states that Schedules 13D and 13G should be prepared in accordance with Regulation S–T, which governs the preparation and submission of documents filed electronically on the Commission's EDGAR system.[417] In accordance with 17 CFR 232.12, electronic filings may be submitted to the Commission Monday through Friday, except Federal holidays, from 6 a.m. to 10 p.m. Eastern Time.[418] Under Rule 13(a) of Regulation S–T, however, most filings must be submitted by direct transmission commencing on or before 5:30 p.m. Eastern Time in order to be deemed filed on the same business day.[419] Most filings submitted by direct transmission commencing after 5:30 p.m. will be deemed filed as of the next business day.[420] Rule 13(a)(4) of Regulation S–T, however, sets forth certain exceptions from that 5:30 p.m. ''cut-off'' time. Specifically, it provides that certain filings—namely, Forms 3, 4 and 5, Form 144, and Schedule 14N—''submitted by direct transmission on or before 10 p.m. [Eastern Time] shall be deemed filed on the same business day.'' [421] Rule 13(a)(4), therefore, effectively extends the ''cut-off'' time for these filings from 5:30 p.m. to 10 p.m.

In addition, Rule 201 of Regulation S–T and 17 CFR 232.202 (''Rule 202 of Regulation S–T'') address hardship exemptions from EDGAR filing requirements, and Rule 13(b) of Regulation S–T addresses the related issue of filing date adjustments. A filer may obtain a temporary hardship exemption under current Rule 201 of Regulation S–T if it experiences unanticipated technical difficulties that prevent the timely submission of an electronic filing by submitting a properly formatted paper copy of the filing under cover of Form TH.[422] Alternatively, instead of pursuing a hardship exemption, a filer may request a filing date adjustment under Rule 13(b) of Regulation S–T. That rule addresses circumstances in which a filer attempts in good faith to file a document with the Commission in a timely manner, but the filing is delayed due to technical difficulties beyond the filer's control.[423] In those instances, the filer may request a filing date adjustment.[424] The staff may grant the request if it appears that the adjustment is appropriate and consistent with the public interest and the protection of investors.[425]

a. Proposed Amendments

In the Proposing Release, the Commission proposed to amend Rule 13(a)(4) of Regulation S–T to provide that any Schedule 13D or Schedule 13G, including any amendments thereto, submitted by direct transmission on or before 10 p.m. Eastern Time on a given business day will be deemed filed on the same business day.[426] Conversely, under the proposed amendment, any Schedule 13D or 13G filing not submitted by direct transmission by 10 p.m. on its due date will be assigned a filing date of the next business day, and for purposes of compliance with the applicable reporting requirements, would be considered late. The Commission proposed this extension of the ''cut-off'' time to ease filers' administrative burdens in connection with the proposed accelerated filing deadlines for Schedule 13D and 13G filings, including those filers located in different time zones.[427]

The Commission also proposed to amend Rule 201(a) of Regulation S–T to remove a Schedule 13D or 13G filer's ability to rely on a temporary hardship exemption under that rule. The Commission noted that this proposal would be consistent with the treatment of Forms 3, 4, and 5, which have a 10 p.m. ''cut-off'' time under Rule 13(a)(4) of Regulation S–T and are ineligible for a temporary hardship exemption under Rule 201(a) of Regulation S–T.[428] The Commission also based this proposal on the following factors: the relative ease of using the EDGAR on-line filing system; the proposed extended 10 p.m. Eastern Time filing deadline; the limited value to the public of paper filings; and the availability of a filing date adjustment under the same circumstances as a temporary hardship exemption would have been available but for the proposed amendment.[429]

b. Comments Received

Commenters largely supported the proposed amendments to Rules 13(a)(4) and 201(a) of Regulation S–T,[430] with only one commenter expressly opposing the proposed amendment to Rule 201(a)

[412] *See supra* notes 138–144 and accompanying text for some examples of those advancements and developments.

[413] *See* Filing and Disclosure Release (adopting the predecessor to current Rule 13d–2(c)).

[414] The five-business day deadline after month-end, as compared to a hypothetical five-calendar day deadline, will give beneficial owners additional time before their Schedule 13G amendment is due if the filing period encompasses days that are not business days (*i.e.,* Saturday, Sunday, or a Federal holiday).

[415] *See* Proposing Release at 13858.

[416] *See supra* section II.A.3.c.

[417] The preamble to Regulation 13D–G states, in relevant part, that ''[t]his regulation should be read in conjunction with Regulation S–T (part 323 of this chapter), which governs the preparation and submission of documents in electronic format'' (all capitalized letters in the original).

[418] 17 CFR 232.12(c).

[419] *See* 17 CFR 232.13(a)(2).

[420] *Id.*

[421] 17 CFR 232.13(a)(4). Rule 13(a)(3) also provides the same accommodation for registration statements or any post-effective amendment thereto filed pursuant to 17 CFR 230.462(b) (''Rule 462(b)''). *See* 17 CFR 232.13(a)(3).

[422] 17 CFR 232.201(a).

[423] 17 CFR 232.13(b).

[424] *Id.*

[425] *Id.*

[426] Notwithstanding the proposed extension of the time period in which accepted Schedule 13D and 13G filings may be made and still be considered timely, the Commission stated that filer support hours would not be extended. Proposing Release at 13859, n.82. Thus, filer support would continue to remain available only until 5:30 p.m. Eastern Time as is currently the case.

[427] Proposing Release at 13859.

[428] *Id.*

[429] *Id.* at 13859–60.

[430] *See* letters from EIM I (supporting only the proposed amendment to Rule 13(a)(4)); Engineer; Hoak (same); IAA (same); ICI I.

of Regulation S–T.[431] One of the supporting commenters asserted that additional time to file would be critical under the Commission's proposed acceleration of the Schedule 13D and 13G filing deadlines.[432] Another supporting commenter noted that the proposed amendment to Rule 13(a)(4) would conform to the section 16 filing deadlines and help ease the compliance burdens of shortened filing deadlines and time zone differences.[433]

Some commenters also made recommendations in connection with the proposed amendments to Rules 13(a)(4) and 201(a) of Regulation S–T. One supporting commenter recommended that the Commission extend filer support hours beyond 6 p.m. Eastern Time.[434] Another commenter, which neither clearly supported nor opposed the proposed amendment to Rule 201(a), stated that it would not object to making a temporary hardship exemption unavailable to Schedules 13D and 13G filers as long as a filer may request a filing date adjustment under Rule 13(b) of Regulation S–T if it experiences unanticipated technical difficulties that prevent the timely submission of an electronic filing.[435]

c. Final Amendments

We are amending Rules 13(a)(4) and 201(a) of Regulation S–T as proposed. Thus, the filing ''cut-off'' time for Schedules 13D and 13G under Rule 13(a)(4) of Regulation S–T will be extended from 5:30 p.m. to 10 p.m. Eastern Time. In addition, the temporary hardship exemption under Rule 201(a) of Regulation S–T will be made unavailable for Schedule 13D and 13G filers. Schedule 13D and 13G filers will, however, remain eligible to request a filing date adjustment under Rule 13(b) of Regulation S–T.[436]

We are adopting these amendments as proposed for the same reasons the Commission discussed in the Proposing Release,[437] which were largely supported by the commenters.[438] We note that a commenter also requested that we extend filer support hours beyond 6 p.m. Eastern Time.[439] As the Commission noted in the Proposing Release, however, the amendment to Rule 13(a)(4) of Regulation S–T mirrors the existing filing ''cut-off'' time for Forms 3, 4, and 5.[440] In extending the filing ''cut-off'' time for those forms, the Commission declined to extend filer support hours.[441] We also decline to do so here in light of the relative ease of using the EDGAR on-line filing system, the extension of the ''cut-off'' time by four and a half hours, and the availability of a filing date adjustment if the filer experiences unanticipated technical difficulties as previously described.

B. Proposed Amendment to Rule 13d–3 Regarding the Use of Cash-Settled Derivative Securities

Neither section 3(a) nor section 13(d) of the Exchange Act defines the term ''beneficial owner'' or ''beneficial ownership.'' Regulation 13D–G similarly does not expressly define those terms. To provide clarity, the Commission adopted Rule 13d–3, which provides standards for the purpose of determining whether a person is a beneficial owner subject to section 13(d) and section 13(g).[442] Over the years, some observers have raised concerns about the ability of investors in cash-settled derivative securities to influence or control an issuer by, for example, pressuring a counterparty to the derivative transaction to make certain decisions regarding the voting and disposition of substantial blocks of securities of the reference issuer.[443] To address these and related concerns,[444] the Commission proposed new Rule 13d–3(e).

1. Proposed Amendment

The Commission proposed to add new paragraph (e) to Rule 13d–3 to deem certain holders of cash-settled derivative securities, other than SBS, to be the beneficial owners of the reference covered class. Proposed Rule 13d–3(e)(1) would have treated a holder of a cash-settled derivative security, excluding SBS, as the beneficial owner of the equity securities in the covered class referenced by the cash-settled derivative security if such person held the cash-settled derivative security with the purpose or effect of changing or influencing the control of the issuer of the class of equity securities, or in connection with or as a participant in any transaction having that purpose or effect.[445] The Commission included this control-based standard in proposed Rule 13d–3(e) to ease the administrative burdens associated with the application of this proposed provision by employing a familiar standard under Regulation 13D–G.[446] In addition, proposed Rule

[431] *See* letter from EIM I.

[432] *See* letter from ICI I.

[433] *See* letter from IAA.

[434] *See* letter from ICI I.

[435] *See* letter from IAA.

[436] One commenter requested that we allow Schedule 13D and 13G filers to request a filing date adjustment under Rule 13(b) of Regulation S–T if they experience unanticipated technical difficulties. *See supra* note 435 and accompanying text. For example, as noted above and consistent with the Commission's statement in the Proposing Release, ''[f]iling date adjustments may . . . be made if a filer is unable to submit its Schedule 13D or 13G as a result of an EDGAR outage . . . under Rule 13(b) of Regulation S–T on the grounds that such outage constitutes technical difficulties beyond the filer's control.'' Proposing Release at 13860, n.84.

[437] *See* Proposing Release at 13859–60 (''We are proposing to amend Rule 201(a) of Regulation S–T to make temporary hardship exemptions unavailable to filers of Schedules 13D and 13G because of: The relative ease of using the EDGAR on-line filing system; the proposed extended 10 p.m. eastern time filing deadline; the limited value to the public of paper filings; and the availability of a filing date adjustment under the same circumstances as a temporary hardship exemption would have been available but for the proposed amendment.''); *see also supra* section II.A.5.a.

[438] *See supra* section II.A.5.b.

[439] *See supra* note 434 and accompanying text.

[440] Proposing Release at 13859, n.82.

[441] *See Mandated Electronic Filing and Website Posting for Forms 3, 4 and 5,* Release No. 34–47809 (May 7, 2003) [68 FR 25788 at 25793 (May 13, 2003)] (''[W]e have amended Rule 13(a) to provide that any Form 3, 4 or 5 submitted by direct transmission on or before 10 p.m. Eastern time is deemed filed on the same business day. However, filer support hours will not be correspondingly extended . . . .'').

[442] *Adoption of Beneficial Ownership Disclosure Requirements,* Release No. 34–13291 (Feb. 24, 1977) [42 FR 12342 (Mar. 3, 1977)]. The Commission emphasized that ''[a]n analysis of all relevant facts and circumstances in a particular situation is essential in order to identify each person possessing the requisite voting power or investment power.'' *Id.* at 12344.

[443] *See, e.g.,* Maria Lucia Passador, *The Woeful Inadequacy of Section 13(d): Time for a Paradigm Shift?,* 13 VA. L. & Bus. Rev. 279, 296–99 (2019) (''[I]n the recent past, cash-settled equity derivatives—mainly call and security-based options—were frequently used not only with a speculative and hedging purpose, but also with the immediate, explicit, and specific aim of silently accumulating a leading (or even control) position in public companies.''); Wachtell Petition, *supra* note 139, at 8 (''Even in the absence of voting or dispositive power, participants in large hedging transactions gain influence in a number of ways. . . . [V]oting of the shares may be subject to counterparty influence or control, either directly or because the counterparty is motivated to vote the hedged shares in a way that will please the investor and induce them to continue to transact with such counterparty. . . . Even those derivatives that are characterized as 'cash-settled' may ultimately be settled in kind, creating further market pressure as the participants need to acquire shares for such settlement.'').

[444] Proposing Release at 13861.

[445] Proposing Release at 13862. Proposed paragraph (e)(1) also would have included a provision stating that any securities that are not outstanding but are referenced by the relevant cash-settled derivative security would be deemed to be outstanding for the purpose of calculating the percentage of the relevant covered class beneficially owned by the holder of the derivative security. *Id.* at 13862–63. Those reference securities, however, would not have been deemed to be outstanding for the purpose of any other person's calculation of the percentage of the covered class it beneficially owns. *Id.*

[446] *Id.* (noting that ''the concept 'purpose or effect of changing or influencing the control of the issuer' is a familiar one under Regulation 13D–G, both in the context of determining whether a person is a beneficial owner under Rule 13d–3 and for purposes of determining whether a beneficial owner

13d–3(e) would have set forth the formula for calculating the number of equity securities that a holder of a cash-settled derivative security would be deemed to beneficially own.[447]

In proposing Rule 13d–3(e), the Commission noted that non-SBS cash-settled derivative securities held with the purpose or effect of changing or influencing control of the issuer may be used to influence the voting, acquisition, or disposition of any shares the holder's counterparty may have acquired in a hedge, proprietary investment, or otherwise.[448] The Commission also stated that a non-SBS cash-settled derivative holder's probability of success in exerting influence or control over the issuer of the reference security may increase given that any voting power the derivative holder held would be magnified by minimizing the number of shares that potentially could be voted against the holder's plans or proposals.[449] Finally, the Commission recognized that holders of non-SBS cash-settled derivative securities may position themselves to acquire any reference securities that the counterparty may acquire to hedge the economic risk of that transaction.[450] The Commission also noted that holders of non-SBS cash-settled derivative securities may present their economic positions to persuade an issuer or its shareholders to engage with them.[451] The Commission concluded, therefore, that these persons' holdings of non-SBS cash-settled derivative securities may implicate the policies underlying section 13(d).[452]

2. Comments Received

Commenters were divided on proposed Rule 13d–3(e). Many commenters expressed general support for the proposed amendment.[453] A number of these commenters indicated that proposed Rule 13d–3(e) would add needed market transparency.[454] One commenter expressed the view that the proposal would mitigate what it described as ''hidden risk concentration.''[455] Another commenter stated that the proposal would provide ''the markets more generally with full information'' and allow stockholders to better assess whether to support or oppose activists' proposals.[456] Some commenters asserted that an investment fund used derivatives (reportedly forward purchase contracts) to conceal an economic interest in an issuer that it later converted into a profitable beneficial ownership stake ultimately reported on Schedule 13D.[457]

Opposing commenters, by contrast, raised numerous objections to proposed Rule 13d–3(e).[458] Some of these commenters questioned whether there was a sound basis for the proposal.[459] One commenter asserted that the proposal was not based on empirical analysis or ''evidence to establish . . . an actual problem in the marketplace'' and is a ''solution in search of a problem.''[460] Other commenters asserted that holders of cash-settled derivative securities should not be deemed beneficial owners because such derivative securities confer no control or influence over the voting or disposition of the reference equity securities.[461] Some commenters asserted that in actuality, a counterparty would not look to the derivative holder as to whether to acquire for hedging purposes, or how to vote and/or dispose of, any securities of the reference class or that doing so would be contrary to market practice and/or standard industry legal documentation.[462] Several opposing commenters asserted that investors in cash-settled derivative securities already may be subject to regulation as beneficial owners under existing Rule 13d–3 in applicable circumstances or that the Commission could proceed via interpretation or other means and without a rule amendment.[463] Similarly, one commenter stated that it may not be necessary to deem investors in cash-settled derivative securities beneficial owners if the Commission is satisfied that derivative counterparties can effectively and irrevocably contract out of the right to convert such derivatives to either physical ownership of underlying shares or any other form of voting rights.[464]

In addition, some opposing commenters expressed concerns regarding proposed Rule 13d–3(e) related to the APA or the Commission's statutory authority to adopt the proposal. For example, some commenters said that the proposal represents an inappropriate expansion of the applicable statutory provisions[465]

is eligible to report on Schedule 13G in lieu of Schedule 13D under Rule 13d–1'').

[447] *See id.* at 13863 (describing that formula and providing illustrative examples of its application). The Commission also proposed three notes to Rule 13d–3(e) that would have clarified the application of the proposed rule's formula. *Id.* at 13863–64.

[448] *Id.* at 13862.

[449] *Id.* The Commission acknowledged the possibility that derivative counterparties may have a business relationship to develop and protect, and thus may ultimately cast votes in accordance with the preference of the derivative holder or not vote the shares. *See id.*

[450] *Id.*

[451] *Id.*

[452] *Id.* (citing the Filing and Disclosure Release, which notes that section 13(d)'s legislative history indicates that the purpose of that section is ''to provide information to the public and the affected issuer about rapid accumulations of its equity securities'' by ''persons who would then have the potential to change or influence control of the issuer.'').

[453] *See, e.g.,* letters from Andres Loubriel (Feb. 19, 2022) (''A. Loubriel''); AFL–CIO; AFREF; AFREF, et al.; Anonymous (Feb. 25, 2022) (''Anonymous 7''); Better Markets I; Convergence; Dan Pierce (Feb. 20, 2022) (''D. Pierce''); Freeport-McMoRan; FundApps; HMA I; Justin G. (Feb. 19, 2022) (''Justin G.''); Labor Unions; Mark C.; NIRI; P. Worts; PL Salvati; Henry T Hu, Allan Shivers Chair in the Law of Banking and Finance at the University of Texas Law School (Apr. 11, 2022) (''Prof. Hu''); Robert Rutkowski (Apr. 12, 2022) (''R. Rutkowski''); Samuel Ryan, Senior Battery Test Engineer, ESS Inc. (Feb. 18, 2022) (''S. Ryan''); SCG; Sen. Baldwin, et al.; T. Reilly; Todd; WLRK I; WLRK II; *see also* Letter Type C.

[454] *See, e.g.,* letters from AFL–CIO; AFREF; Better Markets I; Convergence; D. Pierce; FundApps; Justin G.; Labor Unions; NIRI; P. Worts; PL Salvati; Prof. Hu; SCG; WLRK I; WLRK II.

[455] *See* letter from Better Markets I.

[456] *See* letter from WLRK II.

[457] *See* letters from NIRI; SCG.

[458] *See, e.g.,* letters from ABA; AIMA; B. Mason; CIRCA I; CIRCA III; EIM I; IAA; ICI I; ICM; J. Kennedy; MFA; Robert Plesnarski, O'Melveny & Myers LLP (June 27, 2023) (''O'Melveny & Myers''); Perkins Coie; Prof. Gordon; Profs. Bishop and Partnoy I; Profs. Bishop and Partnoy II; Profs. Bishop and Partnoy III; Profs. Eccles and Rajgopal; SIFMA; SIFMA AMG; SIFMA & SIFMA AMG; STB; TIAA. We note that several commenters expressed concern that proposed Rule 13d–3(e) would ''[a]ssign[] voting rights to derivative holders.'' *See, e.g.,* letter from Susanne Trimbath, Ph.D., Economist, Author, Retired Professor (June 24, 2023); *see also* Letter Type B; Letter Type D, *available at https://www.sec.gov/comments/s7-06-22/s70622-typed.htm;* Letter Type E, *available at https://www.sec.gov/comments/s7-06-22/s70622-typee.htm.* For avoidance of doubt, we note that neither proposed Rule 13d–3(e) nor any of the other Proposed Amendments, nor any of the final amendments we are adopting, would have that effect.

[459] *See* letters from CIRCA I; MFA; Profs. Bishop and Partnoy III; SIFMA; SIFMA AMG.

[460] *See* letter from EIM I.

[461] *See* letters from ABA; AIMA; CIRCA I; EIM I; IAA; MFA; STB; TIAA.

[462] *See* letters from ABA; CIRCA I; EIM I; O'Melveny & Myers; SIFMA; SIFMA AMG; STB.

[463] *See* letters from AIMA; CIRCA I; EIM I; IAA; ICI I; MFA; Profs. Bishop and Partnoy II; Profs. Bishop and Partnoy III; SIFMA; SIFMA AMG. One commenter expressly recommended that the Commission issue interpretive guidance on this point. *See* letter from Profs. Bishop and Partnoy II; *see also* letter from Profs. Bishop and Partnoy III. Similarly, another commenter suggested that the Commission ''publish clarifying guidance explaining that the beneficial ownership determination for all cash-settled derivatives is consistent with the treatment of SBS, as described in the 2011 Release.'' *See* letter from IAA. The ''2011 Release'' that the commenter refers to is *Beneficial Ownership Reporting Requirements and Security-Based Swaps,* Release No. 34–64628 (June 8, 2011) [76 FR 34579 (June 14, 2011)], which we henceforth refer to as the ''Security-Based Swaps Release.''

[464] *See* letter from Wm. Robertson Dorsett, Columbia Law School (Feb. 11, 2022).

[465] *See* letters from ABA; IAA; MFA; Wm. Robertson Dorsett, Columbia Law School (Apr. 11, 2022). One of these commenters also stated that the

Continued

or would be arbitrary and capricious, if adopted.[466] Further, one commenter emphasized that ''[b]y focusing on speculative harms; failing to engage seriously with the question whether new or different rules were needed to combat them; and failing to consider costs, the Proposed Rule falls short of providing a sound justification for the proposals being made.'' [467] The commenter stated that ''[f]or these reasons, the Commission has not satisfied its obligations under sections 3(f) and 23(a)(2) of the Exchange Act.'' [468]

Finally, some opposing commenters discussed other concerns regarding proposed Rule 13d–3(e). Some commenters expressed concern that the proposal would inhibit activist investment strategies.[469] Other commenters expressed concern that the proposed rule, including its ''change of control'' standard, is overly broad, unclear, and would be difficult to administer.[470] Many commenters indicated that the proposal's computational methodology, including the need to conduct daily calculations, would be complex or increase the compliance burden of the rule.[471] In addition, one commenter noted that the ''concept of beneficial ownership is used . . . in many other federal and state laws and rules, as well as in contracts'' and, therefore, ''expanding the definition of 'beneficial ownership' '' as proposed in Rule 13d–3(e) could have ''significant unintended consequences.'' [472] Further, another commenter indicated that the proposed rule's expansion of the scope of the matters that may give rise to beneficial ownership ''could result in potential and significant overreporting by [investment] advisers, leading to unfounded inferences from public filings that holders of cash-settled derivatives may have voting and investment power over securities that they do not, in fact, have, nor do they have the right to acquire.'' [473]

3. Commission Guidance

We are not adopting proposed paragraph (e) to Rule 13d–3 to deem certain holders of cash-settled derivative securities as beneficial owners of the reference covered class. Consistent with the views expressed by several commenters, we have determined that Commission guidance on the applicability of existing Rule 13d–3 to cash-settled derivative securities, similar to the guidance provided in the Security-Based Swaps Release,[474] would provide sufficient clarity.[475]

The Commission explained in the Security-Based Swaps Release the circumstances under which a holder of a SBS may become a beneficial owner as determined under Rule 13d–3. It noted that ''our existing regulatory regime may require the reporting of beneficial ownership'' in cases in which a SBS (1) ''confers voting and/or investment power (or a person otherwise acquires such power based on the purchase or sale of a [SBS]),'' (2) ''is used with the purpose or effect of divesting or preventing the vesting of beneficial ownership as part of a plan or scheme to evade the reporting requirements,'' or (3) ''grants a right to acquire an equity security.'' [476] Although the determination under Rule 13d–3 as to whether the holder of any cash-settled derivative security is the beneficial owner of the reference covered class ultimately will depend on the relevant facts and circumstances, the above-described reasoning in the Security-Based Swaps Release (the three elements of which correspond to Rule 13d–3(a), (b), and (d)(1), respectively) provides an instructive analytical framework with respect to cash-settled derivative securities.

As is the case with persons holding cash-settled SBS, Rule 13d–3 similarly may be applied to holders of non-SBS cash-settled derivatives [477] to treat those persons as beneficial owners in applicable instances. Although non-SBS derivative securities settled exclusively in cash generally are designed to represent only an economic interest, discrete facts and circumstances could arise where the holder of these securities may have voting or investment power as described in Rule 13d–3(a) or otherwise could be deemed to be a beneficial owner as determined under Rule 13d–3(b) or (d), as described below. First, under Rule 13d–3(a), to the extent a non-SBS cash-settled derivative security provides its holder, directly or indirectly, with exclusive or shared voting or investment power, within the meaning of that rule, over the reference covered class through a contractual term of the derivative security or otherwise, the holder of that derivative security may become a beneficial owner of the reference covered class. Second, to the extent a non-SBS cash-settled derivative security is acquired with the purpose or effect of divesting its holder of beneficial ownership of the reference covered class or preventing the vesting of that beneficial ownership as part of a plan or scheme to evade the reporting requirements of section 13(d) or 13(g), the derivative security may be viewed as a contract, arrangement, or device within the meaning of those terms as used in Rule 13d–3(b). The holder of such cash-settled derivative security, therefore, may be deemed a beneficial owner under Rule 13d–3(b) in this context. Finally, under Rule 13d–3(d)(1), a person is deemed a beneficial owner of an equity security if the person (1) has a right to acquire beneficial ownership of the equity security within 60 days or (2) acquires the right to acquire beneficial ownership of the equity security with the purpose or effect of changing or influencing the control of the issuer of the security for which the right is exercisable, or in connection with or as a participant in any transaction having such purpose or effect, regardless of when the right is

proposal would be inconsistent with the Commission's interpretation in the Security-Based Swaps Release. *See* letter from MFA. Another commenter questioned the Commission's authority to adopt proposed Rule 13d–3(e) ''when Rule 13d–3(a) and all relevant authority relating to an understanding of beneficial ownership has historically required a showing of control over the voting or the disposition of securities.'' *See* letter from ABA.

[466] *See* letter from EIM I.

[467] *See* letter from SIFMA; *see also* letter from SIFMA & SIFMA AMG.

[468] *See* letter from SIFMA. The commenter also recommended that the Proposed Amendments be revised and re-proposed for notice and comment. *See id.*

[469] *See* letters from CIRCA I; MFA.

[470] *See* letters from ABA; CIRCA I; EIM I; IAA; MFA; Perkins Coie; SIFMA; SIFMA AMG; TIAA; *see also* IAC Recommendations (stating that the proposed rule, together with the Commission's proposed 17 CFR 240.10B–1 (''Rule 10B–1''), could ''cause confusion in the markets and make compliance difficult for market participants'' and recommending that the two proposed rules be better aligned).

[471] *See* letters from ABA; AIMA; IAA; ICI I; Profs. Bishop and Partnoy I; SIFMA; SIFMA AMG; SIFMA & SIFMA AMG; STB; TIAA; *see also* letter from MFA & NAPFM.

[472] *See* letter from ICI I.

[473] *See* letter from IAA; see also letters from MFA and Perkins Coie that expressed similar concerns about excessive beneficial ownership reporting and potential market confusion even though the persons holding cash-settled derivatives ordinarily have mere economic exposure and no power to vote a reference security or influence or change control of an issuer.

[474] *See supra* note 463 and accompanying text.

[475] *See* letter from IAA; *see also* letter from Profs. Bishop and Partnoy II (stating that, under existing Rule 13d–3, holders of cash-settled derivative securities may be subject to regulation as beneficial owners of the reference equity securities in applicable circumstances, and recommending that the Commission not adopt proposed Rule 13d–3(e) but instead issue ''guidance on cash-settled derivatives'' and ''articulat[e] how the Commission's current rules continue to prohibit problematic conduct related to the [Proposing Release]'').

[476] Security-Based Swaps Release at 34582.

[477] Some commenters expressed the view that non-SBS cash-settled derivatives only represent an economic interest and that section 13 generally should not or does not apply to these securities. *See* letters from ABA; IAA; MFA; Perkins Coie.

exercisable.[478] As the Commission stated in the Security-Based Swaps Release, Rule 13d–3(d)(1) applies regardless of the origin of the right to acquire the equity security.[479] If such a right originates in a derivative security that is nominally ''cash-settled'' or from an understanding in connection with that derivative security, Rule 13d–3(d)(1) would apply.

C. Proposed Amendments to Rule 13d–5

In the Proposing Release, the Commission proposed to amend Rule 13d–5 to, among other things:

- Revise Rule 13d–5(b)(1) to remove the potential implication that it sets forth the exclusive legal standard for group formation under section 13(d)(3) or 13(g)(3);
- Add new paragraph (b)(1)(ii) to specify that if a person, in advance of filing a Schedule 13D, discloses to any other person that such filing will be made and such other person acquires securities in the covered class for which the Schedule 13D will be filed, those persons will have formed a group within the meaning of section 13(d)(3); and
- Add new paragraph (b)(2)(i) to specify that when two or more persons ''act as'' a group under section 13(g)(3) of the Act, the group will be deemed to have become the beneficial owner, for purposes of section 13(g)(1) and (2) of the Exchange Act, of the beneficial ownership held by its members.

Rather than adopt these amendments, we instead are issuing guidance on the operation of existing Rule 13d–5(b) and sections 13(d)(3) and 13(g)(3) that clarifies and affirms that, among other matters, two or more persons who ''act as'' a group for purposes of acquiring, holding, or disposing securities may be treated as a group.

In addition to the foregoing, we are adopting certain amendments to Rule 13d–5 that the Commission included in the Proposing Release. Specifically, we are:

- Adding new paragraph (b)(1)(ii) to specify that a group subject to reporting obligations under section 13(d) shall be deemed to acquire any additional equity securities acquired by a member of the group after the group's formation;
- Adding new paragraph (b)(1)(iii) to carve out from paragraph (b)(1)(ii) any intra-group transfers of equity securities;
- Adding new paragraph (b)(2)(i) to specify that a group regulated under section 13(g) shall be deemed to acquire any additional equity securities acquired by a member of the group after the group's formation;
- Adding new paragraph (b)(2)(ii) to carve out from paragraph (b)(2)(i) any intra-group transfers of equity securities;
- Redesignating current Rule 13d–5(b)(1) as Rule 13d–5(b)(1)(i) to accommodate the inclusion of these amendments, but otherwise not altering the substance of that rule; and
- Making other technical changes to Rule 13d–5.[480]

Those amendments, as well as our guidance, are discussed in more detail below.

1. Proposed Rule 13d–5(b)(1)(i), (b)(2)(i), and (b)(1)(ii)

a. Proposed Amendments

In the Proposing Release, the Commission proposed to amend Rule 13d–5 to track the statutory text of sections 13(d)(3) and (g)(3) and specify that two or more persons who ''act as'' a group for purposes of acquiring, holding, or disposing of securities are treated as a group.[481] Specifically, the Commission proposed to redesignate Rule 13d–5(b)(1) as Rule 13d–5(b)(1)(i) and revise it to, among other things, remove the reference to an agreement between two or more persons and instead indicate that when two or more persons act as a group under section 13(d)(3), the group will be deemed to have acquired beneficial ownership of all of the equity securities of a covered class beneficially owned by each of the group's members as of the date on which the group is formed. The Commission also proposed new Rule 13d–5(b)(2)(i), which would contain nearly identical language to proposed Rule 13d–5(b)(1)(i), with conforming changes to address circumstances in which two or more persons act as a group under section 13(g)(3) and the group is deemed to become the beneficial owner of all of the equity securities of a covered class beneficially owned by each of the group's members as of the date on which the group is formed.

The Commission proposed these amendments, among other things, to (1) make clear that ''the determination [under sections 13(d)(3) and 13(g)(3)] as to whether two or more persons are acting as a group does not depend solely on the presence of an express agreement and that, depending on the particular facts and circumstances, concerted actions by two or more persons for the purpose of acquiring, holding or disposing of securities of an issuer are sufficient to constitute the formation of a group,'' and (2) eliminate any potential for Rule 13d–5(b)(1) to be misconstrued as the definition of a group and consequently used as a basis to narrow the application of sections 13(d)(3) and 13(g)(3).[482]

In addition, the Commission proposed to amend Rule 13d–5 to include new paragraph (b)(1)(ii). The proposed paragraph would provide that a person who shares information about an upcoming Schedule 13D filing such person is or will be required to make with respect to a covered class, to the extent this information is not yet public and was communicated with the purpose of causing others to make purchases of securities of the same covered class, and a person who subsequently purchases securities of that class based on this information, will have formed a group within the meaning of section 13(d)(3).

b. Comments Received

Commenters expressed a wide range of views on proposed Rule 13d–5(b)(1)(i) and (b)(2)(i).[483] A number of commenters supported the amendments.[484] One supporting commenter expressed the view that the proposed amendments would ensure that the terms of sections 13(d) and (g) will be applied as originally intended.[485] Another commenter observed that the proposed amendments appear designed to simply adhere to the underlying statutory language in the Exchange Act.[486] One commenter stated

[478] *See* Rule 13d–3(d)(1)(i). The first prong described above (*i.e.,* the lead-in of Rule 13d–3(d)(1)(i)) applies to any ''right to acquire,'' including but not limited to those enumerated in Rule 13d–3(d)(1)(i)(A) through (D). The second prong described above (*i.e.,* the proviso of Rule 13d–3(d)(1)(i)) applies to any ''security or power'' specified in Rule 13d–3(d)(1)(i)(A) through (C), thereby excluding Rule 13d–3(d)(1)(i)(D) (namely, ''any right to acquire . . . pursuant to the automatic termination of a trust, discretionary account or similar arrangement'') from the types of securities or powers that, if held, can result in the holder being deemed a beneficial owner regardless of when the right is exercisable. Thus, the holder of any right to acquire beneficial ownership as described in Rule 13d–3(d)(1)(i)(D) will be subject to being deemed a beneficial owner pursuant to Rule 13d–3(d)(1) if the right creates an entitlement to acquire securities of the underlying covered class within 60 days.

[479] Security-Based Swaps Release at 34582.

[480] *See supra* note 22.

[481] Proposing Release at 13868–69.

[482] *Id.*

[483] Although commenters generally focused on proposed Rule 13d–5(b)(1)(i) and did not explicitly address proposed Rule 13d–5(b)(2)(i), given the substantial similarity of those proposed rules, we treat comments on proposed Rule 13d–5(b)(1)(i) as also applying to proposed Rule 13d–5(b)(2)(i) unless the comment letter stated otherwise.

[484] *See* letters from AFREF; AFREF, et al.; BRT; Freeport-McMoRan; Labor Unions; Nasdaq; NIRI; P. Worts; Perkins Coie; R. Rutkowski; SCG; Sen. Baldwin, et al.; T. Reilly; WLRK I; WLRK II.

[485] *See* letter from NIRI.

[486] *See* letter from WLRK II.

that it supported the proposed amendments and observed that, under the proposed amendments, compliance with the group formation rules would not depend on whether an express or implied agreement exists among the parties that are acting together.[487] One commenter asserted that the proposed amendments ''could prevent sophisticated investors from skirting reporting requirements when coordinating accumulations of significant stakes'' which could ''help[ ] ensure retail investors have fair insight.''[488]

Several commenters expressed views rejecting criticism that the proposed amendments would interfere with shareholder activism or collaboration.[489] One of these commenters disagreed with the contention by other commenters that such amendments would prevent the build-up of ownership stakes and chill shareholder communications.[490] Another commenter disagreed with concerns that the proposal ''would put mainstream institutional investors at risk of being deemed part of a group simply because they take a meeting with an activist or management and indicate that they may be inclined to vote in favor of their proposed course of action.''[491] This commenter further stated that it did not view the proposal as propounding a definition of ''group'' that would consider a ''regular passive institutional investor'' as a member of a group with an activist simply because it met with an activist, heard its proposed plans, and signaled it would likely use its voting power to support the activist's proposed campaign.[492] One commenter stated a similar view, asserting that nothing in the proposal would limit the ability of investors to engage with company management.[493]

In addition, although the IAC did not make a recommendation with respect to the proposed amendments to Rule 13d–5 ''because of a lack of consensus on the effects of the proposed definition of a 'group' and how that would impact shareholder communication,'' the IAC stated that it ''agree[d] with the SEC's description of existing case-law regarding the definition of 'group' '' and ''would support the inclusion of such description in any final rulemaking regarding Schedule 13D reporting to highlight to market participants the scope of such case law when considering the applicability of the 'group' rules.''[494]

Numerous commenters opposed the proposed amendments, largely because, in their view, the proposed amendments would eliminate a requirement that there be some form of ''agreement'' among members of a group.[495] Some opposing commenters expressed the view that the proposal—particularly the removal of some form of an ''agreement''—would exceed the Commission's authority under the Exchange Act or raise concerns under the APA or the U.S. Constitution.[496] One commenter asserted that eliminating the ''agreement'' requirement in determining whether a group has been formed would contravene the plain meaning of the statutory text, disregard the legislative history, and depart from ''long-established'' judicial precedent.[497] The same commenter asserted that the initial adoption of Rule 13d–5, with what the commenter described as its express requirement for an agreement to exist in order to establish group status, simply reflected the Commission's affirmation of established judicial precedent, not an unwarranted departure from the statutory language.[498] A number of commenters expressed similar points of view, and, among other things, used canons of construction or statutory analysis to assert that persons can only ''act as'' a group under section 13(d)(3) if an agreement exists among the group members.[499] Another commenter suggested the absence of the term ''agreement'' from section 13(d)(3) did not restrict the Commission's capacity to use the term ''agree'' in Rule 13d–5(b) because administrative rulemakings commonly include language not present in a statute in order to implement congressional intent.[500]

Some opposing commenters expressed concern that the proposed amendments would introduce a standard that was overly broad and that could chill or eliminate shareholder communications with other shareholders, issuers' management and/or other parties.[501] One commenter expressed the view that the proposal could deter investors from engaging in ''socially valuable activism'' and noted that to the extent that the proposed rules resulted in restraints on shareholder communications, that may lead to claims that the proposed rules burden investors' First Amendment rights.[502] The commenter also stated that the Commission ''should take care to minimize any burdens on investors' expression.''[503] Other commenters anticipated that under the proposed amendments, ordinary course business transactions or conversations, without more, could result in a finding of group formation.[504] One commenter raised the concern that the proposed rule would produce disruptive collateral consequences, including in relation to ownership reporting under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 Act as it is uncertain whether being deemed a member of a group would deprive an investor of relying on the ''passive investor'' exemption from the antitrust notification requirements under that statute.[505] A number of commenters also asserted that the proposed amendments would prompt litigation over whether communications between parties resulted in group formation.[506] Some commenters expressed the view that the resulting increase in uncertainty that would be caused by the proposed amendments also would result in additional legal exposure under

[487] *See* letter from SCG.

[488] *See* letter from P. Worts.

[489] *See* letters from AFL–CIO; Sen. Baldwin, et al.; WLRK II.

[490] *See* letter from Sen. Baldwin, et al.

[491] *See* letter from WLRK II.

[492] *See id.*

[493] *See* letter from Sen. Baldwin, et al.

[494] *See* IAC Recommendations.

[495] *See* letters from Andrew L. Stern, SEIU (Apr. 11, 2022) (''A. Stern''); ABA; AIMA; Steven M. Rothstein, Managing Director, Ceres Accelerator for Sustainable Capital Markets, Ceres, Inc. (Apr. 11, 2022) (''Ceres''); CIRCA I; CIRCA III; Dodge & Cox; EIM I; HMA II; IAA; ICI I; ICM; MFA; Neuberger Berman Group LLC (Apr. 11, 2022) (''NBG''); O'Melveny & Myers; Benjamin Edwards, Associate Professor of Law, University of Nevada, Las Vegas, William S. Boyd School of Law, Sarah C. Haan, Professor of Law and Cary Martin Shelby, Professor of Law, Washington and Lee University School of Law, Geeyoung Min, Assistant Professor of Law, Michigan State University College of Law, Faith Stevelman, Professor of Law, New York Law School (Apr. 12, 2022) (''Prof. Edwards, et al.''); Prof. Gordon; David H. Webber, Professor of Law and Paul M. Siskind Scholar, Boston University School of Law (Apr. 11, 2022) (''Prof. Webber''); Profs. Bishop and Partnoy I; Profs. Bishop and Partnoy II; Profs. Bishop and Partnoy III; Halit Coussin, Chief Legal Officer & Chief Compliance Officer, Pershing Square Capital Management, L.P. (Apr. 11, 2022) (''PSCM''); Rice Management; SIFMA; SIFMA AMG; SIFMA & SIFMA AMG; SSC; STB; TRP.

[496] *See* letters from CIRCA I; EIM I; ICI I; MFA; Prof. Edwards, et al.; PSCM; SIFMA.

[497] *See* letter from EIM I.

[498] *See id.*

[499] *See* letters from CIRCA I; EIM I, MFA; SIFMA; SIFMA AMG.

[500] *See* letter from PSCM.

[501] *See* letters from A. Stern; ABA; Ceres; CIRCA I; Dodge & Cox; EIM I; IAA; MFA; NBG; Prof. Edwards, et al.; Prof. Gordon; Prof. Webber; Profs. Bishop and Partnoy II; Rice Management; SIFMA; STB; TRP; *see also* letter from MFA & NAPFM.

[502] *See* letter from Prof. Edwards, et al.

[503] *Id.*

[504] *See* letters from HMA II; IAA; MFA; Perkins Coie; Prof. Gordon; Profs. Bishop and Partnoy I; SIFMA; SIFMA AMG; SSC; TRP.

[505] *See* letter from PSCM.

[506] *See* letters from ABA; Dodge & Cox; EIM I; Prof. Edwards, et al.; Prof. Gordon; PSCM; Rice Management; SIFMA.

Exchange Act section 16 for persons alleged to have formed a group.[507]

Opposing commenters also criticized the proposed amendments as inconsistent with those Federal court opinions that have addressed the standard for group formation.[508] One commenter asserted that courts have recognized an ''agreement'' as being a necessary element of group formation based on the need for a ''workable compromise'' between the regulatory objective of having a statute's policies implemented, on one hand, and the market's need for clear rules, on the other hand.[509] Another commenter expressed concern that the proposed amendments would, in its view, dispense ''with more than 40 years of practice and court decisions'' and replace them ''with a vague, circular rule . . . impossibly burdensome to market participants.'' [510] One commenter noted that Federal courts ''have consistently held that the existence of an agreement is necessary to establish the existence of a 'group' under Section 13(d).'' [511] Other commenters expressed the view that the existing standards in Rule 13d–5(b) have worked well for decades or are not in need of reform.[512] Notwithstanding these and other similar criticisms,[513] we note that multiple opposing commenters recognized that, even today, the determination of whether or not a group exists is ultimately dependent upon the facts and circumstances.[514]

A number of commenters offered suggestions on how the Commission should proceed with respect to the proposed amendments.[515] Some commenters expressed the view that the Commission should set forth more specific parameters of what joint conduct or communications may result in group formation.[516] A few commenters offered alternative language to be used in any revision the Commission may ultimately adopt.[517] One commenter encouraged the Commission to consider exempting QIIs from any new ''group formation'' provisions so long as QIIs act consistently with the requirements of Rule 13d–1(b).[518] One commenter suggested that the Commission adopt the equivalent of an exemption from section 16 for any groups formed pursuant to the proposed amendments.[519] Another commenter suggested that the proposed amendments should not be adopted unless a safe harbor is created for securities dealing activities.[520] One commenter recommended no change to the proposal but expressed the view that the proposed rules would not interfere with shareholder rights to engage in, among other things, shareholder activism on ESG issues, collaboration on shareholder proposals under 17 CFR 240.14a–8 (''Rule 14a–8''), and ''vote no'' initiatives and any concerns regarding the filing obligations of such investor groups could be clarified by the Commission in an explanatory statement issued with any final rule.[521] Another commenter stated the Commission should consider whether the public dissemination of information on message boards or through media interviews, and, by extension, social media platforms, could result in group formation.[522] A number of commenters recommended no change be made to current Rule 13d–5(b)(1),[523] which, according to some of these commenters, would result in retention of the ''agreement'' standard. One commenter made reference to existing Rule 13d–5(b) and advocated for the Commission to retain what it referred to as the ''current 'group' definition,'' including the requirement that there be an agreement to act as a group, because the current provision does not: (1) chill shareholder engagement; (2) create the challenge to determine whether a group has been formed or if an exemption applies; or (3) make activist campaigns more difficult to pursue.[524]

Commenters also expressed differing views on proposed Rule 13d–5(b)(1)(ii). Some commenters expressly supported the proposal.[525] One commenter stated that because information about a planned Schedule 13D filing is clearly material to investors, it makes sense to deem tippers and tippees to be acting as a group even without an explicit agreement.[526] Another commenter, while expressing the view that modifications should be made to the Commission's overall proposed amendments relating to group formation, stated that the ''definition of who should constitute a 'group' under the proposal . . . should only apply to the sharing of material nonpublic information related to not yet disclosed large positions instead of efforts to improve the long-term corporate governance of companies.'' [527]

Other commenters opposed the proposal.[528] One commenter analyzed the proposed rule text and observed that linking ''indirectly discloses'' to the ''with the purpose of causing'' clause appears intended to establish a presumption, for all practical purposes, that an acquisition by ''such other person'' was ''based on such information.'' [529] Another commenter similarly expressed the view that such a rule would be unfair given that an adviser may also have independently determined to acquire or even continue to hold the same securities and disclosure of the imminent Schedule 13D may have been outside of the adviser's control and without his or her input or expression of approval.[530]

[507] *See* letters from ABA; EIM I; SIFMA; *see also* letter from MFA & NAPFM.

[508] *See* letters from AIMA; CIRCA I; EIM I; ICI I; MFA; PSCM; SIFMA; SIFMA AMG.

[509] *See* letter from SIFMA.

[510] *See* letter from SIFMA AMG.

[511] *See* letter from EIM I (''Until now, courts have sensibly required and the markets have understood that there must be an agreement (whether implicit or explicit) between shareholders before they could be legally found to be a group and subject to the consequences of such a finding.'').

[512] *See* letters from AIMA; EIM I; ICI I; Profs. Bishop and Partnoy II; PSCM; SSC; STB.

[513] *See* letters from AIMA; CIRCA I; ICI I; MFA; PSCM.

[514] *See* letters from EIM I; ICI I; Profs. Bishop and Partnoy I; PSCM; SIFMA; STB.

[515] *See* letters from ABA; AFREF; AIMA; HMA II; IAA; ICI I; Labor Unions; MFA; Perkins Coie; Profs. Bishop and Partnoy II (expressing the view that it would be sufficient for the Commission to issue guidance instead of adopting a rule change and recommending that the Commission take the position that it ''intends to enforce the 'group' definition as it stands''); SIFMA; SSC; STB; TRP.

[516] *See* letters from ABA; HMA II; IAA; Perkins Coie; TRP.

[517] *See* letters from ABA; MFA.

[518] *See* letter from ABA.

[519] *See* letter from SIFMA. One commenter, which generally supported the proposal, similarly recommended that the Commission address concerns that the proposal could result in a ''regular passive institutional investor'' becoming a member of a group with an activist simply because it met with the activist, heard its proposed plans, and signaled that it would likely use its voting power to support the activist's proposed campaign. *See* letter from WLRK II.

[520] *See* letter from SIFMA.

[521] *See* letter from Labor Unions.

[522] *See* letter from STB.

[523] *See* letters from AIMA; ICI I; SIFMA; SSC.

[524] *See* letter from AIMA.

[525] *See* letters from Perkins Coie; R. Rutkowski; Reilly Steel, Ph.D. Candidate, Department of Politics, Princeton University, and Zohar Goshen, Jerome L. Greene Professor of Transactional Law, Columbia Law School (May 22, 2023) (''R. Steel and Prof. Goshen'') (supporting the proposal conditionally, if Congress does not take the action that the commenter recommended as the primary course of action and if the Commission actively enforces the proposed rule and seeks expansive remedies); SCG.

[526] *See* letter from SCG.

[527] *See* letter from R. Rutkowski.

[528] *See* letters from Dodge & Cox; EIM I; HMA I (stating its belief that ''straightforward application of existing law'' is sufficient); IAA; PSCM (citing proposed Rule 13d–5(b)(1)(iii) but apparently referring to proposed Rule 13d–5(b)(1)(ii)); SIFMA; SIFMA AMG.

[529] *See* letter from SIFMA AMG (adding that this apparent presumption would be unfair, inappropriate, and poorly tailored, and citing to the example of a client acquiring shares from a dealer who also coincidentally acquires shares).

[530] *See* letter from IAA (observing that that adoption of any such rule would be unfair absent

Continued

Another commenter similarly asserted that the proposed rule would place those who receive information from a blockholder at risk of inadvertently becoming subject to group reporting obligations in circumstances that were ''never intended to be covered by Section 13.'' [531]

Some commenters provided recommendations to revise the proposal.[532] One commenter suggested the Commission alternatively ''impose a prohibition on tipping by an activist as soon as it reaches the 5 percent disclosure threshold until it files a Schedule 13D.'' [533] One commenter recommended that the Commission address concerns that the proposal could result in a passive institutional investor becoming a member of a group with an activist simply because it met with the activist, heard its proposed plans, and signaled that it would likely use its voting power to support the activist's proposed campaign by revising proposed Rule 13d–5(b)(1)(ii) to include its suggested alternative text.[534] One commenter, who neither clearly supported nor opposed the proposal, stated that it would be ''deeply troubled if the Commission were to invent a new, extremely difficult to establish element to insider trading law, such as a requirement that the recipient of the tip have an intention of coordinating with the tipper or make its purchases in reliance on the non-public information that the tipper provided.'' [535] A commenter objected to the concept of ''indirect'' disclosure within proposed Rule 13d–5(b)(1)(ii) on grounds that the term ''indirect'' is ''intrinsically ill-defined'' and could create a presumption that certain transactions in the ordinary course of a market-making business were executed ''based on such [indirect] information.'' [536] Another commenter similarly suggested that the rule, if adopted, should only apply to situations where an express or implied intent by parties exists to form a group.[537]

Commenters also expressed observations concerning the collateral consequences to an investor that received information about an impending Schedule 13D filing. One commenter implicitly asked the Commission to consider that once the tippee has the information, ''[t]his quasi-lock-up period not only discourages other shareholders from meeting with the activist but also, effectively, removes the liquidity these other shareholders may provide to the market in that issuer.'' [538] Another commenter suggested the rule should clarify for how long a recipient of information that a Schedule 13D filing would be forthcoming must remain ''frozen'' from making further purchases, particularly if such filing does not get filed in the near term.[539]

c. Commission Guidance

As noted above, we are not adopting proposed Rule 13d–5(b)(1)(i) and (ii) and (b)(2)(i). The Commission's stated objectives were to (1) align the text of Rule 13d–5(b) with the statutory provisions that it serves to implement while clarifying and affirming its application and operation and (2) provide clarity on whether a group is formed if a person shares information about an upcoming Schedule 13D filing that the person is or will be required to make.[540] The proposed amendments were not intended to change how the Commission views what is meant by ''act as a group'' for purposes of sections 13(d)(3) and 13(g)(3). They were intended to codify through a rule amendment our views that ''the determination of whether two or more persons are acting as a group does not depend solely on the presence of an express agreement and that, depending on the particular facts and circumstances, concerted actions by two or more persons for the purpose of acquiring, holding or disposing of securities of an issuer are sufficient to constitute the formation of a group.'' [541] Several commenters generally shared our view that the formation of a group does not depend on the presence of an express agreement.[542] However, some commenters raised objections to the proposal based on their view that the amendments could result in a group being formed for purposes of sections 13(d)(3) and 13(g)(3) absent some evidence of agreement, arrangement, understanding, or concerted action. That was not the Commission's intent. Upon consideration of the comments received, we believe that the better approach is not to adopt the proposed amendment to Rule 13d–5 but instead to provide guidance as to the application of the existing legal standard established in sections 13(d)(3) and 13(g)(3) with respect to the formation of a group.[543]

i. Background of the Regulatory Framework

Sections 13(d)(3) and 13(g)(3) are identical, and each of these provisions provides that ''[w]hen two or more persons act as a . . . group for the purpose of acquiring, holding, or disposing of securities of an issuer, such . . . group shall be deemed a 'person.' '' As the Commission noted in the Proposing Release, Congress enacted these provisions based on two practical considerations.[544] First, sections 13(d)(1) and 13(g)(1), by their terms, apply to, and impose filing obligations upon, a single ''person.'' [545] Second, Congress recognized the need to protect against the evasion of disclosure requirements by persons who collectively sought to change or influence control of an issuer yet who each acquired and held an amount of

some intent to form a group because certain parties could be restricted from buying shares just because a third party told an adviser that it was going to file a Schedule 13D).

[531] *See* letter from PSCM.

[532] *See* letters from AIMA; IAA; Prof. Gordon; SIFMA; SIFMA AMG; STB.

[533] *See* letter from Prof. Gordon; *see also* letter from R. Steel and Prof. Goshen.

[534] *See* letter from WLRK II. Another commenter, which objected to the proposed amendments to Rule 13d–5 in the Proposing Release, specifically responded to that commenter's recommended alternative, intimating that the Commission should not adopt this suggested change for a variety of reasons. *See* letter from Profs. Bishop and Partnoy II.

[535] *See* letter from HMA I.

[536] *See* letter from SIFMA.

[537] *See* letter from IAA.

[538] *See* letter from AIMA.

[539] *See* letter from STB.

[540] *See* Proposing Release at 13869.

[541] *Id.* at 13868–69.

[542] *See, e.g.,* letters from EIM I (''[A]n agreement can be constituted informally, and without a writing. The Commission, in adopting Rule 13d–5 in 1977, selected the word 'agreement' rather than 'contract' for a reason—an agreement is a less formal arrangement, which is consistent with the requirement of Section 13(d)(3) that the persons 'act together.'''); PSCM (''Courts, whether looking to the existence of an agreement out of an interpretation that Rule 13d–5(b) requires it, or as an administrable evidentiary standard for establishing action in concert, have interpreted the term 'agreement' broadly to include informal and unwritten arrangements, and have relied on circumstantial evidence in order to establish that some manner of agreement existed.''); SIFMA (''[T]he existence of a group surely does not depend on the intent of the members to create and wear the label of a 'Section 13(d) group.' It does, however, depend on an intent to take the coordinated actions that will create that relationship.''). *Cf.,* letter from ABA (explaining that an agreement need not be ''written'' or ''formal'' and acknowledging that Rule 13d–5(b) could be modified to add ''arrangement or understanding'' to address any concern that the term ''agreement'' has been misconstrued in the context of Rule 13d–5(b)).

[543] In addition to the guidance set forth in this section, we provide additional guidance in section II.D.3 in connection with the discussion regarding our final disposition of the proposed exemptions under Rule 13d–6.

[544] *See* Proposing Release at 13865.

[545] Because sections 13(d)(3) and 13(g)(3) ''deem'' a group to be a single ''person,'' the correct articulation of how the statutory framework applies in this context is to a ''person, including any group'' and not a ''person or group.'' Thus, under sections 13(d) and 13(g) and Regulation 13D–G, groups are regulated no differently from natural persons or companies described in the definition of ''person'' under section 3(a)(9) of the Exchange Act.

beneficial ownership at or just below the reporting threshold.[546]

Congress sought to address this problem of coordinated circumvention by deeming two or more persons to be one person for purposes of sections 13(d) and 13(g). Based on the statutory treatment of two or more persons as if they were a single person when they ''act as'' a group for at least one of the three purposes specified in the statutory provisions (*i.e.,* acquiring, holding, or disposing of securities of an issuer), the beneficial ownership collectively held by the group members is imputed to the group. If the aggregate amount of beneficial ownership exceeds five percent of a covered class, the group may be required to file a beneficial ownership report. The determination of which statutory provision (*i.e.,* section 13(d)(3) or 13(g)(3)) applies to a group depends on whether a non-exempt acquisition of beneficial ownership has been made that can be imputed to the group and, when on its own or added to any other beneficial ownership held by the group, results in the group's beneficial ownership exceeding five percent of the covered class. If such an acquisition occurs, the group is subject to regulation under section 13(d).[547] If no such acquisition attributable to the group has occurred, but the collective amount of beneficial ownership held by the group members exceeds five percent of a covered class at the end of a calendar year under current rules [548] (or at the end of a calendar quarter based on the amendments to Rule 13d–1 we are adopting in this release), the group is subject to section 13(g).

ii. Guidance

Neither the statute nor our rules provide a definition of a ''group.'' The appropriate legal standard for determining whether a group is formed is found in sections 13(d)(3) and 13(g)(3). While some may view the language of Rule 13d–5(b) as providing a definition of ''group,'' we reiterate that neither the current rule nor its predecessor [549] was designed or adopted by the Commission to serve as a substitute for the legal standard expressly stated in sections 13(d)(3) and 13(g)(3) for determining when two or more persons form a group.[550]

Whether two or more persons have formed a group as contemplated by sections 13(d)(3) and 13(g)(3) depends on a determination of whether they acted together for the purpose of ''acquiring,'' ''holding,'' or ''disposing of'' securities of an issuer.[551] Such persons could be viewed as acting together if they are taking concerted actions in furtherance of any of these purposes.[552] The determination depends on an analysis of all the relevant facts and circumstances and not solely on the presence or absence of an express agreement, as two or more persons may take concerted action or agree informally.[553] This approach is consistent with the statutory language of sections 13(d)(3) and 13(g)(3) and with the purpose of these statutory provisions.[554] It also is consistent with views previously expressed by courts and the Commission, which have determined that groups were established by activities that fell short of an express agreement.[555] Indeed, the Commission recognizes that for a finder of fact, including the Commission itself, to determine that a group has been formed under section 13(d)(3) or 13(g)(3), the evidence must show, at a minimum, indicia, such as an informal arrangement or coordination in furtherance, of a common purpose to acquire, hold, or dispose of securities of an issuer. If two or more persons took similar actions, that fact is not conclusive in and of itself that a group has been formed.[556] We therefore disagree with the comments raising constitutional concerns, as well as the comments concerning the scope of our authority under the Exchange Act and the APA. We note, however, that those comments were directed at the proposed amendment to Rule 13d–5 and the belief that the contemplated rule change meant the Commission was taking a position that a group could be formed without some type of an agreement, arrangement, understanding, or concerted action. As explained above, this is not the Commission's view, and we are not adopting the proposed amendment to Rule 13d–5. Further, the commenters' concerns are not implicated by the guidance we provide here.

[546] Section 13(d)(3) was enacted to prevent ''easy avoidance of section 13(d)'s disclosure requirements by a group of investors acting together in their acquisition or holding of securities.'' S. Rep. No. 550, at 8 (1967); H.R. No. 1711, at 8–9 (1968); *see also* 113 Cong. Rec. Bill S. 510 (Jan. 18, 1967) (noting that the specific provision applicable to groups was added to ''close the loophole that now exists which allows a syndicate, where no member owns more than 10 percent, to escape the reporting requirements of the Securities Exchange Act'').

[547] The operative term ''after acquiring'' in section 13(d)(1) makes the application of section 13(d) contingent upon the existence of an acquisition. Determining that an acquisition has occurred—in particular, an acquisition that is neither exempt nor otherwise not recognized under section 13(d)(1)—is thus necessary to establish the application of section 13(d).

[548] *See* 17 CFR 240.13d–1.

[549] The predecessor rule, Rule 13d–6, was redesignated Rule 13d–5 in 1978. *See* Filing and Disclosure Release. Unless otherwise noted, references to Rule 13d–5 in this section of the release also refer to the predecessor Rule 13d–6.

[550] When proposing Rule 13d–5(b), the Commission did not present the rule as a proposed definition of ''group,'' solicit comment on the sufficiency or any limitations of any such definition, or use any reference to the term ''group'' in the proposed rule text. *See Disclosure of Corporate Ownership,* Release No. 34–11616 (Aug. 25, 1975) [40 FR 42212 (Sept. 11, 1975)]. Instead, the Commission explained that it was proposing to define the term ''acquisition'' to address certain technical issues with respect to section 13(d) and the determination of the due date for a Schedule 13D.

[551] The Commission, in adopting Rule 13d–5(b)(1), indicated that it viewed the term ''holding'' as subsuming the term ''voting,'' but nevertheless expressly referenced the term ''voting'' in the rule for the avoidance of doubt. *See* Proposing Release at 13869 n.135 (citing Filing and Disclosure Release at 18492).

[552] *See, e.g., SEC* v. *Levy,* 706 F. Supp. 61, 69 (D.D.C. 1989) (''In order to find that a 'group' exists under Section 13(d)(3), a court must find that two or more people have formed a combination in support of a common objective.''); *In the Matter of John A. Carley,* Release No. 34–50695 (Nov. 18, 2004) (''A group need not be formally organized, nor memorialize its intentions in writing . . . . All that is required is that its members combine in furtherance of a common objective.''); *In the Matter of John Joslyn, Joseph Marsh, P. David Lucas, Steven Sybesma, Stanley Thomas and Jon Thompson,* Release No. 34–50588 (Oct. 26, 2004).

[553] Proposing Release at 13868.

[554] Both the House and Senate Reports accompanying the bill reflect an effort to prevent circumvention of the reporting threshold in this situation with the inclusion of a provision ''that would prevent a group of persons who seek to pool their voting or other interests from evading the . . . statute because no one individual owns more than [five] percent.'' *See* Disclosure of Corporate Equity Ownership, H.R. Rep. No. 1711, at 9 (1968) and Full Disclosure of Corporate Equity Ownership and in Corporate Takeover Bid, S. 510, Report of the S. Comm. On Banking and Currency, 90th Cong. 1, 8 (1967). As such, the reports noted that section 13(d)(3) ''is designed to obtain full disclosure of the identity of any person or group obtaining the benefits of ownership [b]y reason of any contract, *understanding, relationship,* agreement or *other arrangement*'' (emphasis added). S. Rep. No. 550, at 8 (1967); H.R. Rep. No. 1711, at. 8–9 (1968), *as reprinted in* 1968 U.S.C.C.A.N. 2811, 2818. *Id.*

[555] Group activity may be demonstrated by circumstantial evidence. *See* Proposing Release at 13868, n. 132 (citing *SEC* v. *Savoy Indus., Inc.,* 587 F.2d 1149, 1162 (D.C. Cir. 1978) and noting as indicia of group formation: (1) the presence of a common plan or goal, *Fin. Gen. Bankshares, Inc.* v. *Lance,* 1978 WL 1082, at *9 (D.D.C. 1978); (2) ''considerable dissatisfaction'' with certain officers and a ''desire to reduce'' those officers' role in company management, *Id.* at *10; (3) strategy meetings with, among others, attorneys, *SEC* v. *Levy,* 706 F. Supp. 61, 70 (D.D.C. 1989); (4) a pattern of coordinated stock purchases, *Hallwood Realty Partners, LP* v. *Gotham Partners, LP,* 286 F.3d 613, 618 (2d Cir. 2002); (5) the solicitation of others to join the group, *Wellman* v. *Dickinson,* 682 F.2d 355 363–364 (2d Cir. 1979), cert. denied sub. nom. *Dickinson* v. *SEC,* 460 U.S. 1069 (1983); or (6) the existence of communications between and among group members. *Gen. Aircraft Corp.* v. *Lampert,* 556 F.2d 90, 95 (1st Cir. 1977)); *see also supra* note 482.

[556] The Commission recognizes that inadvertent or coincidental contact would not be sufficient to satisfy the standard given the absence of volitional acts made in concert or in coordination with others.

Relatedly, we recognize the concern expressed by some commenters that the Commission's proposal to amend Rule 13d–5 could chill shareholder engagement, with, some commenters asserted, shareholders unable to communicate freely with each other or with the issuer's management without forming a group. In response to some of the concerns raised by commenters, we provide guidance below on the application of the current legal standard found in section 13(d)(3) and 13(g)(3) to certain common types of shareholder engagement activities.[557]

Question: Is a group formed when two or more shareholders communicate with each other regarding an issuer or its securities (including discussions that relate to improvement of the long-term performance of the issuer, changes in issuer practices, submissions or solicitations in support of a non-binding shareholder proposal, a joint engagement strategy (that is not control-related), or a ''vote no'' campaign against individual directors in uncontested elections) without taking any other actions?

Response: No. In our view, a discussion whether held in private, such as a meeting between two parties, or in a public forum, such as a conference that involves an independent and free exchange of ideas and views among shareholders, alone and without more, would not be sufficient to satisfy the ''act as a . . . group'' standard in sections 13(d)(3) and 13(g)(3). Sections 13(d)(3) and 13(g)(3) were intended to prevent circumvention of the disclosures required by Schedules 13D and 13G, not to complicate shareholders' ability to independently and freely express their views and ideas to one another. The policy objectives ordinarily served by Schedule 13D or Schedule 13G filings would not be advanced by requiring disclosure that reports this or similar types of shareholder communications. Thus, an exchange of views and any other type of dialogue in oral or written form not involving an intent to engage in concerted actions or other agreement with respect to the acquisition, holding, or disposition of securities, standing alone, would not constitute an ''act'' undertaken for the purpose of ''holding'' securities of the issuer under section 13(d)(3) or 13(g)(3).

Question: Is a group formed when two or more shareholders engage in discussions with an issuer's management, without taking any other actions?

Response: No. For the same reasons described above, we do not believe that two or more shareholders ''act as a . . . group'' for the purpose of ''holding'' a covered class within the meaning of those terms as they appear in section 13(d)(3) or 13(g)(3) if they simply engage in a similar exchange of ideas and views, alone and without more, with an issuer's management.

Question: Is a group formed when shareholders jointly make recommendations to an issuer regarding the structure and composition of the issuer's board of directors where (1) no discussion of individual directors or board expansion occurs and (2) no commitments are made, or agreements or understandings are reached, among the shareholders regarding the potential withholding of their votes to approve, or voting against, management's director candidates if the issuer does not take steps to implement the shareholders' recommended actions?

Response: No. Where recommendations are made in the context of a discussion that does not involve an attempt to convince the board to take specific actions through a change in the existing board membership or bind the board to take action, we do not believe that the shareholders ''act as a . . . group'' for the purpose of ''holding'' securities of the covered class within the meaning of those terms as they appear in sections 13(d)(3) or 13(g)(3). Rather, we view this engagement as the type of independent and free exchange of ideas between shareholders and issuers' management that does not implicate the policy concerns addressed by section 13(d) or section 13(g).

Question: Is a group formed if shareholders jointly submit a non-binding shareholder proposal to an issuer pursuant to Exchange Act Rule 14a–8 for presentation at a meeting of shareholders?

Response: No. The Rule 14a–8 shareholder proposal submission process is simply another means through which shareholders can express their views to an issuer's management and board and other shareholders. For purposes of group formation, we do not believe shareholders engaging in a free and independent exchange of thoughts about a potential shareholder proposal, jointly submitting, or jointly presenting, a non-binding proposal to an issuer in accordance with Rule 14a–8 (or other means) should be treated differently from, for example, shareholders jointly meeting with an issuer's management without other indicia of group formation. Accordingly, where the proposal is non-binding, we do not believe that the shareholders ''act as a . . . group'' for the purpose of ''holding'' securities of the covered class within the meaning of those terms as they appear in section 13(d)(3) or 13(g)(3). Assuming that the joint conduct has been limited to the creation, submission, and/or presentation of a non-binding proposal,[558] those statutory provisions would not result in the shareholders being treated as a group, and the shareholders' beneficial ownership would not be aggregated for purposes of determining whether the five percent threshold under section 13(d)(1) or 13(g)(1) had been crossed.

Question: Would a conversation, email, phone contact, or meetings between a shareholder and an activist investor that is seeking support for its proposals to an issuer's board or management, without more, such as consenting or committing to a course of action,[559] constitute such coordination as would result in the shareholder and activist being deemed to form a group?

Response: No. Communications such as the types described, alone and without more, would not be sufficient to satisfy the ''act as a . . . group'' standard in sections 13(d)(3) and 13(g)(3) as they are merely the exchange of views among shareholders about the issuer. This view is consistent with the Commission's previous statement that a shareholder who is a passive recipient of proxy soliciting activities, without more, would not be deemed a member of a group with persons conducting the solicitation.[560] Activities that extend beyond these types of communications, which include joint or coordinated publication of soliciting materials with an activist investor might, however, be indicative of group formation,

[557] Each illustration assumes that the rules adopted in this release are in effect and that the securities of the subject company are in a covered class.

[558] The conclusion reflected in this example assumes the Rule 14a–8 or other non-binding shareholder proposal is submitted jointly and without ''springing conditions'' such as an arrangement, understanding, or agreement among the shareholders to vote against director candidates nominated by the issuer's management or other management proposals if the non-binding proposal is not included in the issuer's proxy statement or, if passed, not acted upon favorably by the issuer's board.

[559] Examples of the type of consents or commitments given in furtherance of a common purpose to acquire, hold (inclusive of voting), or dispose of securities of an issuer could include the granting of irrevocable proxies or the execution of written consents or voting agreements that demonstrate that the parties had an arrangement to act in concert.

[560] *Amendments to Beneficial Ownership Reporting Requirements,* Release No. 34–39538 (Jan. 12, 1998) [63 FR 2854, 2858 (Jan. 16, 1998)].

depending upon the facts and circumstances.

Question: Would an announcement or a communication by a shareholder of the shareholder's intention to vote in favor of an unaffiliated activist investor's director nominees, without more, constitute coordination sufficient to find that the shareholder and the activist investor formed a group?

Response: No. We do not view a shareholder's independently-determined act of exercising its voting rights, and any announcements or communications regarding its voting decision, without more, as indicia of group formation. This view is consistent with our general approach towards the exercise of the right of suffrage by a shareholder in other areas of the Federal securities laws.[561] Shareholders, whether institutional or otherwise, are thus not engaging in conduct at risk of being deemed to give rise to group formation as a result of simply independently announcing or advising others—including the issuer—how they intend to vote and the reasons why.

Question: If a beneficial owner of a substantial block of a covered class that is or will be required to file a Schedule 13D intentionally communicates to other market participants (including investors) that such a filing will be made (to the extent this information is not yet public) with the purpose of causing such persons to make purchases in the same covered class, and one or more of the other market participants make purchases in the same covered class as a direct result of that communication, would the blockholder and any of those market participants that made purchases potentially become subject to regulation as a group?

Response: Yes. To the extent the information was shared by the blockholder with the purpose of causing others to make purchases in the same covered class and the purchases were made as a direct result of the blockholder's information, these activities raise the possibility that all of these beneficial owners are ''act[ing] as'' a ''group for the purpose of acquiring'' securities of the covered class within the meaning of section 13(d)(3). Such purchases may implicate the need for public disclosure underlying section 13(d)(3) and these purchases could potentially be deemed as having been undertaken by a ''group'' for the purpose of ''acquiring'' securities as specified under section 13(d)(3).[562] Given that a Schedule 13D filing may affect the market for and the price of an issuer's securities, non-public information that a person will make a Schedule 13D filing in the near future can be material.[563] By privately sharing this material information in advance of the public filing deadline, the blockholder may incentivize the market participants who received the information to acquire shares before the filing is made.[564] Such arrangements also raise investor protection concerns regarding perceived unfairness and trust in markets.[565] The final determination as to whether a group is formed between the blockholder and the other market participants will ultimately depend upon the facts and circumstances, including (1) whether the purpose of the blockholder's communication with the other market participants was to cause them to purchase the securities and (2) whether the market participants' purchases were made as a direct result of the information shared by the blockholder.

2. Proposed Rule 13d–5(b)(1)(iii) and (b)(2)(ii)

a. Proposed Amendments

The Commission proposed to amend Rule 13d–5 to expressly impute acquisitions made by a group member after the date of group formation to the group once the collective beneficial ownership among group members exceeds five percent of a covered class.[566] Specifically, proposed Rule 13d–5(b)(1)(iii) would provide that a group under section 13(d)(3) will be deemed to have acquired beneficial ownership of equity securities of a covered class if any member of the group becomes the beneficial owner of additional equity securities of such covered class after the date of the group's formation. Similarly, proposed Rule 13d–5(b)(2)(ii) would contain nearly identical language, with conforming changes to address circumstances in which a member of a group under section 13(g)(3) becomes the beneficial owner of additional equity securities of a covered class after the date of the group's formation. The Commission noted that absent an express provision that would treat post-formation acquisitions of beneficial ownership by group members as acquisitions by the group, the Commission or other affected parties must prove the acquisition is attributable to the group.[567]

b. Comments Received

The Commission did not receive any comments on proposed Rule 13d–5(b)(1)(iii) and (b)(2)(ii).

[561] For example, public announcement of a voting intention qualifies for the exclusion from the definition of solicitation under 17 CFR 240.14a–1(l)(2)(iv).

[562] While each group member individually bears a reporting obligation arising under Rule 13d–1(k)(2), a tippee would not become a member of a group, and thus would not incur a reporting obligation, until it makes a purchase of securities of the same covered class in response to having been tipped even if the tippee already is a beneficial owner of that class.

[563] *See* Alon Brav, Wei Jiang, Frank Partnoy, and Randall S. Thomas, *Hedge Fund Activism, Corporate Governance and Firm Performance,* 61 J. Fin. 1729 (2008) (finding on average an abnormal short-term return of 7% over the window before and after a Schedule 13D filing); Marco Brecht, Julian Franks, Jeremy Grant, and Hammes F. Wagner, *The Returns to Hedge Fund Activism: An International Study, Center for Economic Policy Research,* Discussion Paper No. 10507 (Mar. 15, 2015).

[564] *See, e.g.,* Susan Pulliam, Juliet Chung, David Benoit, and Rob Barry, *Activist Investors Often Leak Their Plans to a Favored Few,* Wall St. J. (Mar. 26, 2014), *available at https://www.wsj.com/articles/SB10001424052702304888404579381250791474792* (''Activists, who push for broad changes at companies or try to move prices with their arguments, sometimes provide word of their campaigns to a favored few fellow investors days or weeks before they announce a big trade, which typically jolts the stock higher or lower.'').

[565] For example, any near-term gains made by these other investors attributable to information about the impending filing may cause uninformed shareholders who sell at prices reflective of the *status quo* to question the efficacy of existing regulatory framework. Even though the demand to acquire shares in the covered class may increase as a direct result of the blockholder's communications, and in turn increase the prices at which selling shareholders exit, such prices may be discounted in comparison to the price such shareholders would have realized had the information about the impending Schedule 13D filing been public. *See, e.g.* John C. Coffee, Jr. & Darius Palia, *The Wolf at the Door: The Impact of Hedge Fund Activism on Corporate Governance,* 41 J. Corp. L. 545, 596 (2016) (explaining that ''the gains that activists make in trading on asymmetric information—before the Schedule 13D's filing—come at the expense of selling shareholders [and] represent[ ] another wealth transfer''). Consequently, this informational imbalance could, to the extent some perceive it to be unfair, diminish trust in markets. *See, e.g.,* Georgy Chabakauri et al., *Trading Ahead of Barbarians' Arrival at the Gate: Insider Trading on Non-Inside Information* (Colum. Bus. Sch. Rsch. Paper, Jan. 2022), *available at https://ssrn.com/abstract=4018057* (finding a significant concurrence between purchases of stock by insiders of the issuer and purchases by an activist in the 60 days, and particularly in the last 10 days, preceding a Schedule 13D filing).

[566] As the Commission noted, groups may form at a time when a class of equity securities is not yet registered under section 12 or the aggregate beneficial ownership held by the membership in the group on the date of its formation is 5% or below of a covered class. *See* Proposing Release at 13870. Expressly capturing post-formation acquisitions of beneficial ownership by group members therefore can become important for purposes of assessing whether a group intentionally tried to evade the reporting process, determining whether an amendment was due for a pre-existing Schedule 13D filing, and evaluating the availability of the section 13(d)(6)(B) exemption. *See id.*

[567] Proposing Release at 13870.

c. Final Amendments

For the reasons set forth in the Proposing Release,[568] we are adopting the text of Rule 13d–5(b)(1)(iii) and (b)(2)(ii) substantially as proposed. We also are redesignating these provisions as Rule 13d–5(b)(1)(ii) and (b)(2)(i) and slightly modifying them to account for the possibility that group members may make acquisitions in furtherance of the group's common purpose on the same day the group has been formed. Accordingly, the rule text will now attribute acquisitions by group members to the group at any time after the group has been formed rather than after the date on which the group has been formed.

3. Proposed Rule 13d–5(b)(1)(iv) and (b)(2)(iii)

a. Proposed Amendments

The Commission proposed amendments to Rule 13d–5 to carve out from the purview of proposed Rule 13d–5(b)(1)(iii) and (b)(2)(ii) intra-group transfers of equity securities of a covered class.[569] Specifically, proposed Rule 13d–5(b)(1)(iv) would provide that a group under section 13(d)(3) will not be deemed to have acquired beneficial ownership in a covered class if a member of the group becomes the beneficial owner of additional equity securities in such covered class through a sale by, or transfer from, another member of the group. Proposed Rule 13d–5(b)(2)(iii) would contain nearly identical language, with conforming changes to address circumstances in which a member of a group under section 13(g)(3) becomes the beneficial owner of additional equity securities in a covered class through a sale by, or transfer from, another member of the group.

b. Comments Received

The Commission did not receive any comments on proposed Rule 13d–5(b)(1)(iv) and (b)(2)(iii).

c. Final Amendments

For the reasons set forth in the Proposing Release, we are adopting the text of Rule 13d–5(b)(1)(iv) and (b)(2)(iii) substantially as proposed, but redesignating these provisions as Rule 13d–5(b)(1)(iii) and (b)(2)(ii). We also are slightly modifying the rule text to account for the possibility that group members may make intra-group transfers on the same day but after the time at which the group has been formed instead of ''after the date of group formation.''

D. Proposed Amendments to Rule 13d–6 To Create Certain Exemptions

Congress granted the Commission the authority to issue exemptions from the application of sections 13(d) and 13(g). The Commission can, under section 13(d)(6)(D), exempt acquisitions ''as not entered into for the purpose of, and not having the effect of, changing or influencing the control of the issuer or otherwise as not comprehended within the purposes of [section 13(d)].'' [570] Congress similarly granted the Commission authority, under section 13(g)(6), to exempt any person or class of persons from section 13(g) ''as it deems necessary or appropriate in the public interest or for the protection of investors.'' [571] The Commission exercised this authority when it adopted Rule 13d–6, titled ''Exemption of certain acquisitions.'' Rule 13d–6 currently sets forth one exemption from section 13(d) for the acquisition of securities of an issuer by a person who, prior to such acquisition, was a beneficial owner of more than five percent of the securities of the same class as those acquired, provided certain conditions are met.[572]

1. Proposed Amendments

In the Proposing Release, the Commission proposed to exempt certain circumstances from resulting in a person being deemed to have acquired beneficial ownership of, or otherwise to beneficially own, equity securities of a covered class for purposes of sections 13(d) and 13(g). Specifically, the Commission proposed to amend Rule 13d–6 to:

- Add new paragraph (c) to create an exemption from sections 13(d)(3) and 13(g)(3) for certain circumstances in which two or more persons take concerted actions with respect to an issuer or a covered class; and
- Add new paragraph (d) to create an exemption from sections 13(d)(3) and 13(g)(3) for certain circumstances in which two or more persons enter into an agreement setting forth the terms of a derivative security.

The Commission proposed these amendments to Rule 13d–6 to exempt certain actions taken by two or more persons from the scope of sections 13(d)(3) and 13(g)(3) if those actions do not have the purpose or effect of changing or influencing the control of an issuer and thus are not within the purpose of section 13(d).

In light of the proposed amendments to Rule 13d–5, the Commission proposed to add new paragraph (c) to Rule 13d–6 to avoid potentially chilling communications among shareholders or impeding shareholders' engagement with issuers where those activities are undertaken without the purpose or effect of changing or influencing control of the issuer (and are not made in connection with or as a participant in any transaction having such purpose or effect).[573] Proposed Rule 13d–6(c) would provide that two or more persons would not be deemed to have acquired beneficial ownership of, or otherwise beneficially own, an issuer's equity securities as a group solely because of their concerted actions related to an issuer or its equity securities, including engagement with one another or the issuer, provided they meet certain conditions. The Commission noted that such interactions, depending upon the level of coordination and degree to which the persons advocated in furtherance of a common purpose specified within the statutory framework, could be found to satisfy the ''act as'' a group standard under section 13(d)(3) or 13(g)(3) for the purpose of ''holding'' a covered class.[574] To help ensure that the exemption is available only where such persons independently determine to take concerted actions, the proposed exemption would be available only if such persons are not obligated to take such actions (*e.g.,* pursuant to the terms of a cooperation agreement or joint voting agreement).[575]

In addition, the Commission proposed to add new paragraph (d) to Rule 13d–6, in light of proposed new Rule 13d–3(e), to avoid impediments to certain financial institutions' ability to conduct their business in the ordinary course.[576] Proposed Rule 13d–6(d) would have provided that two or more persons would not be deemed to have formed a group under section 13(d)(3) or 13(g)(3) solely by virtue of their entrance into an agreement governing the terms of a derivative security. This exemption would have been available if the agreement is a bona fide purchase and sale agreement entered into in the ordinary course of business. Further, the exemption would have been available only if such persons did not enter into the agreement with the purpose or effect of changing or influencing control of the issuer, or in connection with or as a

[568] *See id.*

[569] *Id.* at 13870–71.

[570] 15 U.S.C. 78(m)(d)(6).

[571] 15 U.S.C. 78(m)(g)(6).

[572] 17 CFR 240.13d–6.

[573] Proposing Release at 13872.

[574] *Id.* at 13873.

[575] *Id.*

[576] *Id.*

participant in any transaction having such purpose or effect.

2. Comments Received

Some commenters supported proposed Rule 13d–6(c),[577] while others generally supported the proposal's intent but expressed some reservations regarding Rule 13d–6(c) as proposed.[578] Some of those commenters generally indicated that the exemption (as proposed or as modified in accordance with their recommendations) could provide clarity that would help prevent the chilling of communications among shareholders and shareholder engagement with issuers.[579] In addition, one commenter appeared to support the inclusion of the ''no obligation'' to act concept in the second prong of the proposed exception and noted that when the institutional investors that are its members act jointly, they are acting independently, consistent with their fiduciary, legal, and other obligations to their fund participants and beneficiaries.[580]

Other commenters opposed the proposed Rule 13d–6(c) exemption.[581] Some commenters appeared to base their opposition on the argument that such an exemption would impliedly define what a group is by stating what it is not.[582] Several commenters said that ambiguity in the proposed exemption could inhibit market participants' ability to readily discern when a ''purpose or effect of changing or influencing control'' has been manifested.[583] One commenter further submitted that the subjective ''control intent'' standard likely will create more uncertainty and confusion than it will resolve.[584] One commenter indicated, in light of its comments on the proposed amendments to Rule 13d–5, that ''[t]his rule [exemption] would chill the kind of shareholder communications that are central to a proxy contest'' and stated that ''[c]onsultation among fellow shareholders and discussion with the activist are . . . essential.'' [585]

A number of commenters made recommendations regarding proposed Rule 13d–6(c).[586] Some commenters requested that coordination with respect to Rule 14a–8 shareholder proposals be expressly made exempt.[587] Several commenters requested that coordination with respect to ''vote no'' campaigns be expressly made exempt.[588] Other commenters requested that it be made clear that the state of mind of one person would not be imputed to another for purposes of determining the availability of the exemption.[589] Some commenters asked that the ''in connection with [any change of control] transaction'' language be removed from the exemption.[590] One of those commenters stated that the ''in connection with'' language ''might be read too broadly and have an unintended chilling effect of the sort of communications that routinely occur today.'' [591] Some commenters indicated that the ''indirectly obligated to act'' standard was in need of clearly defined boundaries and/or should be deleted.[592] One of these commenters asserted that the ''indirectly obligated'' standard is vague and would engender additional uncertainty, and recommended that the Commission eliminate the proposed condition that ''[s]uch persons, when taking such concerted actions, are not directly or indirectly obligated to take such actions.'' [593] One commenter stated the Commission should consider the circumstances under which investors advocating for specific changes (*e.g.,* board composition or diversity) might later be subjected to an inquiry about whether their communications or activities were protected by the exemptions given the terms in the proposal such as ''solely,'' ''only,'' ''indirectly,'' ''purpose,'' ''effect,'' and ''contemplated.'' [594]

In response to the Commission's solicitation for comments on proposed Rule 13d–6(d), several commenters expressed support for the proposal.[595] One commenter stated that the proposal would ''help investors understand when they could become subject to regulation as a 'group' under these circumstances and avoid costly regulatory filings for activity in the ordinary course of business.'' [596]

Several other commenters opposed the proposed Rule 13d–6(d) exemption.[597] Some of those commenters questioned whether the proposed exemption is necessary, and implied that the proposal's inclusion in this rulemaking intimates that ordinary course of business transactions currently present risks of group formation.[598] One of those commenters said that it was fairly settled that a bilateral transaction, negotiated at arm's length, would not by itself be sufficient to create a group absent other indicia of group status such as agreements to vote and other factors.[599] Another of these commenters questioned whether this

[577] *See, e.g.,* letters from Anonymous (Mar. 13, 2022) (''Anonymous 10''); Kerrie Waring, Chief Executive Officer, ICGN (June 27, 2023) (''ICGN''); Kyle (Mar. 13, 2022) (''Kyle''); Perkins Coie.

[578] *See, e.g.,* letters from Ceres (generally supporting the proposal, but stating that the rule, as proposed, could create some ambiguity as to the circumstances under which a group is formed and suggesting changes to the proposal); Jeff Mahoney, General Counsel, Council of Institutional Investors (Apr. 8, 2022) (''CII'') (same); ICI I (supporting the intent of the proposal, but stating that the exemption, as proposed, would be too narrow and could create additional uncertainty regarding the circumstances under which a group is formed); Shareholder Rights Group, Interfaith Center on Corporate Responsibility and The Shareholder Commons (Apr. 11, 2022) (''Interfaith Center, et al.'') (endorsing the comments in the letter from Ceres).

[579] *See* letters from Ceres; CII; ICGN; ICI I; Perkins Coie.

[580] *See* letter from CII.

[581] *See, e.g.,* letters from B. Mason; CIRCA I; Dennis and Mary Spohn (June 25, 2023); EIM I; NBG; Prof. Edwards, et al.; Prof. Gordon; Prof. Webber; *see also* letter from SIFMA AMG (describing the proposed exemption as ''problematic'' and recommending that it not be adopted if the Commission also does not adopt the proposed amendments to Rule 13d–5).

[582] *See* letters from CIRCA I; Prof. Edwards, et al.; Prof. Webber. These commenters characterized the proposed exemption as setting forth the *exclusive* circumstances under which two or more persons may engage with one another or an issuer without being regulated as a group. One of these commenters further said that the Commission's description of proposed Rule 13d–6(c) ''indicate[d] that two shareholders of the same Covered Security that coordinate in any manner regarding the holding would be deemed to be a group'' unless those shareholders qualify for the proposed exemption and that ''[t]his is not consistent with the legislative history underlying the Williams Act.'' *See* letter from CIRCA I. And, one of these commenters asserted that the effect of proposed Rule 13d–6(c), in tandem with the proposed amendments to Rule 13d–5, on shareholder communications could raise concerns under the First Amendment. *See* letter from Prof. Edwards, et al.; *see also supra* note 503 and accompanying text.

[583] *See* letters from EIM I; SIFMA AMG.

[584] *See* letter from EIM I.

[585] *See* letter from Prof. Gordon.

[586] *See* letters from AFREF; Ceres; CII; IAA; ICGN; ICI I; Interfaith Center, et al.; NBG; Prof. Edwards, et al.; SSC; STB.

[587] *See* letters from AFREF; Ceres; ICI I; Interfaith Center, et al.

[588] *See* letters from AFREF; Ceres; CII; Interfaith Center, et al. For example, one commenter expressed support for the recommendations of another commenter that ''the Commission [should] clarify the Rule 13d–6(c) exception to ensure it covers launching and participating in 'vote no' campaigns and communications with Schedule 13D filers post-filing.'' *See* letter from AFREF (indicating support of a corresponding recommendation in the letter from CII).

[589] *See* letters from ICI I; Interfaith Center, et al.; SSC.

[590] *See* letters from Ceres; CII.

[591] *See* letter from CII. The commenter stated ''that the positive step taken by adopting Rule 13d–6(c) could be undercut if there is a concern among investors that communicating with a Rule 13D 'group' could expose investors to being considered as a part of that 'group.' '' *Id.*

[592] *See* letters from Ceres; CII; ICI I.

[593] *See* letter from ICI I.

[594] *See* letter from Prof. Edwards, et al.

[595] *See* letters from ICGN; O'Melveny & Myers; Perkins Coie.

[596] *See* letter from ICGN.

[597] *See* letters from ABA; EIM I; Engineer; Gabriel Morales, Retail Investor (Feb. 23, 2022) (''G. Morales''); IAA; ICI I; J. Kennedy; PSCM; SIFMA AMG; STB.

[598] *See* letters from ABA; ICI I; STB.

[599] *See* letter from STB.

proposed provision or any explicit exemption is necessary or would instead create further uncertainty given that market participants have been entering into ordinary course derivatives transactions for years without treating these transactions as creating a group.[600] One commenter expressed concerns regarding potential negative collateral effects of the exemption.[601] This commenter said that proposed Rule 13d–6(d) suggests that, ''outside of the safe harbor,'' the parties to a derivative security transaction may be deemed to form a ''group'' and implied that the exemption's existence would create a risk of eroding the confidence of parties to any ''ordinary'' securities purchase and sale transactions that they do not constitute a ''group.''[602]

Some commenters indicated that few dealers or market participants would be able to rely on the exemption or that it would not serve its intended purpose.[603] Another commenter similarly implied the exemption should not be adopted because ''financial institutions would not just be apprehensive about, or marginally disincentivized from, entering into transactions with an activist counterparty'' but instead ''would avoid the risk altogether, and wholly refrain from engaging in these transactions that are economically useful and unrelated to the purposes of Section 13.''[604] Another commenter echoed the concerns regarding the projected heightened level of risk arising in relation to the exemption and stated that the exemption would significantly impair ordinary-course derivatives transactions by dealers and financial institutions, even with counterparties who do not have any control intent.[605] A similar criticism was offered by a commenter who explained that if the proposed exemption were adopted, an implication would be created that counterparties to a derivative transaction agreement that did not qualify for the exemption would be viewed as having formed a group.[606]

Some commenters expressed doubt that proposed Rule 13d–6(d) would operate to only exempt legitimate business activity, suggesting the purpose of the proposed amendments regarding group formation and derivatives would be undermined.[607] One of these commenters said that the proposal ''sounds like this is an open invitation for high profile firms to actually work together as a group without [repercussion] of regulation.''[608] Another of these commenters appeared to refer to proposed Rule 13d–6(d) and expressed concern that the proposed exemption ''will get taken advantage of too easily and will obscure transactions that might substantially and singlehandedly affect a security.''[609] A different commenter impliedly alluded to the undermining of the proposed change to Rule 13d–5(b) and speculated that no benefit of other proposed rule changes will be received if derivative position holders can claim an exemption under a different law.[610]

3. Final Amendments

We are adopting the proposed redesignation of current Rules 13d–6 and 13d–5(b)(2) as Rule 13d–6(a) and (b), respectively, for the reasons set forth in the Proposing Release and as discussed above.[611] As discussed in more detail below, however, we are not adopting proposed Rule 13d–6(c) or (d).

The Commission proposed Rule 13d–6(c) in connection with proposed Rule 13d–5(b)(1)(i) and (b)(2)(i).[612] As discussed above, we are not adopting those amendments.[613] Proposed Rule 13d–6(c) was intended to avoid potentially chilling communications among shareholders or impeding shareholders' engagement with issuers where those activities are undertaken without the purpose or effect of changing or influencing control of the issuer (and are not made in connection with or as a participant in any transaction having such purpose or effect).[614] Some commenters, however, expressed concern that the exemption would in fact have the opposite effect.[615] This concern appears to be based on their view that the exemption would be too narrow and impliedly define what actions would be sufficient to constitute ''acting as a group'' (*i.e.,* any actions that would not qualify for the proposed exemption).[616] To address those concerns, and in light of the fact that we are not adopting the amendments to Rule 13d–5 that prompted the proposal of the exemption in Rule 13d–6(c), we are not adopting Rule 13d–6(c). We also believe that the discussion and guidance we provided in section II.C.1.c above will help to address the Commission's goals of preserving shareholder communications and engagement with issuers that are undertaken without the purpose or effect of changing or influencing control.

Similarly, after considering the comments received regarding proposed Rule 13d–6(d),[617] we also do not believe adoption of that exemption is necessary. Under sections 13(d)(3) and 13(g)(3), formation of a group requires that two or more persons be found to have acted as a group for the purpose of acquiring, holding, or disposing ''of securities of an issuer.'' Many cash-settled derivatives, including those that were intended to be covered by proposed exemption, are not considered ''securities of [the] issuer.'' Those derivatives originate with persons other than the issuer and simply reference a class of an issuer's securities. The holders of such cash-settled derivative securities are, therefore, generally not owed a fiduciary duty by the issuer and do not generally have legal standing to bring a claim against the issuer. Moreover, holders of such derivative securities are not, by virtue of those instruments, debt or equity holders of the issuer and are not entitled to a right to vote or dispose of any security ''of an issuer'' based on their investment in these derivatives. Absent the circumstances in which a holder of a derivative settled exclusively in cash that did not originate with the issuer could become a beneficial owner of the reference security,[618] the Commission does not believe that persons who, in the ordinary course of business, acquire derivative securities settled exclusively in cash would generally be deemed to ''act as a . . . group'' under sections 13(d)(3) and 13(g)(3) with the financial

[600] *See* letter from ICI I.

[601] *See* letter from ABA.

[602] *See id.*

[603] *See* letters from EIM I; IAA; STB. One of these commenters further reasoned that the exemption is arbitrary and capricious because it would treat similarly situated parties differently inasmuch as only a subset of dealer transactions may be viewed as having contributed to an activist's goals. *See* letter from EIM I.

[604] *See* letter from PSCM.

[605] *See* letter from STB. The commenter added that ''the uncertainty caused by proposed Rule 13d–6(d) may increase risks for market participants in otherwise established financial transactions which may inhibit such activity.'' *Id.*

[606] *See* letter from ABA.

[607] *See* letters from Engineer; G. Morales; J. Kennedy.

[608] *See* letter from J. Kennedy.

[609] *See* letter from Engineer.

[610] *See* letter from G. Morales.

[611] *See supra* note 22 for a discussion of our redesignation of current Rules 13d–6 and 13d–5(b)(2) as Rule 13d–6(a) and (b), respectively.

[612] Proposing Release at 13872.

[613] *See supra* section II.C.1.

[614] Proposing Release at 13872.

[615] *See supra* notes 585–591 and accompanying text.

[616] *See supra* notes 582–584 and accompanying text.

[617] *See supra* notes 595–610 and accompanying text.

[618] See *supra* section II.B.3 for a discussion of those circumstances.

institutions that sell such derivatives. Simply put, such persons cannot be found, as a matter of law, to have acquired, held, or disposed ''of securities of an issuer'' as that term is used in sections 13(d)(3) and 13(g)(3).

While investors in a cash-settled equity-based derivative security, in order to acquire the derivative security, may need to enter into an agreement governing the terms of such instrument with a financial institution that, in the ordinary course of its business, acts as a counterparty to such investors, that agreement, without more, does not result in group formation. We believe that a bilateral transaction, negotiated at arm's length and entered into solely for commercial purposes, as described, would not by itself introduce facts sufficient to find that a group exists. In our view, an agreement between an investor in a cash-settled derivative security and a counterparty entered into for the ordinary course of business would fail to satisfy the ''act as a . . . group'' element in sections 13(d)(3) and 13(g)(3) absent other indicia of group status such as agreements to vote or other factors.

To offset any risk exposure to that derivative security, including any obligations that may arise at settlement, the financial institution counterparty may, in practice, purchase securities in the reference covered class and hold such reference security for the duration of the agreement. While it may be true that but for the joint actions of the parties in entering into the agreement, that specific acquisition of beneficial ownership in the covered class by the financial institution would not have occurred, we believe that if the counterparty acts on its own initiative and not at the direction of the investor or otherwise on its behalf, there is no basis to assert that the investor and counterparty acted in concert and thus subjected themselves to regulation as a group. As such, entry into such an agreement will not implicate sections 13(d)(3) and (g)(3) because the two persons cannot be viewed as acting as a group even given the financial institution's foreseeable acquisition of securities of a covered class. Assuming that the investor and the financial institution did not enter into the agreement with the purpose or effect of changing or influencing control of the issuer, the regulatory purposes of sections 13(d) and 13(g) would not be furthered by treating the investor and the financial institution as members of a group under section 13(d)(3) or section 13(g)(3) solely by virtue of their entrance—for strictly commercial purposes and not for purposes of acquiring, holding, or disposing of a covered class—into that agreement. Accordingly, we have elected not to adopt proposed Rule 13d–6(d) as the exemption is not needed in order for such ordinary course of business transactions in derivative securities to freely occur.

E. Amendment to Schedule 13D To Clarify Disclosure Requirements Regarding Derivative Securities

Schedule 13D sets forth the information that beneficial owners reporting pursuant to section 13(d)(1) and Rule 13d–1(a) must disclose. Item 6 of Schedule 13D requires beneficial owners to ''[d]escribe any contracts, arrangements, understandings or relationships (legal or otherwise) among the persons named in Item 2 [of Schedule 13D] and between such persons and any person with respect to any securities of the issuer'' and sets forth a non-exclusive list of examples of such contracts, arrangements, understandings or relationships.[619] Because cash-settled derivative securities were not expressly included among these examples, questions may arise as to whether beneficial owners should report their holdings of these derivative securities as contracts ''with respect to'' an issuer's securities under the rationale that (1) only a purely economic, but no legal, interest is generally held through such derivatives in any class of an issuer's securities and (2) the issuer's securities are only used as a reference security. Further, as discussed below, the current requirement could be interpreted as excluding the disclosure of cash-settled options not offered or sold by the issuer, or other derivatives not originating with the issuer, including other cash-settled derivatives such as SBS.

1. Proposed Amendment

In the Proposing Release, the Commission proposed to amend Schedule 13D to clarify the disclosure requirements with respect to derivative securities held by a person reporting on that schedule. The Commission noted that, at present, the formulation ''with respect to securities of the issuer'' in Item 6 might be read to suggest that contracts, arrangements, understandings or relationships that only create economic exposure to the issuer's equity securities or are otherwise considered synthetic could be excluded.[620] Accordingly, to remove any ambiguity as to the scope of the required disclosures, the Commission proposed to revise Item 6 to expressly state that the use of derivative securities, including cash-settled SBS and other derivatives settled exclusively in cash, which use the issuer's securities as a reference security are included among the types of contracts, arrangements, understandings and relationships which must be disclosed.[621] The Commission also proposed the amendment to clarify that the derivative security need not have originated with the issuer or otherwise be part of its capital structure in order for a disclosure obligation to arise.[622] The proposed amendment thus specified that a person filing a Schedule 13D would be required to disclose interests in all contracts, arrangements, understandings, or relationships, including derivative securities, that use the issuer's equity security as a reference security.

2. Comments Received

Commenters expressed various views on the proposed amendment to Item 6 of Schedule 13D. Some commenters supported the proposed amendment.[623] One commenter, which did not clearly support or oppose the proposal with respect to Item 6, appeared to indicate, in connection with a response to a request for comment with respect to Item 7, Exhibits, that Item 6 may already apply to cash-settled derivatives.[624]

Other commenters opposed the proposed amendment to Item 6 of Schedule 13D, stating that requiring disclosure of SBS arrangements in Item 6 would be confusing and indicating that it did not believe this disclosure would serve any additional purpose.[625] One commenter explained that determining which type of derivative security to include in different parts of Schedule 13D would present a logistical challenge.[626] The commenter anticipated that the compliance-related challenge would arise, from an operational point of view, because of the

[619] 17 CFR 240.13d–101, Item 6.

[620] Proposing Release at 13874.

[621] *Id.* To further minimize any potential ambiguity regarding what interests need to be disclosed, the Commission also proposed to eliminate the ''including but not limited to'' regulatory text that precedes the itemization of the instruments or arrangements covered. *Id.*

[622] *Id.*

[623] *See, e.g.,* letters from AFL–CIO; D. Pierce; Mark C.

[624] *See* letter from STB. Specifically, the commenter said that the filing of the cash-settled derivative instruments as an exhibit to Schedule 13D is unnecessary because the ''material terms of such arrangements . . . can be described in'' Item 6. *Id.* The commenter also stated that the filing of such instruments as exhibits would present logistical difficulties if the proposed ''compressed'' timeframes for reporting Schedule 13D amendments are adopted. *Id.*

[625] *See, e.g.,* letters from IAA; Slade Thornburg (June 25, 2023) (''S. Thornburg'').

[626] *See* letter from IAA.

regulatory inconsistency created by the exclusion of SBS from the beneficial ownership calculation under proposed Rule 13d–3(e) but the inclusion of SBS under Item 6 (to the extent they use the issuer's equity security as a reference security).[627] The commenter expressed additional concern that requiring disclosure of SBS arrangements under Item 6 would negate the benefits to these holders of non-disclosure of counterparties in proposed Schedule 10B.[628]

3. Final Amendment

We are adopting the amendment to Item 6 of Schedule 13D as proposed. Specifically, we are amending Rule 13d–101 to expressly state that derivative contracts, arrangements, understandings, and relationships with respect to an issuer's securities, including cash-settled SBS and other derivatives which are settled exclusively in cash, would need to be disclosed under Item 6 of Schedule 13D in order to comply with section 13(d)(1) and Rule 13d–1(a). We also are eliminating the ''including but not limited to'' language in Item 6 that currently precedes the itemization of the instruments or arrangements covered to remove any implication that additional interests may need to be disclosed.

We believe that investors could benefit from a more complete disclosure of a Schedule 13D filer's economic interests in the relevant issuer, including economic interests via positions in cash-settled derivatives. For example, disclosure of any such cash-settled derivatives may help investors evaluate whether their interests with respect to the issuer's securities are aligned with the Schedule 13D filer's. In addition, disclosure of this information is consistent with other interests required to be disclosed under Item 6, such as, for example, ''division of profits or loss.''

Our adoption of the amendment also furthers the congressional purpose of section 13(d)(1), as demonstrated by the legislative history accompanying Congress' enactment of this provision.[629] The disclosures required under Item 6 of Schedule 13D originated with a congressional mandate. Congress specified certain information within sections 13(d)(1)(A) through (E) that beneficial owners must report once they incur a filing obligation. In addition to the disclosure required under sections 13(d)(1)(A) through (E), Congress also authorized the Commission to require disclosure of ''such additional information'' it prescribes as ''necessary or appropriate in the public interest or for the protection of investors.''[630] Under section 13(d)(1)(E), Congress provided that a beneficial owner must report ''information as to any contracts, arrangements, or understandings with any person with respect to any securities of the issuer, including [the] transfer of any of the securities, joint ventures, loan or option arrangements, puts or calls, guaranties of loans, guaranties against loss or guaranties of profits, division of losses or profits, or the giving or withholding of proxies.''[631] Consistent with the mandate of section 13(d)(1)(E), which forms part of the basis for the disclosure requirements of existing Item 6, this baseline disclosure requirement has existed in Schedule 13D since 1968.

We note that one commenter opposed the proposed amendment to Item 6. The commenter stated, among other things, that requiring disclosure of SBS holdings in Item 6 would be confusing.[632] Specifically, the commenter pointed out that proposed Rule 13d–3(e) would have excluded SBS and stated that there would be a ''logistical challenge'' associated with *excluding* SBS from the beneficial ownership calculation but *including* them in the narrative disclosure in response to Item 6.[633] We disagree. Item 6 (as well as the other items in Schedule 13D) already requires disclosure of various information that does not factor into calculating a Schedule 13D filer's beneficial ownership.[634] We do not believe that requiring disclosure in Item 6 of SBS that may be excluded from a Schedule 13D filer's beneficial ownership calculation would present any unique complications or be more complex than disclosure of this other information, and the commenter did not present any specific ''logistical challenges'' that could arise from this requirement. Moreover, we are not adopting proposed Rule 13d–3(e),[635] further diminishing this concern about potential confusion.

The commenter also noted that the proposed amendment to Item 6 would be unnecessary in light of, and could conflict with, the disclosure of SBS positions in proposed Rule 10B–1.[636] While the Commission will consider concerns about a potential conflict if it takes any final action with respect to proposed Rule 10B–1, we note that proposed Rule 10B–1 (along with proposed Schedule 10B) is intended to serve a purpose different from Item 6 of Schedule 13D. The Commission proposed Rule 10B–1 to, among other things, provide market participants (including counterparties, issuers, and issuers' stakeholders) and regulators with access to information that may indicate that a person (or a group of persons) is building up a large SBS position, and to alert market participants and regulators to the existence of concentrated exposures to a limited number of counterparties, which should inform those market participants and regulators of the attendant risks, allow counterparties to risk manage and lead to better pricing of the SBS with respect to transactions with persons holding large positions in those SBS (as a result of all market participants having

[627] *Id.* According to the commenter, ''[n]ot only would this be confusing, but we do not believe such disclosure would serve any additional purpose.'' *Id.*

[628] *Id.* Specifically, the commenter noted that proposed ''Schedule 10B . . . would not require identification of the swap counterparty'' while ''the instruction to Item 6 requires 'naming the persons with whom such contracts, arrangements, understandings, or relationships have been entered into.'" *Id.* Schedule 10B is a proposed disclosure statement containing information regarding large SBS positions and other information that would be required by proposed 17 CFR 240.10B–101. The Commission proposed this disclosure statement in a proposing release titled *Prohibition Against Fraud, Manipulation, or Deception in Connection with Security-Based Swaps; Prohibition against Undue Influence over Chief Compliance Officers; Position Reporting of Large Security-Based Swap Positions,* Release No. 34–93784 (Dec. 15, 2021) [87 FR 6652 (Feb. 4, 2022)] (''Schedule 10B Proposal'').

[629] *See* Disclosure of Corporate Equity Ownership, H.R. Rep. No. 1711, at 8 (1968) (''The purpose of section 13(d) is to require disclosure of information by persons who have acquired a substantial *interest,* or increased their *interest* in the equity securities of a company by a substantial amount, within a relatively short period of time.'' (Emphasis added)).

[630] 15 U.S.C. 78m(d)(1).

[631] *Id.*

[632] *See supra* notes 626–627 and accompanying text.

[633] *See id.*

[634] For example, Item 6 requires a description of ''any contracts, arrangements, understandings or relationships . . . with respect to any securities of the issuer, including . . . puts or calls.'' 17 CFR 240.13d–101, Item 6. If any such ''puts or calls'' include call options with respect to the issuer's covered class that are not exercisable within 60 days (and were not acquired with a change of control purpose or effect), then they would be required to be disclosed in response to Item 6, but they would not factor into the Schedule 13D filer's beneficial ownership. *See* Rule 13d–3(d)(1)(i). Similarly, Item 4(a) of Schedule 13D requires a description of ''any plans or proposals which the reporting persons may have which relate to or would result in . . . [t]he acquisition by any person of additional securities of the issuer, or the disposition of securities of the issuer.'' 17 CFR 240.13d–101, Item 4(a). Although such plans for potential future acquisitions or dispositions of securities of the issuer could, if consummated, result in changes to the Schedule 13D filer's beneficial ownership, they generally would not factor into the beneficial ownership amount reflected in the Schedule 13D filing in which such plans are disclosed.

[635] *See supra* section II.B.3.

[636] *See supra* note 628 and accompanying text.

access to the information about the positions).[637] Item 6 of Schedule 13D, on the other hand, is intended to implement section 13(d)(1)(E), where Congress specifically mandated that the disclosure statement filed would include information as to any contracts, arrangements, or understandings with any person with respect to any securities of the issuer, including the names of relevant parties, as part of its intent to require disclosures to security holders regarding persons with significant holdings. Thus, in light of that congressional mandate, we believe it is appropriate to require disclosure of such information pursuant to Item 6 of Schedule 13D.

F. Structured Data Requirement for Schedules 13D and 13G

Currently, the EDGAR Filer Manual requires Schedules 13D and 13G to be filed electronically on the Commission's EDGAR system in HTML or ASCII format.[638] HTML and ASCII are both unstructured data languages; thus, the disclosures reported on Schedules 13D and 13G are not currently machine-readable.[639] As a result, information disclosed on Schedules 13D and 13G is generally more difficult for investors and other market participants to access, compile, and analyze as compared to information that is submitted in a machine-readable data language.

While the majority of EDGAR filings under the Commission's rules are submitted in HTML or ASCII, certain EDGAR filings are submitted using machine-readable, XML-based languages that are each specific to the particular EDGAR document type being submitted.[640] This includes filings that, like Schedules 13D and 13G, are submitted by individuals and entities other than the registrant of the class of securities.[641] For these EDGAR XML filings, filers are typically provided the option to either submit the filing directly to EDGAR in XML, or manually input their disclosures in a fillable web form as part of an online web application developed by the Commission that converts the completed form into an EDGAR-specific XML document.

1. Proposed Amendment

In the Proposing Release, the Commission proposed to require that beneficial ownership reports on Schedules 13D and 13G be filed using a structured, machine-readable data language. In particular, the Commission proposed to require that Schedules 13D and 13G be filed in part using an XML-based language specific to Schedules 13D and 13G (''13D/G-specific XML'').[642] For both Schedules, all disclosures, including quantitative disclosures, textual narratives, and identification checkboxes, would be structured in 13D/G-specific XML under the proposal, with the exception of the exhibits to the Schedules, which would remain unstructured. The Commission stated that a structured data requirement for the disclosures reported on Schedules 13D and 13G would greatly improve the accessibility and usability of the disclosures, allowing investors to access, aggregate and analyze the reported information in a much more timely and efficient manner.[643]

2. Comments Received

Commenters largely supported the proposed structured data requirement for Schedules 13D and 13G.[644] Other commenters objected to the proposed structured data requirement for Schedules 13D and 13G, with one commenter expressing concern that the proposed structured data requirement would be unduly burdensome for small beneficial owners.[645]

Some of the supporting commenters asserted that the proposed structured data requirement would improve the fairness and transparency of the markets.[646] One commenter asserted that the proposal would be a fundamental step toward ensuring that the beneficial ownership reporting requirements remain modern and comprehensible.[647] One commenter noted that the proposed structured data requirement would not impose significant costs to beneficial owners of more than five percent of a covered class and stated that the requirement would allow the Commission to make use of advancing technologies in order to reduce costs to taxpayers and more speedily provide the public with the information it needs to accurately assess the conditions of the market.[648] Another commenter asserted that the proposal would enable the Commission to process filings instantaneously and therefore allow for real-time analysis and if necessary, remedial action and stated that any data which cannot be easily processed by machines will become largely useless as the century progresses.[649] In addition, one commenter agreed with the Commission that tagging the data reported on Schedules 13D and 13G will make it easier for investors and other market participants to access, compile, and analyze this information and expressly supported the Commission's development of electronic ''style sheets'' that, when applied to the reported XML data, would represent that data in ''human readable'' format.[650]

Some of the supporting commenters also made recommendations to the Commission regarding the proposed structured data requirement. One commenter requested that the Commission release the taxonomy at least six months in advance of the date by which any revised Schedules 13D or 13G must be filed so that reporting

[637] *Prohibition Against Fraud, Manipulation, or Deception in Connection with Security-Based Swaps; Prohibition against Undue Influence over Chief Compliance Officers; Position Reporting of Large Security-Based Swap Positions,* Release No. 34–93784 (Dec. 15, 2021) [87 FR 6652, 6667, 6678 (Feb. 4, 2022)].

[638] EDGAR Filer Manual (Volume II) version 67 (Sept. 2023) (''EDGAR Filer Manual''), at 5–1 (requiring EDGAR filers generally to use ASCII or HTML for their document submissions, subject to certain exceptions). Schedule 13D and 13G filers are required, by rule, to comply with the requirements of the EDGAR Filer Manual. *See* 17 CFR 232.301 (''Filers must prepare electronic filings in the manner prescribed by the EDGAR Filer Manual, promulgated by the Commission, which sets forth the technical formatting requirements for electronic submissions.'').

[639] The term ''machine-readable'' is defined in 44 U.S.C. 3502 as ''data in a format that can be easily processed by a computer without human intervention while ensuring no semantic meaning is lost.''

[640] *See* Securities and Exchange Commission, Current and Draft Technical Specifications, *available at https://www.sec.gov/edgar/filer-information/current-edgar-technical-specifications.*

[641] Examples include the section 16 beneficial ownership reports (Forms 3, 4, and 5) and Form 13F. *See id.*

[642] The Commission noted that this would be consistent with the approach used for other XML-based structured data languages created by the Commission for certain EDGAR Forms, including the data languages used for reports on each of Form 13F, Form D and the section 16 beneficial ownership reports (Forms 3, 4, and 5). Proposing Release at 13874, n. 154.

[643] *Id.* at 13875. These considerations are generally consistent with objectives of the Financial Data Transparency Act of 2022, which directs the establishment by the Commission and other financial regulators of data standards for collections of information. Such data standards must meet specified criteria relating to openness and machine-readability and promote interoperability of financial regulatory data across members of the Financial Stability Oversight Council. *See* James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Public Law 117–263, tit. LVIII, 136 Stat. 2395, 3421–39 (2022).

[644] *See, e.g.,* letters from Aaron Leonard (June 28, 2023); Anonymous 12; Benjamin Ng (Feb. 21, 2022) (''B. Ng''); Convergence; David Kraft (June 26, 2023); FundApps; HMA I; IAA; ICI I; J. Kennedy; J. Pieper; J. Soucie; Mike Slavens, Retail Investor and Mechanical Engineer (Feb. 19, 2022) (''M. Slavens''); Mark C.; P. Worts; Todd; XBRL US (Apr. 11, 2022) (''XBRL'').

[645] *See, e.g.,* letter from A. Day; *see also* letters from B. Mason; S. Thornburg.

[646] *See* letters from Anonymous 12; J. Kennedy; M. Slavens.

[647] *See* letter from B. Ng.

[648] *See* letter from J. Soucie.

[649] *See* letters from Convergence; FundApps.

[650] *See* letter from ICI I.

persons can incorporate the taxonomy into their filing system.[651] Similarly, other commenters recommended that the Commission provide for a test period in which reporting persons can make test filings using the taxonomy in advance of the date by which the revised schedules must be filed.[652] Finally, one commenter suggested that the Commission opt for the XBRL data language, rather than creating an XML schema designed specifically for beneficial ownership reporting as proposed.[653]

3. Final Amendment

We are adopting the structured data requirement for Schedules 13D and 13G as proposed. Specifically, we are replacing the current HTML or ASCII requirement for Schedules 13D and 13G in the EDGAR Filer Manual with a requirement to use 13D/G-specific XML for the disclosures reported on those Schedules.[654] As is the case with other EDGAR XML filings, reporting persons will be able to, at their option, submit filings directly to EDGAR in 13D/G-specific XML or use a web-based reporting application developed by the Commission that will generate the Schedule in 13D/G-specific XML in connection with the submission of the filing to EDGAR.[655]

In adopting the structured data requirement as proposed, we note that commenters overwhelmingly supported the proposal.[656] Although one commenter opposed the proposed structured data requirement on the basis that it would be unduly burdensome for small beneficial owners,[657] we believe the web-based reporting application that will generate the Schedule in 13D/G-specific XML should serve to reduce the burden of preparing a Schedule 13D or 13G for small beneficial owners (and other Schedule 13D and 13G filers), as compared to the current system whereby beneficial owners generally use third-party software to prepare their Schedule 13D or 13G.[658] In addition, because 13D/G-specific XML lends itself more readily to the development of a web-based reporting application on EDGAR than XBRL does, we believe 13D/G-specific XML is more suitable than XBRL for structuring Schedules 13D and 13G.[659] In response to commenters requesting a test period for the revised Schedules and requesting a taxonomy (*i.e.,* schema) release at least six months before compliance is required, we are providing an extended voluntary compliance period during which the schema will be publicly available.[660] The compliance period is discussed in further detail in section II.G below.

G. Compliance Dates

The Commission did not propose a transition period for any of the Proposed Amendments. Some commenters suggested, however, that the Commission should provide for an extended compliance period with respect to the proposed structured data requirement for Schedules 13D and 13G.[661] Based on this feedback, we believe that an extended transition period for compliance with the structured data requirement is appropriate. As such, compliance with the structured data requirement for Schedules 13D and 13G will not be required until December 18, 2024. We welcome, however, early compliance with this requirement, and Schedule 13D and 13G filers may begin to voluntarily comply with the structured data requirement on December 18, 2023.

In order to further reduce some of the potential burdens that commenters described, compliance with the revised Schedule 13G filing deadlines under Rules 13d–1 and 13d–2 will not be required before September 30, 2024. Thus, notwithstanding the fact that the final amendments will become effective on February 5, 2024, beneficial owners will continue to be required to comply with the current Schedule 13G filing deadlines through September 29, 2024. Beginning on September 30, 2024, however, beneficial owners will be required to comply with the revised Schedule 13G filing deadlines. For example, under Rule 13d–2(b), as amended, a Schedule 13G filer will be required to file an amendment within 45 days after September 30, 2024, if, as of end of the day on that date, there were any material changes in the information the filer previously reported on Schedule 13G.

III. Other Matters

If any of the provisions of these amendments, or the application thereof to any person or circumstance, is held to be invalid, such invalidity shall not affect other provisions or the application of such provisions to other persons or circumstances that can be given effect without the invalid provision or application.

Pursuant to the Congressional Review Act, the Office of Information and Regulatory Affairs has designated these amendments a ''major rule,'' as defined by 5 U.S.C. 804(2).

IV. Economic Analysis

A. Overview

As discussed in section II, the final amendments generally shorten the filing deadlines for initial Schedule 13D and 13G filings, together with other changes described below. These filings are required in accordance with sections 13(d) and 13(g) of the Exchange Act. Section 13(d) was enacted in 1968 with the intent to alert issuers and the marketplace to rapid accumulations of equity securities by persons who would then have the potential to change or influence control of the issuer.[662] Section 13(g), subsequently enacted in 1977, was intended, together with section 13(d), to provide a ''comprehensive disclosure system of corporate ownership'' applicable to all persons who are the beneficial owners of more than five percent of a covered class.[663]

[651] *Id.*

[652] *See* letters from IAA; ICI I.

[653] *See* letter from XBRL. The commenter asserted that, among other purported benefits, an XBRL-based standard will result in significantly lower costs and efficiencies across both reporting entities and data users, consistent datasets that can be easily commingled with other datasets, and enhanced validation capabilities to improve data quality. *Id.*

[654] Section 13(g)(5) of the Exchange Act provides, in part, that ''the Commission shall take such steps as it deems necessary or appropriate in the public interest or for the protection of investors . . . to tabulate and promptly make available the information contained in any report filed pursuant to this subsection in a manner which will, in the view of the Commission, maximize the usefulness of the information to . . . the public.'' 15 U.S.C. 78m(g)(5). The requirement proposed in this section would be consistent with this mandate. Although this statutory language applies only to beneficial ownership reports filed pursuant to section 13(g)—*i.e.,* a Schedule 13G filed by an Exempt Investor—we believe these public benefits would be furthered by applying the requirement proposed in this section to all Schedule 13D and 13G filers.

[655] In addition, the Commission's staff intends to develop electronic ''style sheets'' that, when applied to the reported XML data, will represent that data in human-readable form on EDGAR.

[656] *See supra* section II.F.2.

[657] *See supra* note 645 and accompanying text.

[658] For example, this web-based reporting application will contain and prompt a beneficial owner to respond to the Schedule 13D and 13G disclosure requirements, as set forth in Rules 13d–101 and 13d–102, respectively, which should make the preparation process more streamlined and convenient.

[659] *See also infra* section IV.D.3.

[660] *See supra* notes 651–652 and accompanying text.

[661] *See id.*

[662] *See* H.R. Rep. No. 1711, at 8 (1968).

[663] *See* S. Rep. No. 114, at 14 (1977).

The efficiency of financial markets rests on material information becoming public in a timely fashion. In addition to protecting investors, greater availability of information allows securities prices to better reflect their issuers' fundamental value, and ultimately promotes capital formation. The widespread enactment of laws and regulations that restrict the use of information obtained by virtue of insider status, as well as regulations that restrict selective disclosure to certain persons in the absence of public disclosure, point to the public-good nature of rules requiring public disclosure.

This same principle motivates the requirement to disclose beneficial ownership of significant shareholders with the potential to change or influence control of the issuer. Knowledge of who is influencing control is highly material.[664] Investors benefit from this information just as they benefit from material information regarding their investments more broadly. The five-business day deadline balances the interest of investors to be in possession of material information with the interest of investors seeking changes in control that may benefit shareholders, and is longer than the filing deadline for other settings involving ownership changes, such as for Form 4 under Exchange Act section 16 reporting.[665]

Moreover, as we discuss below, studies suggest that traders other than the filer may be in a position to become aware of a potential activist campaign and buy stock of the target issuer immediately prior to a Schedule 13D filing, thereby benefiting directly from foreknowledge of the filing rather than their own efforts.[666] Shortened filing deadlines may lessen the opportunity for these traders to gain such an advantage, as discussed below, which could enhance trust in markets and thereby capital formation. Finally, shortening the deadline is expected to reduce overall informational asymmetries in the market. Both theoretical and empirical studies have connected information asymmetry, and in particular the presence of informed traders, to wider bid-ask spreads.[667] We therefore expect shortening the initial Schedule 13D filing deadline to improve liquidity.[668]

Shortening the initial Schedule 13D filing deadline will have costs. Specifically, activist investors will have less time in which to accumulate shares before the filing deadline and, therefore, before the price of the stock reflects their plans. This may reduce their expected profit, and accordingly some of the incentives for activism. However, although we cannot predict with precision the magnitude of the ultimate effect on activism and how the overall markets and activists themselves will respond to these changes, we believe it is likely that the shortened deadline will not significantly reduce the level of activism as we expect most campaigns will not be affected by the amended deadline, based on our analysis of historical campaigns, and most activists will have ability to adapt to the shortened deadline through various alternatives.

We are also, among other things, revising the filing deadlines for Schedule 13D and 13G amendments and amending Item 6 of Schedule 13D, which requires the disclosure of certain contracts, arrangements, understandings, and relationships, to remove any implication that a person is not required to disclose interests in all derivative securities that use a covered class as a reference security. Each of these final amendments may allow investors and other market participants to make better-informed decisions by accelerating the disclosure of information or expanding the amount of information disclosed. The final amendments also require that Schedule 13D and Schedule 13G be filed using a structured, machine-readable data language, which may facilitate the extraction and analysis of information in the filings, and make technical changes to Regulation S–T associated with extending the filing ''cut-off'' time from 5:30 p.m. to 10 p.m., which may ease the compliance costs for filers.

We are mindful of the costs and benefits of the final amendments.[669] Below, we discuss in more detail the economic effects of the final amendments, including their anticipated costs and benefits and, integrated into that discussion, the likely effects of the final rules on efficiency, competition, and capital formation.[670] We also analyze the potential costs and benefits of significant alternatives to the final amendments.

B. Baseline

The baseline against which the costs, benefits, and the effects on efficiency, competition, and capital formation of the final amendments are measured consists of the current state of the market and the current regulatory framework. The economic analysis considers existing regulatory requirements, including recently adopted rules, as part of its economic baseline against which the costs and benefits of the final amendments are measured.[671]

[664] For the purpose of this economic analysis, the term ''significant shareholders'' is used to represent persons with a large shareholding in a particular issuer. The terms ''blockholders'' and ''significant stockholders'' were used to represent such persons in the Proposing Release.

[665] Some commenters indicated that the Commission failed to appropriately justify the shortened filing deadlines or identify an associated market failure, or stated that the information asymmetry between a filer and the market is not a market failure or otherwise problematic. *See, e.g.,* letters from AIMA; EIM I; IAA; ICM; Profs. Bishop and Partnoy I; Profs. Eccles and Rajgopal; Profs. Swanson, Young, and Yust; SIFMA; SIFMA AMG; TIAA. We agree that the initial information asymmetry between a prospective filer and the market is not a market failure because in its absence, the filer may not be sufficiently rewarded for the expenses of its efforts expended in information acquisition and in pursuing changes at the issuer, which often have market-level benefits. Nevertheless, an earlier resolution of this information asymmetry is expected to have the benefits discussed in this economic analysis.

[666] *See infra* section IV.C.1.a.iii.

[667] *See infra* section IV.C.1.a.iv.

[668] *See id.*

[669] Section 3(f) of the Exchange Act [17 U.S.C. 78c(f)] requires the Commission, when engaging in rulemaking where it is required to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation. Further, section 23(a)(2) of the Exchange Act [17 U.S.C. 78w(a)(2)] requires the Commission, when making rules under the Exchange Act, to consider the impact that the rules would have on competition, and prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the Exchange Act.

[670] Several commenters raised concerns about the Proposing Release's discussion of potential effects on efficiency, competition, and/or capital formation. *See, e.g.,* Craig Lewis, *Review of the Economic Analysis for Proposed Rule Amendments to Modernize Beneficial Ownership Reporting,* exhibit to letter from EIM I (''Lewis Study I (exhibit to letter from EIM I)'') (stating that the discussion of efficiency, competition, and capital formation in the Proposing Release ''appears to be an afterthought and glosses over or fails to address many important points''); *see also* letters from AIMA; B. Sharfman; Profs. Schwartz and Shavell I; Profs. Schwartz and Shavell II. Our analysis of potential effects on efficiency, competition, and capital formation has been revised and expanded from the Proposing Release and has been integrated into the discussion of the benefits and costs of the final amendments.

[671] *See, e.g., Nasdaq* v. *SEC,* 34 F.4th 1105, 1111–15 (D.C. Cir. 2022). This approach also follows Commission staff guidance on economic analysis for rulemaking. *See* Staff's ''Current Guidance on Economic Analysis in SEC Rulemaking'' (Mar. 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

Continued

1. Current Schedule 13D and 13G Filing Requirements

The current Schedule 13D and Schedule 13G filing requirements are discussed in detail in section II.A above.[672] Briefly, an initial Schedule 13D is currently required to be filed within 10 days after any acquisition of beneficial ownership of a covered class that results in a person directly or indirectly being the beneficial owner of more than five percent of the covered class. Among other disclosures, the reporting person must describe, pursuant to Item 6 of Schedule 13D, any contracts, arrangements, understandings, or relationships among the reporting persons or between the reporting persons and any other person with respect to any securities of the issuer. In addition, a Schedule 13D amendment must be filed ''promptly'' upon any material change in the facts reported in the Schedule 13D filing, inclusive of any amendments thereto.[673]

The initial filing deadline for the initial Schedule 13G varies by investor category. QIIs and Exempt Investors must file an initial Schedule 13G within 45 days after the end of the calendar year in which their beneficial ownership exceeds five percent of a covered class at the end of the last day of that calendar year. Further, if a QII beneficially owns more than 10 percent of a covered class as of the last day of any month, then the initial Schedule 13G must be filed within 10 days after the end of that month. Passive Investors must file an initial Schedule 13G within 10 days of acquiring beneficial ownership of more than five percent of a covered class.

For all Schedule 13G filers, if, as of the end of the calendar year, there are any changes in the information previously reported in a Schedule 13G filing, a Schedule 13G amendment must be filed within 45 days after the end of that calendar year. In addition, QIIs must file a Schedule 13G amendment within 10 days after the end of the first month in which their beneficial ownership either exceeds 10 percent of a covered class, or, once across that threshold, increases or decreases by more than five percent of the covered class. Similarly, Passive Investors must ''promptly'' file a Schedule 13G amendment upon acquiring beneficial ownership of more than 10 percent of a covered class, or, once across that threshold, if they increase or decrease their beneficial ownership by more than five percent of the covered class.

2. Market Trends

There have been significant changes in the technological, financial market, and regulatory environment since the enactment of the Williams Act.[674] In particular, various new technologies developed over this time period facilitate the filing process, including both the preparation and submission of a filing. For example, communications have become easier and faster over this time, facilitating the gathering of information to be disclosed and any necessary coordination among parties. Further, information technologies used to compile the necessary data and prepare and transmit filings may have helped to reduce the time required to produce and submit filings. Also, electronic submission relieves filers of the need to mail or hand deliver filings. On the other hand, as some commenters noted, some of the tasks necessary for filers' preparation and submission of filings have not been automated or otherwise accelerated.[675] Further, as one commenter noted, information technologies have also facilitated easier and faster access to filings, which may reduce the time for the information in filings to reach market participants even under the same deadline.[676] Modern information technologies and the faster pace of communication may also allow investors and other market participants to react more quickly to disclosures, such that they may benefit more from disclosures being made a few days earlier than they might have in earlier decades, when decision-making may have proceeded at a slower pace.

In addition to the ease of communication, the introduction of electronic trading, new types of financial contracts and instruments, and advances in order-splitting and other trade execution optimization techniques, as well as the rise of dark pools,[677] may facilitate an investor accumulating a large equity stake more quickly than at the time of the enactment of the Williams Act. On the other hand, we also recognize that accumulating significant ownership could instead be more difficult in the face of modern algorithmic and high-frequency trading, more sophisticated surveillance of equity trading and ownership by other traders, market participants, and issuers,[678] and the defenses and tactics currently used by issuers with respect to potential unsolicited takeover bids or shareholder activism.[679]

At least one study presents evidence that, despite variations in the number of filings from month to month and from year to year, the absolute number of initial or total Schedule 13D filings

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 that would improperly assume the adoption of those proposed actions.

[672] Other disclosure requirements may also apply to significant shareholders. For example, persons deemed beneficial owners of more than 10% of any class of equity securities (other than certain exempted securities) registered under Exchange Act section 12 are also considered to be insiders for the purpose of Exchange Act section 16 and subject to the associated disclosure requirements. For example, these persons must file with the Commission an initial report on Form 3 either within 10 days after becoming an insider of an issuer that already has a class of equity securities registered under section 12, or upon the issuer's initial registration of the class of equity security under section 12. 15 U.S.C. 78p(a)(2)(A)–(B). Also, acquisitions of ownership stakes exceeding certain dollar thresholds trigger the premerger notification requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976. Public Law 94–435, 90 Stat. 1383 (1976), as administered by the Federal Trade Commission and Department of Justice. In general, we do not expect these additional disclosure requirements to significantly affect the costs and benefits of the final rules.

[673] As noted *supra* in section II.A.3 the Commission has expressed that under the current standard, ''[a]ny delay beyond the date the filing reasonably can be filed may not be prompt'' and an amendment to a Schedule 13D reasonably could be filed in as little as one day following the change (citing *In re Cooper Laboratories,* Release No. 34–22171 (June 26, 1985)). Some commenters indicated that the requirement for Schedule 13D amendments to be made ''promptly'' has generally been understood to mean within two business days. *See* letters from EIM I; IAA.

[674] *See* Proposing Release at 13851. Several commenters identified trends that were not discussed in the Proposing Release or indicated that the economic analysis in the Proposing Release could have been enhanced by considering additional evidence regarding changes over time. *See* letters from Charlie Penner and Bob Eccles (Apr. 12, 2022) (''C. Penner and Prof. Eccles''); CIRCA I; CIRCA IV; ICM; Prof. Gordon; PSCM; SCG; Lewis Study I (exhibit to letter from EIM I) (requesting ''evidence that efficiency enhancements have increased the pace at which investors build beneficial ownership positions''). In response to these comments, this discussion has been expanded relative to the discussion in the Proposing Release with respect to changes since the enactment of the Williams Act. *See supra* notes 138–141 and accompanying text.

[675] *See infra* notes 866–867 and accompanying text.

[676] *See* letter from CIRCA IV.

[677] *See* letter from SCG. A dark pool is a private forum for trading securities. *See also Order Competition Rule,* Release No. 34–96495 (Dec. 14, 2022) [88 FR 128 (Jan. 3, 2023)] (for further discussion on dark pools).

[678] *See* letter from ICM.

[679] Researchers have found that the increased use of low-threshold poison pills within the last decade or two could increase the difficulty of accumulating an equity stake beyond a certain size. *See, e.g.,* Ofer Eldar et al., *The Rise of Anti-Activist Poison Pills* (Working Paper, Jan. 2023), *available at https://ssrn.com/abstract=4198367;* Nicole Boyson & Pegaret Pichler, *Hostile Resistance to Hedge Fund Activism,* 32 Rev. Fin. Stud. 771 (2019) (''Boyson & Pichler 2019 Study''). Commenters discussed an increased use of poison pills as well as a more general increase in anti-takeover or ''anti-activist'' defenses. *See* letters from CIRCA I; EIM III; ICM; Prof. Gordon; PSCM.

made per year did not increase overall from 1985 to 2012.[680] Commission staff analysis of more recent filings supports the observation that the number of total filings made per year has not increased over recent decades; in fact, the number of Schedule 13D filings has decreased somewhat in the most recent decade.[681] Further, according to academic research examining different time periods and subsets of filings from 1985 through 2018, there has been no significant change in the average level of beneficial ownership of a covered class reported in individual initial Schedule 13D filings over that time horizon.[682] Commission staff analysis of more recent filings supports the observation that the average level of beneficial ownership reported in initial Schedule 13D filings has not meaningfully changed in recent decades.[683]

There is also research that addresses whether other developments may have changed the significance of lower ownership stakes in an issuer's securities over time. For example, some observers have stated that the increase in stock ownership by institutional investors, the rise of proxy advisory services,[684] and regulatory and legal developments regarding shareholder communications may have made it easier for an investor with a lower ownership stake to influence other shareholders, and, ultimately, the issuer.[685] On the other hand, others have stated that the increased presence of institutional investors may make it more difficult for an investor with a lower ownership stake to exert control, without the support of these institutional investors.[686] Overall, it is unclear whether regulatory, legal, and market developments have led activist campaigns by investors with lower ownership stakes to become more or less effective over time.[687] That said, researchers have noted that today's market for corporate control, in contrast to that at the time of the enactment of the Williams Act and the Commission's original adoption of the related rules, prominently features investors with minority interests in issuers who seek to influence these issuers' governance or corporate policies by convincing other shareholders to support their causes instead of pursuing direct control of issuers through majority ownership.[688]

3. Affected Parties and Current Market Practices [689]

The parties affected by the final amendments include: all investors that are required or potentially required to report their beneficial ownership of covered classes on Schedules 13D and 13G; the issuers of covered classes; shareholders of these issuers who are not Schedule 13D or 13G filers; and other investors, market participants, and issuers. Below we provide information about the current nature of Schedule 13D and Schedule 13G filings and filers, which has not changed markedly since publication of the Proposing Release.

a. Schedule 13D Filings

i. Number of Filings, Filer Types, and Time To File

During calendar year 2022, the Commission received a total of 5,179 Schedule 13D filings, including 1,161 initial filings and 4,018 amendments.[690]

[680] *See, e.g.,* Ulf von Lilienfeld-Toal & Jan Schnitzler, *What is Special About Hedge Fund Activism? Evidence from 13–D Filings,* Swedish House of Fin. Rsch. Paper No 14–16 (June 4, 2014), *available at https://ssrn.com/abstract=2506704* (''Lilienfeld-Toal and Schnitzler 2014 Study'') (plotting, in Figure 1 therein, the number of initial and total Schedule 13D filings per month from 1985 through 2012, and demonstrating substantial month-to-month variation and a slight overall downward trend overall in initial and total Schedule 13D filings).

[681] Staff reviewed the number of Schedule 13D and 13D/A filings on EDGAR each year from 1997 (the first full year after the phase-in of electronic filing was complete) through 2022, available at *https://www.sec.gov/dera/data/dera_edgarfilingcounts,* and found no clear trend in the number of these filings per year over the last decade, but found that the rate of Schedule 13D filings over the last decade was somewhat lower than the rate in the earlier part of the sample period. For example, for the years 1997 through 2010, the average number of filings per year were approximately 2,800 and 5,200 for initial and amended Schedule 13D filings respectively, which are generally consistent with the monthly rates of filings reported for 1985 through 2012 in the Lilienfeld-Toal and Schnitzler 2014 Study. In contrast, for the years 2011 through 2022, the average number of filings per year were roughly 1,400 and 4,100 for initial and amended Schedule 13D filings respectively. This decline is roughly commensurate with the decline in the number of publicly listed companies. Staff also reviewed the number of Schedule 13G filings on EDGAR each year from 1997 through 2022, from the same source, and found no clear trend in the number of such filings per year over this period.

[682] *See, e.g.,* Lilienfeld-Toal and Schnitzler 2014 Study (based on data from all Schedule 13D filings from 1985 through 2005, including data from paper filings obtained via Thomson Research); Lucian Bebchuk et al., *Pre-Disclosure Accumulations by Activist Investors: Evidence and Policy,* 39 J. Corp. L. 1, 14–17 (2013) (''Bebchuk et al. 2013 Study'') (based on data from Schedule 13D filings by hedge funds from 1994, the advent of electronic trading, through 2007). Subsequent research on more recent samples of Schedule 13D filings by hedge funds shows reported average ownership levels consistent with the Bebchuk et al. 2013 Study. *See, e.g.,* Alon Brav et al., *Governance by Persuasion: Hedge Fund Activism and Market-Based Shareholder Influence, Oxford Rsch. Encyclopedia of Econ. and Fin.* (2022) (''Brav et al. 2022 Study'') (based on data from Schedule 13D filings by hedge funds from 1994 through 2018).

[683] See sections IV.B.3.a.i and ii below for details on the filings analyzed by staff.

[684] Proxy advisory firms (or proxy voting advice businesses) provide voting services that can help shareholders, primarily investment advisers and institutional investors, manage their substantive and procedural proxy voting needs with respect to the public companies they own, including assisting these shareholders in making their voting determinations on behalf of their own clients and handling other aspects of the voting process. *See, e.g., Exemptions from the Proxy Rules for Proxy Voting Advice,* Release No. 34–89372 (July 22, 2020) [85 FR 55082 (Sept. 3, 2020)].

[685] *See, e.g.,* John C. Coffee, Jr. & Darius Palia, *The Wolf at the Door: The Impact of Hedge Fund Activism on Corporate Governance,* 41 J. Corp. L. 545, 553–71 (2016); *see also* letter from SCG (stating that ''activists today have more resources, often win the support of highly influential proxy advisors, can readily share their views on financial news networks, and have access to . . . modern financial instruments that they can use to postpone disclosure'').

[686] *See, e.g.,* Ian Appel et al., *Standing on the Shoulders of Giants: The Effect of Passive Investors on Activism,* 32 Rev. Fin. Stud. 2720 (2019) (''Appel et al. 2019 Study'').

[687] It is difficult to measure how the effectiveness of activist campaigns may have changed over time because, among other things, the outcomes of campaigns are heterogeneous and thus difficult to compare, the costs of most campaigns are not observable, and the threat of a campaign can have significant effects without being associated with an observable campaign. Commenters expressed mixed views on whether activist campaigns have become more or less effective over time. *See, e.g.,* letters from WLRK II (describing an ''increasing effectiveness of activist campaigns and their decreased cost''); Profs. Bishop and Partnoy I (stating that ''the impact that shareholder activists are having on corporate America is modest and in decline'' and citing a practitioner study ''describing the number of board seats secured by activists as 'lower than in recent years''' and ''describing the number of activist campaigns in 2021 as 'in line with 2020's slower pace''').

[688] *See, e.g.,* Brav et al. 2022 Study; *see also* letter from Profs. Bishop and Partnoy I (stating that ''public company boards are no longer monitored by hostile takeovers, so activism is the remaining recourse'').

[689] Commenters specifically suggested the Commission consider the interaction between the final amendments and the Short Position Reporting Proposal, its proposal relating to the reporting of securities loans, and the security-based swap reporting portion of the Schedule 10B Proposal. *See* letters from Profs. Bishop & Partnoy I; EIM IV at 4–5; ICI II at 7 n. 13; *see also Reporting of Securities Loans,* Release No. 34–94315 (Feb. 25, 2022) [87 FR 11659]. These proposals, or portions of proposals, have not been adopted and thus have not been considered as part of the baseline here. To the extent those proposals or portions of proposals are adopted in the future, the baseline in those subsequent rulemakings will reflect the regulatory landscape that is current at that time.

[690] These estimates are based on staff analysis of EDGAR filings. The Proposing Release reported that the Commission received 10,542 Schedule 13D filings (2,288 initial filings and 8,254 amendments) in calendar year 2020. As noted in the DERA Memorandum, based on further staff review of these reported statistics, we believe they included duplicate records, and that the actual number of unique Schedule 13D filings received in 2020 was 5,288 filings (1,148 initial filings and 4,140 amendments), which is similar to the counts provided for 2022 above. One commenter addressing the DERA Memorandum questioned whether data pertaining to other filing years used in the analyses in that memorandum include ''similar double counting.'' *See* letter from EIM IV. Staff reviewed to verify that duplicate records were

Continued

Overall, these initial filings and amendments involved 2,194 unique lead filers.[691] Additional details specific to the initial filings, including their breakdown and characteristics by filer type, are presented in Table 1.[692]

TABLE 1—INITIAL SCHEDULE 13D FILINGS IN 2022 BY FILER TYPE

	Prominent activists	Other institutions	Other individuals	All filings
Number of unique lead filers	22	720	252	994
Number of initial filings	60	843	258	1,161
Median calendar days from trigger date * to filing date	9	10	11	10
Median ownership reported in filing	6.6%	15.0%	10.5%	13.0%

* The trigger date is the date on which the investor has acquired beneficial ownership of more than 5% of a class of equity securities described in section 13(d)(1) of the Exchange Act and Rule 13d–1(i), or, for an investor previously eligible to file a Schedule 13G in lieu of a Schedule 13D pursuant to Rule 13d–1(b) or (c), the date on which the investor becomes ineligible to report on Schedule 13G.

We present the breakdown of filer type in the initial Schedule 13D filings under the baseline in Table 1 to characterize the affected parties. We did not limit our analyses of costs and benefits to any of these categories.[693]

A detailed day-by-day breakdown of the percentage of the filings made each day after the trigger date is provided in Figure 1 below.[694]

not included in the statistics and analyses in the DERA Memorandum or in this economic analysis.

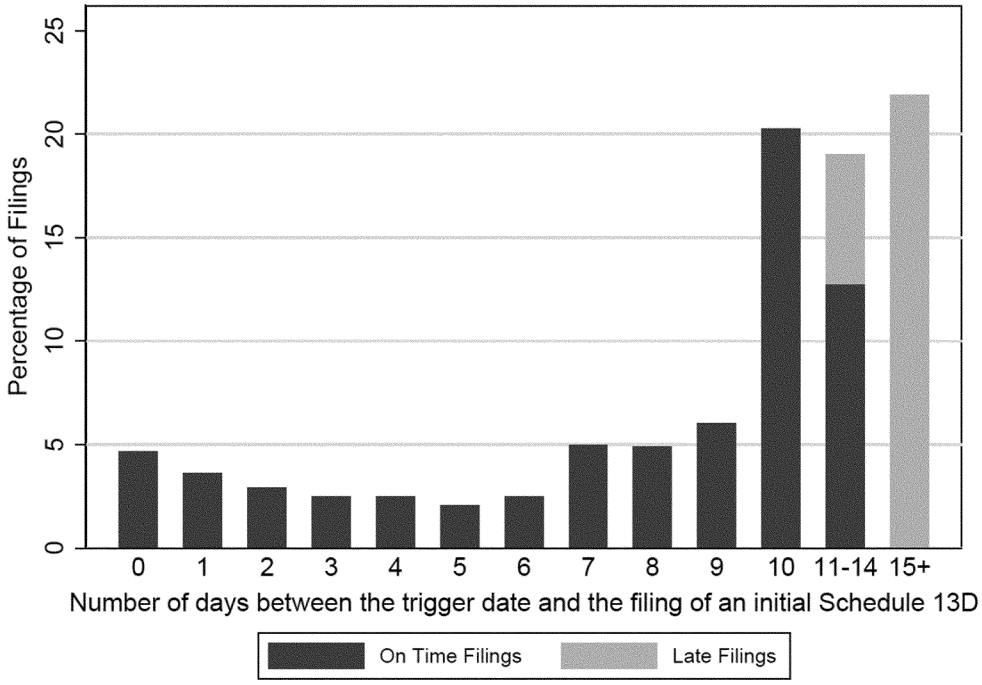
[691] This estimate is based on staff analysis of EDGAR filings. ''Lead filer'' indicates the filer that submits a filing to the Commission, though the same filing may include information about additional co-filers and their beneficial ownership of securities.

[692] These estimates are based on staff analysis of EDGAR filings. The ''Prominent Activists'' category is based on the classification of the filer as either (or both) (i) a member of the Insightia (previously Activist Insight) ''Activist Top Ten'' list in any of the 10 years (2014 to 2023) that this list has been published, which represent Insightia's ranking of the most influential activists over the past year, based on the quantity, size, and performance of their activist investments; or (ii) a ''Sharkwatch 50'' activist in the FactSet SharkRepellent database as of 2021, which represents FactSet's compilation of the 50 most significant activists based on, *e.g.,* the number and impact of their campaigns as of that date. The ''Other Institutions'' category is based on filings by institutions (primarily partnerships, corporations, investment advisors, and banks) that do not fall in the ''Prominent Activist'' category. The ''Other Individuals'' category is based on filings that report holdings of individuals and no other filer type and that do not fall in the ''Prominent Activist'' category; filings that report holdings of individuals who are co-filing as affiliates or part of a group with institutions (none of whom fall in the ''Prominent Activist'' category) are included in the ''Other Institutions'' category. Information about the number of days from the trigger date to the filing date of the Schedule 13D and the beneficial ownership percentage reported in the Schedule 13D, respectively, are based on a subset of filings (about 98% of the filings) for which we were able to extract the required information. The ''median ownership reported in filing'' row represents the median, across filings, of the maximum beneficial ownership percentage separately reported in a filing and may thus understate the aggregate ownership of a group of co-filers. Based on hand-collection of aggregate ownership in a random subsample of 2021 filings, we estimate that this approach does not fully aggregate all of the ownership reported by a group of co-filers in approximately 7% of the filings. In contrast, alternative algorithms we considered to aggregate ownership reported in different fields in a given filing very often vastly overstated ownership due to the double-counting of shares whose beneficial ownership could be attributed to multiple affiliates.

[693] *See* letter from EIM IV (stating that the categorization of filers by type in the DERA Memorandum implied that ''activists (prominent or otherwise) warrant separate regulatory scrutiny''). This commenter also raised concerns about the reliability of the FactSet SharkRepellent database used to identify ''prominent activists,'' including whether the data is ''accurate and current.'' We note that the FactSet SharkRepellent database including the ''Sharkwatch 50'' is used, currently, by both academics (*see, e.g.,* Ian Appel & Vyacheslav Fos, *Short Campaigns by Hedge Funds* (Working Paper, Feb. 2023), available at *https://ssrn.com/abstract=3242516*) and practitioners (*see, e.g.,* the activist surveillance tool offered at *Activist Surveillance,* The Conference Board, *https://www.conference-board.org/proxyvoting*) to identify prominent activists. We also note that the categorization ''prominent activist'' is used in the production of descriptive statistics that characterize Schedule 13D filings and the affected parties but does not contribute to key results or estimates of our analyses. Nevertheless, given this commenter's concerns, staff revised its approach to identifying ''prominent activists'' by supplementing the ''Sharkwatch 50'' with an annual ranking of top activists published by Insightia (including a total of 34 ''top ten'' activists over 10 years) to compile a broader list of ''prominent activists.'' *See supra* note 692. This revision resulted in the addition of five Schedule 13D filers from our 2011–2021 sample to the category of ''prominent activists.''

[694] This figure is based on staff analysis of EDGAR filings and reflects the subset of filings (1,136 of the total 1,161 filings reported in Table 1) for which required information could be extracted.

Figure 1. Days between trigger date and the filing of initial Schedule 13D filings in 2022



About 71 percent of all of the initial Schedule 13D filings in 2022 were filed within the existing 10-day filing window (represented by the dark grey bars),[695] with about 34 percent of the filings being made on the filing deadline.[696] Approximately 29 percent of the initial Schedule 13D filings, representing about 41 percent of all of the initial Schedule 13D filings that were filed by the current filing deadline, were filed within the amended five-business day deadline.

ii. Types of Filings

An initial Schedule 13D filing obligation is triggered by the acquisition of beneficial ownership of more than five percent of a covered class, which can be achieved through various means, including via the purchase of shares on the open market as well as the receipt of shares through events involving off-market transactions. Initial Schedule 13D filings are required in a number of different circumstances, only some of which reflect shareholder activism, as noted by commenters.[697] As discussed further below, filings involving the acquisition of shares as a result of certain corporate actions and other off-market transactions (*e.g.,* compensatory equity grants to executives) are less likely to be characterized as announcements of activist campaigns.

Based on staff review of over a decade of Schedule 13D filings,[698] we believe that the nature of transaction history disclosures, which are required pursuant to Item 5(c) of Schedule 13D,[699] provide a reasonable means of distinguishing, in a large sample, those filings that are likely to reflect the acquisition of beneficial ownership through corporate actions or other off-market transactions as opposed to those that are more likely to represent activist campaigns.[700] In particular, for those filings for which we could not extract a history of transactions in tabular form, we found that most reported only one or two transactions, representing off-market transfers of shares.[701] We found

[695] We note that approximately 42% of the Schedule 13D filings in Figure 1 were made after the tenth day following the trigger date. However, not all of these filings are considered late by the Commission. By rule, the Commission accepts as timely any filing that, if the calendar due date falls on a weekend or holiday, is received by the next business day. 17 CFR 240.0–3(a) (''[I]f the last day on which [a filing] can be accepted as timely filed falls on a Saturday, Sunday or holiday, such [filing] may be [made] on the first business day following.''). Therefore, after accounting for weekends and holidays, we preliminarily estimate that about 29% of the filings (represented by the light grey bars) were late.

[696] This statistic includes the 20.7% of initial Schedule 13D filings made on the 10th day after the trigger date (*i.e.,* the dark gray bar for day 10 in Figure 1) as well as those filings made after the 10th day but still considered timely due to holidays or weekends (*i.e.,* the dark gray portion of the bar for days 11–14 in Figure 1). *See supra* note 695.

[697] *See, e.g.,* letter from STB (stating that ''the Commission should recognize that the investors who file on Schedule 13D are by no means all activist investors engaging in the types of activities the Williams Act seeks to regulate'').

[698] Staff analyzed initial Schedule 13D filings from EDGAR from calendar years 2011 to 2021 through programmatic text analysis and manual review. In particular, programmatic search terms were designed to identify text or data associated with transactions or with beneficial ownership obtained through various kinds of events (such as initial public offerings (''IPOs'') and equity-based compensation awards). Programmatic text analysis was also used to extract transaction history data reported in tabular form. Manual review of the extracted text and data and of the filings was used to better understand the nature of different filings and to what extent the extracted text and data were systematically related to the different types of underlying filings.

[699] *See* 17 CFR 240.13d–101, Item 5(c) (requiring reporting persons to ''[d]escribe any transactions in the class of securities reported on that were effected during the past sixty days or since the most recent filing of Schedule 13D'').

[700] We also note that the nature of transaction history disclosures affects staff's ability, in practice, to include filings in certain analyses. In particular, data on the share accumulation patterns of the filer could only be systematically extracted from filings when it was presented in tabular form, and such data is required for the analyses presented in Tables 5 and 6 below (in sections C.1.a.iii and C.1.b.i).

[701] This observation is based on staff review of initial Schedule 13D filings from EDGAR from calendar years 2011 to 2021 through programmatic text analysis and manual review. In particular, staff used programmatic text analysis to extract potential transaction dates outside of any tabular disclosure by searching for any text in the format of a date that seemed to be accompanied by a price and/or a quantity of shares. Among the filings for which a tabular history of transactions was not extracted, no more than two potential transaction dates were extracted for about 70% of the filings. Upon manual review of the remaining 30% of the filings for which a tabular history of transactions was not extracted, staff found that a large number of the additional potential transaction dates that were programmatically extracted do not actually reflect

Continued

that these filings are typically associated with beneficial ownership acquired in events such as the consummation of negotiated mergers and acquisitions, IPOs, other restructurings, private placements, or compensation awards.[702] We therefore categorize these filings as ''corporate action filings.'' [703] In contrast, we found that filings that report a transaction history pursuant to Item 5(c) in tabular form are typically associated with the accumulation of shares in open-market trading through a series of multiple transactions and are more likely to discuss potential plans and proposals that are commonly viewed as characteristic of activist campaigns.[704] We therefore categorize the filings for which we are able to extract a transaction history in tabular form as ''non-corporate-action filings,'' which we view as more likely to involve activist campaigns, acknowledging that we may be somewhat over-inclusive in our application of the term ''activist campaign.'' [705] We present a breakdown of the percentages of initial Schedule 13D filings in calendar years 2011 through 2021 that we characterize as ''non-corporate-action filings'' or ''corporate action filings'' based on the nature of transaction histories extracted from the filings in Table 2.[706]

TABLE 2—TYPES OF INITIAL SCHEDULE 13D FILINGS IN 2011–2021

	Number of filings	Percentage of all filings (%)	Breakdown by filer type		
			Prominent activists (%)	Other institutions (%)	Other individuals (%)
Non-Corporate-Action Filings *	3,067	20	28	65	7
Corporate Action Filings **	12,657	80	3	67	30

* Filings for which tabular trading histories were extracted are categorized as ''Non-Corporate-Action Filings'' due to the results of our staff's programmatic and manual review of such filings. *See* note 705 regarding some of the limitations of this approach. About 11% of these filings were filed late relative to the current deadline (*see* note 706).

** Filings for which tabular trading histories were not extracted are categorized as ''Corporate Action Filings'' due to the results of our staff's programmatic and manual review of such filings. *See* note 703 regarding some of the limitations of this approach. About 34% of filings in this category were filed late relative to the current deadline (*see* note 706).

The categorization of filings presented in Table 2 was also included by staff in the DERA Memorandum. One comment letter addressing the DERA Memorandum indicated that the analysis presented in that memorandum (which is similar to analysis included in this economic analysis) was not replicable because it is ''not based on publicly available information,'' citing staff's references to programmatic text analysis and manual review.[707] To clarify, the analyses in the DERA Memorandum and this economic analysis are based on publicly available filings and datasets. The reliance of the staff's analysis on programmatic text analysis is limited primarily to the extraction of trigger dates, the reported level of beneficial ownership, and the tabular trading histories (as discussed in this section) from public initial Schedule 13D filings from EDGAR. This data or other data that would allow us to understand the share accumulation patterns of filers is not available from any third-party sources that we are aware of, and our extraction of this data is not novel; other researchers have extracted similar transaction history data from public Schedule 13D filings for the purpose of academic studies.[708] Further, the manual review (as well as certain additional programmatic text analysis) discussed in this section and elsewhere in this economic analysis is used to validate our methodologies and not to generate the results of the analyses.

Another commenter addressing the DERA Memorandum raised concerns about potential errors in the classification of filings as ''non-corporate-action filings'' category, as acknowledged by staff in the DERA Memorandum, and questioned why the magnitude of any overstatement of this category is not quantified.[709] In the

transactions. We therefore believe that a significant fraction of these remaining filings also reflect no more than two transactions.

[702] This observation is based on staff review of initial Schedule 13D filings from EDGAR from calendar years 2011 to 2021 through programmatic text analysis and manual review, including significant manual review of the disclosures pursuant to Item 3 of the Schedule 13D filings to confirm the source of the shares acquired. See *supra* note 698 for more detail on the analysis and review undertaken.

[703] While we label all of these filings as ''corporate action filings'' for simplicity, we acknowledge that some of these filings represent transfers that are not strictly related to corporate actions, such as bequests of shares, and that our classification methodology is subject to some possible error. For example, 3% of these filings reflected in Table 2 below are made by Prominent Activists, as described *supra* note 692, (representing 28% of all of the filings by Prominent Activists in Table 1 above) and it is possible that such filings may represent activist campaigns incorrectly classified as corporate action filings.

[704] This observation is based on staff review of initial Schedule 13D filings from EDGAR from calendar years 2011 to 2021 through programmatic text analysis and manual review, including significant manual review of the disclosures pursuant to Item 4 of the Schedule 13D filings regarding the purpose of the transaction. See *supra* note 731 for more detail on the analysis and review undertaken. Examples of plans and proposals that were considered characteristic of activist campaigns include potential discussions or recommendations with respect to board composition, other governance matters, business strategy, capital structure and dividend policies, and a potential sale process for the issuer or a segment of the issuer.

[705] In a manual review of these filings, our staff did observe many instances of beneficial ownership held for investment purposes, with no stated plans or proposals, which are nonetheless included in our category of non-corporate-action filings by virtue of their filing on Schedule 13D (rather than Schedule 13G) and their inclusion of a tabular transaction history. In general, our classification methodology is subject to some possible error. Further, a filer might not consider itself an ''activist investor'' or be viewed as such even if it is involved in what we label as a non-corporate-action filing and characterize as a potential activist campaign for purposes of this memorandum.

[706] These estimates are based on staff analysis of EDGAR filings, including programmatic text analysis to extract tabular trading histories. *See supra* note 692 regarding the filer type classifications. The classification of filings as late (in the notes accompanying the table) accounts for the effect of weekends and holidays. *See supra* note 695.

[707] *See* letter from Profs. Bishop and Partnoy III.

[708] *See, e.g.,* Pierre Collin-Dufresne & Vyacheslav Fos, *Do Prices Reveal the Presence of Informed Trading?,* 70 J. Fin. 1555 (2015) (''Collin-Dufresne & Fos 2015 Study''); Yu Ting Forester Wong, *Wolves at the Door: A Closer Look at Hedge Fund Activism,* 66 Mgmt. Sci. 2347 (2020) (''Wong 2020 Study'').

[709] *See* letter from EIM IV. That commenter also stated that the categorization of filings presented in the DERA Memorandum would, in some cases, result in ''potential double counting'' whereby ''Schedule 13D filings with respect to a single M&A transaction would likely end up in both categories.'' *Id.* We do not believe there is a risk of double-counting in this sample given that it is limited to initial Schedule 13D filings and each filing appears only in a single category. If a person that is a potential acquiror in an M&A transaction files an initial Schedule 13D while assembling an initial position, and then files a Schedule 13D amendment upon consummation of the acquisition of the issuer, only the initial Schedule 13D would appear (in a single category) in our analysis.

discussion above, we acknowledge that some filings classified as non-corporate-action filings do not state plans and proposals typical of activist campaigns. That said, these filings are still due consideration. That is, to the extent the share accumulation patterns reported in these filings would be affected by a shortened deadline, and to the extent these filings are associated with abnormal stock returns, they may still be important to consider in evaluating the costs and benefits quantitatively analyzed in this economic analysis. We also acknowledge above that some non-corporate-action filings may be incorrectly categorized as corporate action filings.[710] While we acknowledge the potential noise in our data, we believe that any large dataset or classification approach applied to a large dataset would be subject to some degree of error. Another commenter suggested that we consider using an alternative database, stating that it ''includes a more comprehensive dataset on non-corporate action filings and activist campaigns than that created by DERA.'' [711] Our initial dataset includes all Schedule 13D filings on EDGAR, so we expect it to be fully comprehensive. As discussed above, the subset of these filings that are categorized as non-corporate-action filings may not include every filing that some may consider to represent an ''activist campaign.'' However, it is not practical to extend the key analyses conducted later in this economic analysis to additional filings because staff was, by definition, unable to systematically extract transaction history data for the filings classified as corporate action filings, and data on the share accumulation patterns of the filer are required for these analyses.[712] We do not believe that potential misclassifications have a meaningful impact on the results or interpretation of the analyses in this economic analysis.[713]

iii. Timing of Share Accumulation

Because the final amendments will shorten the window between the trigger date and filing deadline for an initial Schedule 13D filing, we also consider current practices under the baseline with respect to the timing of the filer's accumulation of shares during the filing window.

As discussed above, for those initial Schedule 13D filings that we classify as ''corporate action filings,'' which represent about 80 percent of initial Schedule 13D filings (per the second row of Table 2), we found that most reported only one or two transactions representing off-market transfers of shares.[714] These transfers typically took place on or very close to the trigger date.[715] We found that very few of these transfers occur following the fifth day after the filer [716] crosses the five percent threshold.[717]

For initial Schedule 13D filings that we classify as ''non-corporate-action filings,'' we use data extracted from the filings to examine filers' current patterns of share accumulation. We extracted such data from the 3,067 non-corporate-action filings from 2011 through 2021 reflected in the first row of Table 2. We further refined the sample of filings to exclude late filers and filers with no beneficial ownership reported as of the filing date and to adjust for multiple filings on the same date.[718] Our refinements resulted in a sample size of 2,370 non-corporate-action filings, which we use for Figures 2, 3a, 3b, and Table 3 below. Figure 2 displays the percentage of non-corporate-action filings for which filers completed acquiring the total beneficial ownership reported in their initial Schedule 13D filing by the specified day after the trigger date.[719]

[710] One commenter suggested that staff ''could have alternately analyzed a set of Schedule 13D filed by prominent activists to avoid assignment errors.'' *See* Craig Lewis, *Review of the Supplemental Data and Analysis on Certain Economic Effects of Proposed Amendments Regarding the Reporting of Beneficial Ownership,* exhibit to letter from EIM IV (''Lewis Study II (exhibit to letter from EIM IV)''). We note that prominent activists are responsible for a minority of non-corporate-action filings (per Table 2) and that we do not believe it would be appropriate to limit our assessment of costs and benefits to this subgroup of filers given that filings by less prominent activist investors and filers that do not consider themselves to be ''activist'' investors are also due consideration and may be associated with similar types of costs and benefits. Further, it is not necessarily the case that filings by prominent activists are misclassified as corporate action filings, as many of these filers engage in a variety of activities which could include involvement in corporate actions of the types listed above.

[711] *See* letter from CIRCA IV (recommending the use of the 13D Monitor database).

[712] *See* Tables 5 and 6 below (in sections C.1.a.iii and C.1.b.i).

[713] For example, staff found that many filings by prominent activists that were categorized as ''corporate action filings'' did not involve the accumulation of shares on the open market during the filing window, which is why staff could not extract a tabular transaction history. This finding also means that the risk that the filer's acquisition of its beneficial ownership interest could be affected by the shortened filing deadline is limited.

[714] *See supra* note 701.

[715] This observation is based on staff review of initial Schedule 13D filings from EDGAR from calendar years 2011 to 2021 through programmatic text analysis (to extract potential transaction dates, as discussed *supra* note 701, and to extract trigger dates) and manual review.

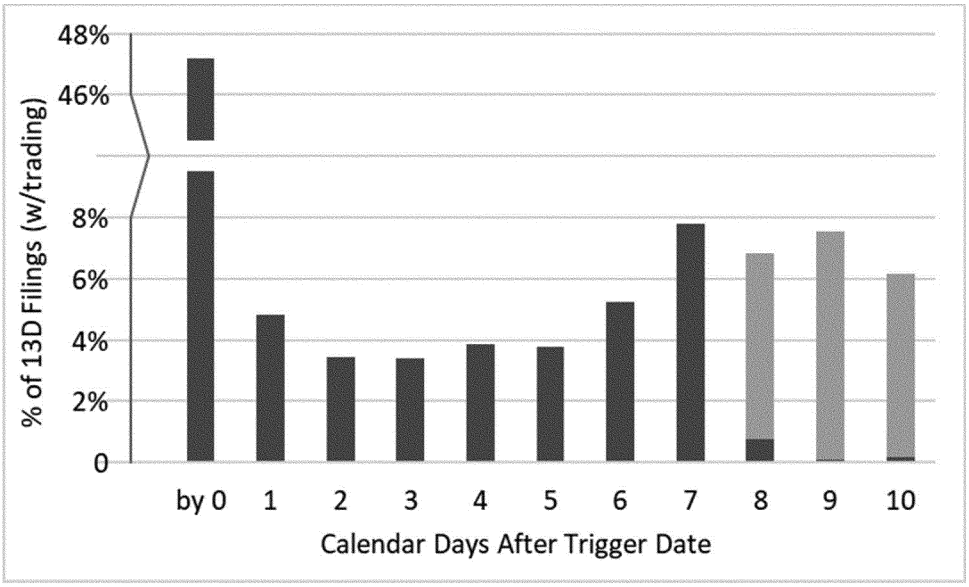
[716] References to the term ''filer'' in this economic analysis are inclusive of the beneficial owner before the person actually made a Schedule 13D filing.

[717] References to a filer ''crossing the five percent threshold'' in this economic analysis mean that the filer just completed acquiring beneficial ownership totaling more than five percent of a covered class or otherwise triggered a responsibility to file an initial Schedule 13D. Based on staff analysis of EDGAR filings through programmatic text analysis (to extract potential transaction dates, as discussed *supra* note 701, and to extract trigger dates), we estimate that about 2% of the potential transaction dates extracted from the text of corporate action filings between 2011 and 2021 occurred between the fifth day after the filer crosses the 5% threshold and the subsequent filing date. However, upon manual review, we found that many of these dates do not actually reflect transactions (*i.e.,* the dates were extracted because they seemed to relate to a number of shares and/or a price, but they reflect information other than specific transactions, as in the case of a summary of holdings as of the filing date that appears in the body of the filing).

[718] When multiple filings were made on the same date and pertain to the same issuer, only the filing reporting the largest stake is included in the analysis.

[719] These estimates are based on staff analysis of EDGAR filings through programmatic text analysis (to extract trigger dates, the reported levels of beneficial ownership, and transaction histories, which were all used to determine share accumulation patterns; and to categorize filings, as discussed in the previous section). *See supra* section IV.B.3.a.ii.

Figure 2. Percentage of non-corporate-action filings from 2011-2021 for which filers complete share accumulation as of a given day by calendar days after trigger date



The dark grey bars in Figure 2 represent filers that completed acquiring their total reported stake by the amended deadline, *i.e.,* five business days after their trigger date.[720] Summing the dark grey bars of the figure,[721] we find that about 80 percent of the filers completed acquiring their reported stake by the amended deadline. The remaining approximately 20 percent of filers (represented in the light grey bars) continued accumulating shares after the amended deadline.

We next explore the significance of additional accumulations of shares after the amended deadline. Figures 3a and 3b display, for the same sample of filings as in Figure 2, the percentage of filers that complete acquiring 90 percent and 75 percent, respectively, of their stake on the indicated day after the trigger date.[722]

[720] *See supra* note 695.

[721] Typically, five business days translates to seven calendar days after weekends are accounted for. Occasionally, five business days includes more than seven calendar days because of federal holidays. For instance, if an investor crosses the 5% threshold on a Friday and the following Monday is a federal holiday, then five business days will equate to 10 calendar days.

[722] These estimates are based on staff analysis of EDGAR filings through programmatic text analysis (to extract trigger dates, the reported levels of beneficial ownership, and transaction histories, which were all used to determine share accumulation patterns; and to categorize filings, as discussed in the previous section). See section IV.B.3.a.ii. As discussed above, we use the maximum ownership separately reported in a filing as our measure of the total reported ownership, and, in some cases (approximately 7% of all of the Schedule 13D filings in Table 2 above), this approach may understate the aggregate ownership of a group of co-filers. *See supra* note 692. Because this measure of total reported ownership is used as the denominator to determine the percentage accumulation by a given day in these figures, our estimate of the percentage of reported ownership that is accumulated after the fifth business day following the trigger date may be overestimated in some cases. For example, we manually reviewed all filings categorized in the light grey bars of Figure 3b (those with 25% or more of their reported ownership accumulated after the amended deadline) and determined that 1 out of 16 filings in the light grey bars, or 6% of these filings, would not have been categorized in this group if our algorithm to extract total reported ownership from the filing was as precise as our manual review of the documents.

Figure 3a. Percentage of non-corporate-action filings from 2011-2021 for which filers achieve 90% of their total reported share accumulation as of a given day by calendar days after trigger date

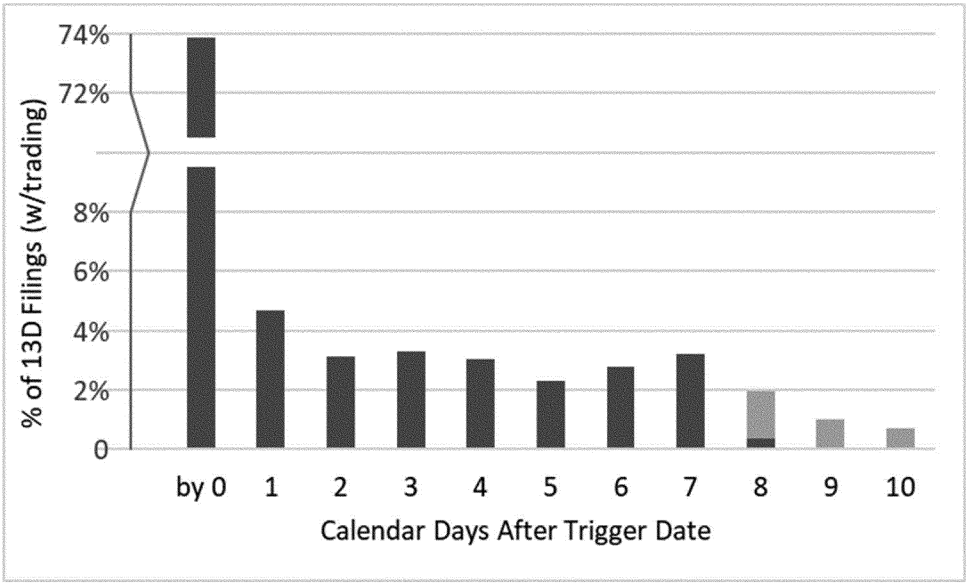
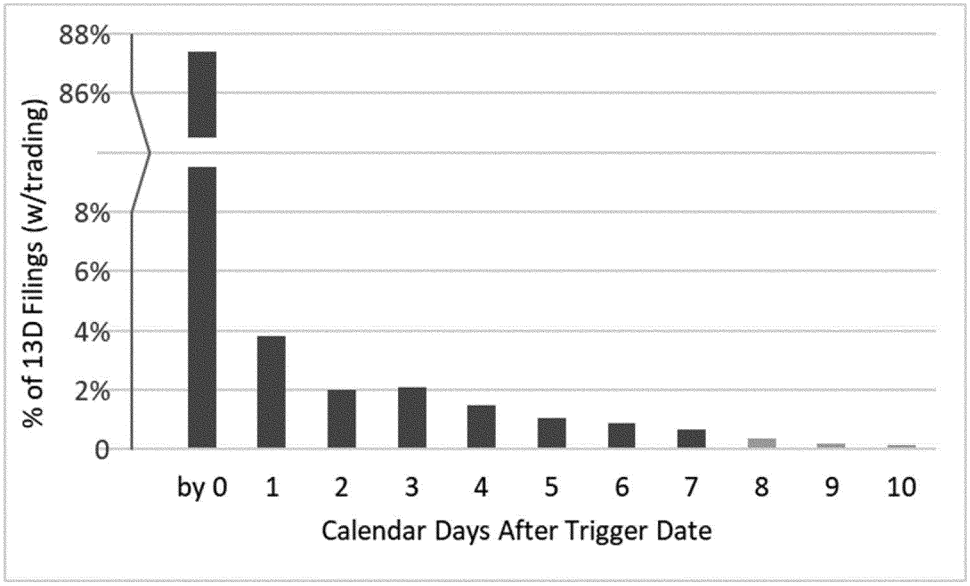


Figure 3b. Percentage of non-corporate-action filings from 2011-2021 for which filers achieve 75% of their total reported share accumulation as of a given day by calendar days after trigger date



The dark grey bars in Figures 3a and 3b represent filers that completed acquiring 90 percent or 75 percent, respectively, of their reported stake by the amended deadline. Summing the dark grey bars of Figure 3a, we find that about 97 percent of the filers completed acquiring 90 percent of their reported stake by the amended deadline, while the remaining three percent of filers (represented in the light grey bars) continued to accumulate shares constituting 10 percent or more of their reported stake after the amended deadline. Similarly, summing the dark grey bars of Figure 3b, we find that about 99 percent of the filers completed acquiring 75 percent of their reported stake by the amended deadline, while the remaining one percent of filers continued to accumulate shares representing 25 percent or more of their reported stake after that date.

The number and percentage of non-corporate action filings with different degrees of accumulation from Figures 2,

3a, and 3b are summarized in Table 3.[723]

TABLE 3—DEGREE OF ACCUMULATION BY AMENDED DEADLINE NON-CORPORATE-ACTION FILINGS OF INITIAL SCHEDULE 13D

[2011–2021]

	Percent of stake accumulated by amended deadline			
	(1) 100% (full stake)	(2) <100%	(3) <90% subset of (2)	(4) <75% subset of (3)
Number of campaigns in sample	1,907	463	78	16
Percent of campaigns in sample	80%	20%	3%	1%
Average number of campaigns/year	173	42	7	1

Column 1 of Table 3 (representing the same filings as those in the dark grey bars of Figure 2) presents information about campaigns in which the filer completed accumulating their shares by the amended deadline (five business days after crossing the five percent threshold). Column 2 (representing the same filings as those in the light grey bars of Figure 2) presents information about the remainder of the campaigns, in which the filer continued accumulating shares after the amended deadline. Columns 3 and 4 (representing the same filings as those in the light grey bars of Figure 3a and 3b respectively) present the subsets of the campaigns in Column 2 in which the filer had accumulated less than 90 or 75 percent, respectively, of their stake by the amended deadline (*i.e.,* 10 percent or 25 percent, respectively, or more of their stake was accumulated between the amended deadline and their actual filing date).[724]

b. Schedule 13G Filings

During calendar year 2022, the Commission received a total of 26,523 Schedule 13G filings, including 8,433 initial filings and 18,090 amendments.[725] Overall, the initial filings and amendments involved 4,321 unique lead filers.[726] Additional details specific to the initial filings, including their breakdown and characteristics by filer type, are presented in Table 4.[727]

TABLE 4—INITIAL SCHEDULE 13G FILINGS IN 2022 BY FILER TYPE

	QII	Exempt investor	Passive investor	Total
Number of unique lead filers *	567	1,340	793	2,633
Number of initial filings *	4,660	1,508	2,222	8,433
Median calendar days from trigger date ** to filing date	40	45	10	39
Median ownership reported in filing	6%	15%	6%	7%
% filers also filing Form 13F	84%	10%	31%	30%

* The total numbers of unique lead filers and of initial filings reported in the table each differ from the sum across columns because the same filer may fall into multiple categories and filer type could not be determined for about 0.5% of the filings.

** For Passive Investors, the trigger date is the date on which the investor has acquired beneficial ownership of more than 5% of a covered class. QIIs and Exempt Investors each have different initial Schedule 13G filing trigger dates and filing deadlines. See section II.A.2 above for more detail.

Table 4 demonstrates that initial Schedule 13G filings are somewhat concentrated among QIIs, who represent about one fifth of the filers but are responsible for over half of the filings.[728] Per the second row of the table, QIIs are also more likely to report their ownership of securities on a quarterly basis on Form 13F, with 84 percent of QIIs filing a Form 13F (compared to 30 percent for all initial Schedule 13G filers).[729]

[723] These estimates are based on staff analysis of EDGAR filings through programmatic text analysis. *See supra* notes 719 and 722.

[724] The figures in Tables 3, 5, and 6 use the same methodology as in Table 2 and as discussed in section IV.B.3.a.ii for identifying non-corporate action filings. A different methodology, such as those proposed in some comment letters *(see supra* notes 710–711), would likely yield different campaign counts and percentages in Table 3.

[725] These estimates are based on staff analysis of EDGAR filings. The Proposing Release reported that the Commission received 44,059 Schedule 13G filings (12,838 initial filings and 31,221 amendments) in calendar year 2020. As noted in the DERA Memorandum, based on further staff review of these reported statistics, we believe they included duplicate records, and that the actual number of unique Schedule 13G filings received in 2020 was 22,080 filings (6,436 initial filings and 15,644 amendments), which are similar to the counts provided for 2022 above.

[726] This estimate is based on staff analysis of EDGAR filings. ''Lead filer'' indicates the filer that submits a filing to the Commission, though the same filing may include information about additional co-filers.

[727] These estimates are based on staff analysis of EDGAR filings. Information about the number of days from the trigger date to the filing date of the Schedule 13G and the beneficial ownership percentage reported in the Schedule 13G, respectively, are based on a subset of filings (about 95% of the filings) for which staff was able to extract the required information. We note that staff's methodology for identifying the filer type associated with a given filing has been refined since the publication of similar statistics for 2021 in the DERA Memorandum. The Proposing Release reported that, at that time, it was impracticable to produce statistics on the median days to file for different types of filers. Our staff has since structured the underlying data into a more readily analyzable format and we have included these statistics in the table. See *supra* note 692 for details on the extraction of percentage beneficial ownership data from filings.

[728] Per the first row of the table, QIIs represent 567 out of 2,633 unique lead filers, or about 22% (567/2,633) of the unique lead filers. Per the third row of the table, QIIs are responsible for 4,660 out of 8,433 initial filings, or about 55% (4,660/8,433) of the initial filings.

[729] Institutional investment managers that use the United States mail (or other means or instrumentality of interstate commerce) in the course of their business and that exercise investment discretion over $100 million or more in section 13(f) securities must file Form 13F.

C. Economic Effects of the Final Rules

In this section, we discuss the anticipated benefits and costs of the final rules, some of which cannot be quantified for reasons discussed below. We considered all of these costs and benefits in their entirety. We have integrated our discussion of potential effects on efficiency, competition, and capital formation within our discussion of the other benefits and costs of the final amendments. Our analysis of the economic effects includes certain quantifiable elements based on historical data.[730] These elements may provide insights into certain benefits and costs—including with quantitative data and also with non-quantifiable benefits and costs—but those insights are conditional on, and constrained by, the reactions of market participants to the final amendments. Finally, we have indicated where quantitative data discussed in our analysis do not represent the Commission's cost or benefit estimates of the final amendments.

1. Shortened Initial Schedule 13D Filing Deadline

The final amendment to Rule 13d–1(a) shortens the initial Schedule 13D filing deadline from 10 calendar days to five business days after the date of the acquisition that results in a person's beneficial ownership of a covered class exceeding five percent of that class. The final amendments to Rule 13d–1(e), (f), and (g) similarly shorten the initial Schedule 13D filing deadline for investors who are no longer eligible to file Schedule 13G in lieu of Schedule 13D.

a. Benefits

The disclosures required under Schedule 13D consist, among other matters, of information related to significant shareholders and potential changes of corporate control. An earlier filing deadline for Schedule 13D will allow information to be incorporated into securities prices sooner and allow market participants to make better-informed investment decisions. Shortened filing deadlines may lessen the opportunity for what we have termed ''informed bystanders'' to gain advantages over the average selling shareholder, as further discussed below, which could ultimately enhance trust in markets and thereby capital formation. Finally, we expect that shortening the deadline will reduce overall informational asymmetries in the market, thereby improving liquidity, which benefits all market participants, including activists. While we think the benefits to market participants arising from the final amendments will be significant, these benefits are not quantifiable.

i. Extent of Earlier Disclosure of Information

This subsection provides some data about the extent of information that may be revealed to the market more quickly under the final amendments, as support for the discussion of benefits in the subsections that follow.[731] As discussed in section IV.B.3 above, among initial Schedule 13D filings that were timely filed in 2022 in accordance with the existing filing deadline, roughly 41 percent were already filed within the amended filing deadline.[732] The final amendments may thus result in earlier filing for about 59 percent of timely Schedule 13D reports.

For those initial Schedule 13D filings that would be filed earlier under the amended filing deadline, the amount of market-moving information that could be revealed more quickly under the final rules varies across filings. To better understand the extent of information that could be more quickly incorporated into market prices under a shortened filing deadline, we explore how the stock market reacts on and around Schedule 13D filing dates for different types of filings. Figure 4 presents the average pattern in abnormal returns[733] for filings from 2011 through 2021 that we classify as ''non-corporate-action filings,'' using the methodology described in section IV.B.3.ii.[734] In order to align the trigger and filing dates across the filings reflected in the graph, we limit the filings included in the figure to those that used the full 10-day filing window to file.[735]

[730] *See infra* section IV.C.1.a.iii, Table 5 and section IV.C.1.b.i, Table 6.

[731] *See infra* sections IV.C.1.a.ii through iv.

[732] About 71% of initial Schedule 13D filings are timely filed in accordance with the existing filing deadline. *See* section IV.B.3.a above. Our analyses of costs and benefits generally exclude the remaining roughly 29% of filings, which are filed late based on the existing filing deadline, because it is difficult to predict how filers that are not in compliance with the current filing deadline will react to a change in this deadline.

[733] Throughout this subsection (and sections IV.C.1.a.iii and IV.C.1.b.i below, as well as statements in other sections referencing the results of the data analyses presented in these sections), an issuer's ''abnormal return'' represents the difference between the issuer's market stock return and the Center for Research in Security Prices (''CRSP'') value-weighted market index. We acknowledge that abnormal returns for a given issuer may be sensitive to the choice of benchmark and affected either positively or negatively by other market or issuer events during the horizon of the analysis, though the impact of such confounding effects may be reduced when looking at the average abnormal returns across many issuers. References in other subsections to ''abnormal returns'' in the context of academic studies reflect the definitions of this term in each individual study (which may use different models to compute benchmark or ''normal'' returns for the purpose of isolating the ''abnormal'' portion of the returns).

[734] These estimates are based on staff analysis of EDGAR filings through programmatic text analysis as well as data from the CRSP database.

[735] Figure 4 reflects a total of 534 filings, in all of which filers used the full 10-day filing window to file. To arrive at this figure from the total 3,067 non-corporate-action filings in Table 2, we retained only one filing when multiple filings were made for the same issuer on the same day and limited the sample to filings for which stock return data is available. These restrictions led to a sample of 2,553 non-corporate-action filings. The additional requirement that the filer used the full 10-day filing window to file results in the figure reflecting about 21% of this sample of 2,553 filings. If we instead consider the subset of the 2,553 non-corporate-action filings that were filed after the amended filing deadline but not after the current filing deadline (*i.e.,* the subsample that would be more likely to be affected by a change in the filing deadline), the figure reflects about 37% of this subsample of filings. Data on the abnormal returns between five business days after the trigger date to the actual filing date for additional subsets of non-corporate-action filings is presented in Table 5 below.

Figure 4. Cumulative abnormal return around filing date for "non-corporate-action filings" (from Table 2) from 2011-2021 that were filed 10 calendar days after trigger date

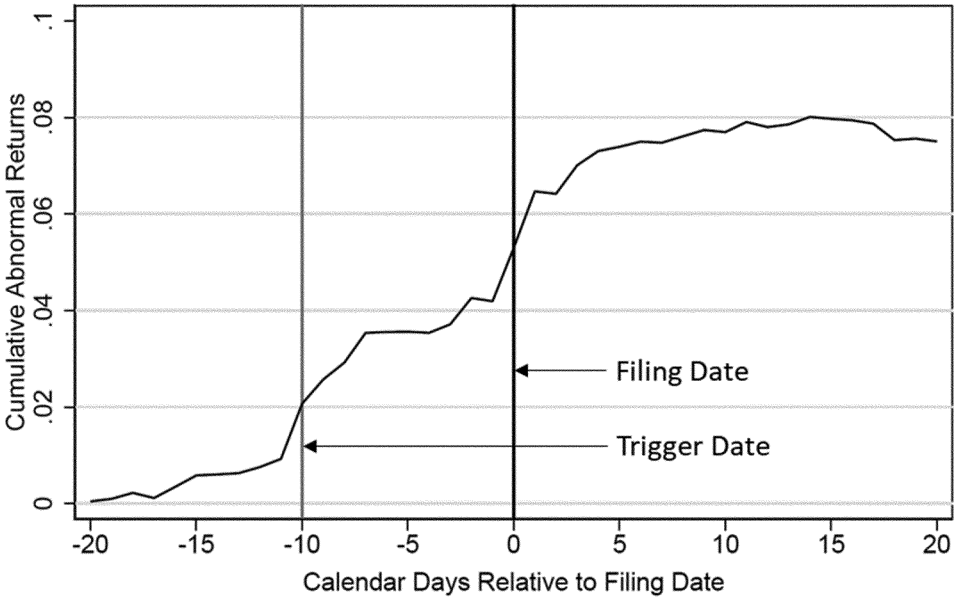


Figure 4 demonstrates that the stocks of issuers that are the subject of these filings experience an abnormal return of roughly three percent from day seven—the approximate number of calendar days corresponding to five business days—following the trigger date to the day after the filing date.[736] This pattern of returns suggests that, for this group of filings, there is market-moving information that is currently not fully incorporated into market prices as of the amended filing deadline, and which would be likely to be revealed earlier if similar filings were made under the amended filing deadline.[737] We estimate that about 43 percent of timely non-corporate-action filings are currently filed by the amended filing deadline, such that the remaining 57 percent of timely non-corporate-action filings would be subject to earlier disclosure under the final amendments and are expected to generate the benefits discussed in the following subsections.[738]

We next consider the filings that we classify as ''corporate action filings.'' The average pattern in abnormal returns for these filings from 2011 through 2021 is presented in Figure 5.[739] In order to align the trigger and filing dates across filings reflected in the graph, we again limit the filings included in the figure to those that used the full 10-day filing window to file.[740]

[736] The amended deadline corresponds to approximately 7.25 calendar days: (365.25 calendar days per year ÷ 252 business days per year) × (5 business days).

[737] One commenter stated that the DERA Memorandum included ''no discussion of what may cause [the gains after the filing date in the figure], or, importantly, whether, if the filing period is shortened, the gains that the Commission labels as 'abnormal' in the five-day window prior to filing will simply shift to the period after the amended filing deadline.'' *See* letter from EIM IV. We note that the pattern of some additional positive price movement, or price drift, after the filing date is consistent with what has been found in academic studies and that researchers generally use an event window including a period after the filing date (such as from 20 days prior to 20 days after a Schedule 13D filing date) to capture what is believed to be the full abnormal return associated with a Schedule 13D filing. *See, e.g.,* Brav et al. 2022 Study. Such post-disclosure abnormal return patterns have been found to be associated with a wide variety of types of corporate news. *See, e.g.,* David Hirshleifer et al., *Driven to Distraction: Extraneous Events and Underreaction to Earnings News,* 64 J. Fin. 2289 (2009) (stating that ''[i]n several kinds of tests, there is on average a delayed price reaction to news that has the same sign as the immediate response''). However, we continue to believe that it is reasonable to expect that, all else equal, an accelerated filing date would be likely to accelerate the returns between the amended filing date and the day after the current actual filing date (which, per Figure 4, is concentrated around the actual filing date itself) rather than the returns shifting to the period after the amended filing deadline because this abnormal return likely reflects the immediate market reaction to the filing.

[738] These estimates are based on staff analysis of EDGAR filings. The estimates are based on the same sample of non-corporate-action filings from 2011 through 2021 used in Figures 2, 3a, and 3b above (*i.e.,* the sample refined to exclude late filers and filers with no beneficial ownership reported as of the filing date and to adjust for multiple filings on the same date). *See supra* note 718 and accompanying text.

[739] These estimates are based on staff analysis of EDGAR filings through programmatic text analysis (to categorize filings, as discussed in section IV.B.3.a.ii above, and to extract the required dates) as well as data from the CRSP database.

[740] Figure 5 reflects a total of 1,492 filings, in all of which filers used the full 10-day filing window to file. To arrive at this figure from the total 12,657 corporate action filings in Table 2, as in the case of Figure 2, we retained only one filing in cases where multiple initial Schedule 13D filings were made on the same day for the same issuer. The figure is also limited to filings for which stock return data is available (generally, issuers listed on the NYSE, NYSE American, NASDAQ, and NYSE Arca exchanges). These restrictions led to a sample of 6,125 corporate action filings. The additional requirement that the filer used the full 10-day filing window to file resulted in the figure reflecting about 24% of this sample of 6,125 filings. If we instead consider the subset of the 6,125 corporate action filings that were filed after the amended filing deadline but not after the current filing deadline (*i.e.,* the subsample that would be more likely to be affected by a change in the filing deadline), the figure reflects about 41% of this subsample of filings.

Figure 5. Cumulative abnormal return around filing date for "corporate action filings" (from Table 2) from 2011-2021 that were filed 10 calendar days after trigger date

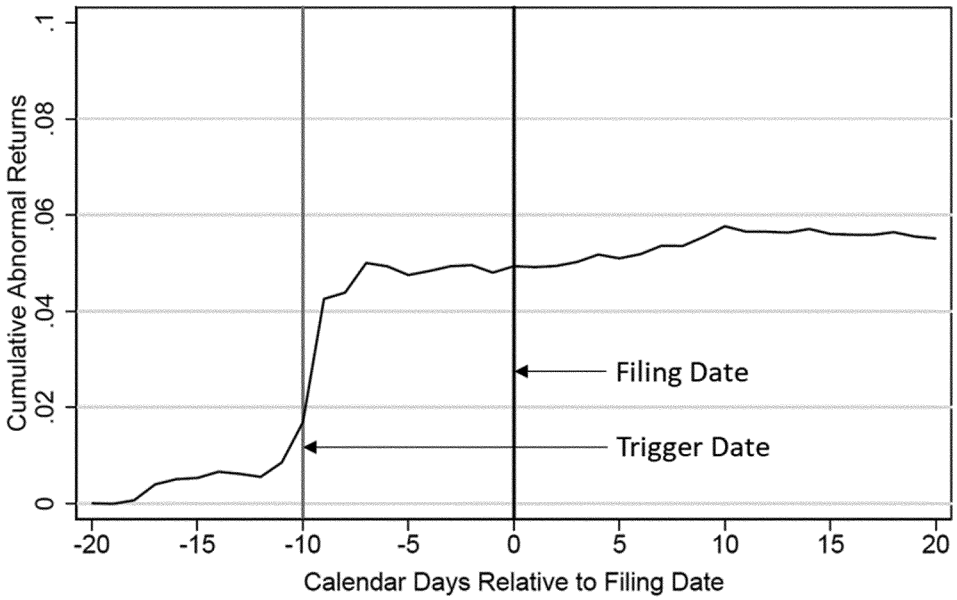


Figure 5 demonstrates that, in contrast to the pattern observed for non-corporate-action filings, the vast majority of the market stock price reaction to corporate action filings occurred close to the day on which the filers crossed the five percent ownership threshold, triggering the requirement for a Schedule 13D filing. The limited market reaction between the amended deadline—five business days after the trigger date (or approximately seven calendar days)—and the day after the actual filing date implies that little market-moving information is revealed during this period. We did not conduct a systematic analysis to investigate potential explanations for this pattern of abnormal returns. However, it is possible that this pattern may reflect the existence of other disclosures about the associated events (outside of the Schedule 13D filing) that are made public on or close to the trigger date.[741] To the extent that the most value-critical information contained in the filing is already known to the market prior to the amended filing date (through legal means, such as other disclosures made outside the Schedule 13D), we do not expect the amended filing deadline to result in the earlier revelation of significant new information for corporate action filings.

ii. Improved Information Content of Stock Prices

The amended Schedule 13D initial filing deadline will get material information to investors faster. This will allow new information contained in Schedule 13D filings to be incorporated into market prices earlier,[742] allowing investors and issuers to make better-informed decisions.

Commenters agreed that the acceleration of filing deadlines would allow market prices to incorporate the information contained in a filing earlier,[743] investors to make better-informed decisions,[744] and issuers to make better-informed decisions in responding to the presence of a new significant shareholder.[745] On the other hand, some commenters questioned whether a shortened filing deadline would enhance market efficiency or requested further evidence or analysis of the effects on market efficiency.[746]

As suggested by a commenter,[747] we have considered patterns in abnormal returns around Schedule 13D filings to better assess the potential effect of the accelerated filing deadline on market prices (and, thereby, on decision-making by market participants). We note that decision-making and the efficiency of resource allocation are unlikely to materially improve with a shortened deadline for corporate action filings because, as discussed in the previous section, the vast majority of any market price reaction around the time of these filings seems, on average, to occur well before the amended deadline.[748]

By contrast, we documented that for non-corporate-action filings there are, on average, meaningful abnormal

[741] Staff reviewed a small number of individual filings and confirmed the existence of such disclosures, such as a Form 8-K disclosure on or within a day of the trigger date of a merger agreement or a bankruptcy, in the cases that were reviewed. However, we did not conduct more comprehensive or systematic analysis of such disclosures or other potential explanations for why the vast majority of the market stock price reaction for this group of filings occurred close to the trigger date and before the Schedule 13D was filed.

[742] One commenter stated that our use of the term ''market efficiency'' to describe the earlier incorporation of information in market prices were in fact references to ''strong-form market efficiency wherein share prices fully reflect all *public* and *private* information'' which is viewed ''as an idealized and unobtainable standard'' in contrast to semi-strong market efficiency (wherein prices reflect all public information). The commenter noted that ''defining mispricing in terms of private information that is not currently reflected in share price is a misleading characterization of price formation that serves as an impractical basis for regulation.'' *See* Lewis Study I (exhibit to letter from EIM I). Some commenters similarly questioned whether a delay in market prices reflecting a significant shareholder's investment constituted a mispricing that warranted correction. *See* letters from AIMA; CIRCA I; Dodge & Cox; EIM I; Prof. Gordon; Profs. Schwartz and Shavell I. To avoid confusion, we no longer use the term ''market efficiency'' in this context, focusing instead on the earlier updating of market prices and resulting effects on decision-making (and thereby efficiency of resource allocation). We also no longer refer to prices that do not yet reflect the information in a Schedule 13D filing before it is filed as ''mispricing.''

[743] *See* letters from AFREF; Nasdaq; TIAA.

[744] *See* letters from AFREF; HMA I; Hoak; Nasdaq; TIAA.

[745] *See* letters from NIRI; SCG.

[746] *See* letters from AIMA; Dodge & Cox; EIM I; Rice Management.

[747] *See* Lewis Study I (exhibit to letter from EIM I) (stating that ''the Commission could have analyzed equity trading activity and abnormal returns around triggering and announcement dates to properly assess potential gains to market efficiency'').

[748] *See supra* section IV.C.1.a.i.

returns between the amended filing deadline and the day after the filing date.[749] These abnormal returns patterns suggest that market-moving information is revealed during this period. A shortened deadline will accelerate the remaining market price reaction with respect to non-corporate-action filings, as investors incorporate the new information into their buying and selling decisions. Investors and issuers, with earlier access to the information and an updated stock price, may then be able to make better-informed investment and resource allocation decisions. At the level of the economy as a whole, better investment and resource allocation decisions by individual issuers and investors under the amended filing deadline may improve the efficiency of resource allocation overall.

As discussed in the previous section, about 57 percent of timely non-corporate-action initial Schedule 13D filings, or about 122 filings of this type per year, are currently filed after the amended deadline.[750] Based on this historical filing behavior, we expect the amended deadline may give rise to an earlier market reaction than would otherwise have been experienced for approximately this number of filings per year. Thus, investors, issuers, and other market participants may have access to updated stock prices and the information disclosed in a Schedule 13D up to three days earlier for over 120 such events per year according to current estimates, allowing them to make better-informed decisions in each of those periods.

Some commenters stated that the market cannot impound new information into a price if that information has not been developed, or more generally indicated that the benefits of a shortened deadline were predicated on investors not forgoing investments that may give rise to a Schedule 13D filing in response to the amended deadline.[751] We continue to believe that, holding the content of the filings constant, amending the deadline will allow for more informed decision-making and improve the information content of stock prices, with associated benefits for investors, issuers, and other market participants. We acknowledge that the improvement in the efficiency of resource allocation at the economy level could be mitigated to the extent that some of the research and/or investment activities giving rise to these filings are reduced or otherwise change after the adoption of the final amendments (see section IV.C.1.b).

iii. Transfers From Selling Shareholders and Trust in Markets

In the days between the trigger date for an initial Schedule 13D and the filing date of that Schedule 13D under the current 10-day deadline, various investors may buy and sell shares of the subject issuer. The resulting trading losses and gains (whether or not the trading is based on information from or about the Schedule 13D filer) generally represent wealth transfers[752] among individual investors, not net costs to investors (and market makers) as a group. However, the possession of an informational advantage regarding the future control or potential strategic or operational changes at an issuer, together with the knowledge of the precise date of informational revelation, creates a near-arbitrage opportunity. The incentives to gain access to such information, and thus profit from it, can be strong. An extended window of time between the trigger date and the date on which the filer's beneficial ownership and plans are made public on Schedule 13D may increase the likelihood of information leakage to ''informed bystanders''[753] who may then buy shares during the window of time just before the filing of the Schedule 13D. Such informed bystanders can thus profit from access to this information rather than from their own fundamental research or effort to improve the issuer's performance. We acknowledge, however, that some of these informed bystanders may be associated with shareholder value creation to the extent they may represent the entry of additional ''activism-friendly'' shareholders, which academic researchers have associated with greater returns to activism.[754]

Investors may possess information regarding activism for a variety of reasons. Some may emerge from fundamental research. For example, some investors may use research to identify companies that are likely to be targeted by activists. These investors may be able to glean information about the likelihood of an activist campaign from, for example, unexpected increases in trade volume. However, information leakage that creates a near-arbitrage opportunity for some investors (who themselves have not performed fundamental research to generate the information) is likely to erode trust in markets, reducing participation and capital formation.[755] We would expect that amending the filing deadline would increase perceptions of fairness in the markets, which could, in turn, lead to benefits in participation and liquidity. These benefits cannot be quantified but are nonetheless important.

Academic research provides evidence consistent with informed bystanders buying shares just prior to Schedule 13D filings. For example, studies have identified unusual EDGAR search activity during the 10 days prior to a Schedule 13D filing[756] and abnormally high trading volume on the same day the filer crosses the five percent threshold[757] as evidence of certain traders other than the filer being aware of the filer's intentions. While the researchers note that some of the trading behavior investigated in these studies may simply reflect the reaction of sophisticated investors to unusual, public market data (such as that associated with the filer's purchases) in advance of a Schedule 13D filing, further evidence led them to suggest that at least some of the increased trading is by informed parties.[758]

[749] *See id.*

[750] *See supra* section IV.C.1.a.i.

[751] *See* letters from CIRCA I; EIM I; Profs. Schwartz and Shavell I; Profs. Schwartz and Shavell II.

[752] We use the term ''transfer'' to distinguish the trading losses and gains from costs and benefits that may result from rule. *See* Current Guidance on Economic Analysis in SEC Rulemakings (Mar. 16, 2012) (*available at https://www.sec.gov/divisions/riskfin/rsfi_guidance_econ_analy_secrulemaking.pdf*) at n.32.

[753] In a similar analysis in the DERA Memorandum, staff used the term ''opportunistic traders'' to reference these parties. We have revised the term used in response to a comment that this term seemed pejorative as well as comment letters that appeared to presume that the term was inclusive of the filer. *See, e.g.,* letters from CIRCA IV; EIM IV.

[754] *See, e.g.,* Simi Kedia et al., *Institutional Investors and Hedge Fund Activism,* 10 Rev. Corp. Fin. Stud. 1 (2021) (''Kedia et al. 2021 Study'') (finding that a one-standard-deviation increase in the pre-existing ''activism-friendly'' ownership is associated with an increase in the 36-month buy-and-hold returns of 7.8% to 15.5%); Wong 2020 Study (finding that a proxy for a dispersed group of investors aligned with the activist buying shares before the Schedule 13D filing, measured based on abnormal trading volume on the date the activist exceeds 5% ownership, is associated with an increase in the buy-and-hold return over the course of an activist campaign of 5.5% to 8.4%).

[755] *See, e.g.,* Luigi Guiso et al., *Trusting the Stock Market,* 63 J. Fin. 2557 (2008).

[756] *See* Ryan Flugum et al., *Shining a Light in a Dark Corner: Does EDGAR Search Activity Reveal the Strategically Leaked Plans of Activist Investors?,* J. Fin. Quant. Analys. (forthcoming 2023), *available at https://ssrn.com/abstract=3612507* (''Flugum et al. 2023 Study'').

[757] *See, e.g.,* Wong 2020 Study.

[758] For example, the researchers found that institutions unusually accessing EDGAR filings for issuers prior to Schedule 13D filings each appeared to engage in this activity primarily for Schedule 13D filings pertaining to a particular filer, rather than predicting Schedule 13D filings in general. *See* Flugum et al. 2023 Study. Also, both this study and the abnormal volume study discussed above found evidence of abnormal trading activity even in the case of Schedule 13D filings made by previous

Other research identifies specific types of informed bystanders or more direct evidence of those traders' source of information. For example, one study presented evidence suggesting that the broker of a filer may leak information about the filer's trades to other traders before the Schedule 13D filing.[759] Another study observed a correlation between purchases by insiders and by the filer before the Schedule 13D filing, and suggested this trading reflected inside information and insiders' surveillance of trading volume and ownership data for the issuer's stock.[760]

Several commenters indicated that the economic analysis in the Proposing Release lacked evidence or quantitative analysis with respect to potential effects on selling shareholders under the current Schedule 13D filing deadline.[761] Others questioned the magnitude of any effects with respect to selling shareholders.[762] To better understand the potential effects of a shortened deadline on the type of activity discussed in these studies, we designed a quantitative analysis intended to estimate the wealth transfers, under the current rules, from selling shareholders to potential informed bystanders between the amended filing deadline and the actual filing dates.

Our analysis focuses on those initial Schedule 13D filings that we classify as ''non-corporate-action filings,'' which represent about 20 percent of initial Schedule 13D filings (per the first row of Table 2).[763] For filings that we classify as ''corporate action filings,'' we found that there was limited stock price movement, on average, between the amended deadline and the day after the actual filing date.[764] We therefore expect that it is unlikely that there would have been material wealth transfers from selling shareholders to informed bystanders just prior to the actual filing date of these filings.

For the sample of non-corporate-action filings, we first examine abnormal[765] trading volumes in the days prior to an initial Schedule 13D filing to identify trading activity that could be curtailed by a shortened filing window. We focus on trading before the filing date to exclude trading in reaction to the information in the filing and use information on the filer's trades from Schedule 13D to exclude their trading activity from this analysis.

For non-corporate-action filings from 2011 to 2021, Figure 6 compares the average trading volume excluding the filer's accumulations (''Total Non-Filer Trading Volume'') to the filers' average pattern of accumulations (''Filer Trading Volume'').[766] Both measures are scaled by the normal level of daily trading volume in the issuer's stock such that a value of one for ''Total Non-Filer Trading Volume'' would mean there is zero abnormal trading volume outside of the filer's trades while a value of two for ''Total Non-Filer Trading Volume'' would mean that trading volume is double the usual level (*i.e.,* there is an amount of abnormal trading volume equal to the amount of normal trading volume). Because we exclude trading on or after the filing date, the graph ends before day 10.

Schedule 13G filers, which are less likely to be accompanied by unusual market activity associated with trades by the filer. *See* Flugum et al. 2023 Study; Wong 2020 Study.

[759] *See* Marco Di Maggio et al., *The Relevance of Broker Networks for Information Diffusion in the Stock Market,* 134 J. Fin. Econ. 419 (2019) (finding that the ''best clients'' of the broker used by a filer, *i.e.,* those generating a large share of the broker's business, buy more of the target stock than other institutional investors in the 10 days prior to a Schedule 13D filing).

[760] *See* Georgy Chabakauri et al., *Trading Ahead of Barbarians' Arrival at the Gate: Insider Trading on Non-Inside Information* (Colum. Bus. Sch. Rsch. Paper, Jan. 2022), *available at https://ssrn.com/abstract=4018057* (finding a significant concurrence between purchases of stock by insiders of the issuer and purchases by an activist in the 60 days, and particularly in the last 10 days, preceding a Schedule 13D filing).

[761] *See, e.g.,* Lewis Study I (exhibit to letter from EIM I) (stating that the Commission could have attempted to quantify the intended benefits of the rule change to selling shareholders by ''[e]stimat[ing] losses to selling shareholders with one of the trading models used to estimate damages in shareholder 10b-5 actions,'' wherein ''[h]igh end estimates of costs could assume that all shares sold (after adjusting for estimates of dealer activity) during this period came from sales made by investors that would have benefited from having the information on Schedule 13D earlier''); letter from Profs. Swanson, Young, and Yust (discussing investors that sell prior to a Schedule 13D filing and related statistics and stating that ''the forgone returns seem too small in of themselves to justify a change''); Profs. Bishop and Partnoy I (stating that ''an intuitive concern about investors who might be disadvantaged by selling during the window before such filings'' is unsupported by evidence).

[762] For example, some commenters stated that any cost borne by selling shareholders is minor relative to benefits to other shareholders of the Schedule 13D filer's actions. *See* letters from AIMA; CIRCA I; EIM I; ICM; Profs. Schwartz and Shavell II; S. Lorne. We consider the potential benefits to shareholders from a filer's actions in section IV.C.1.b.i below.

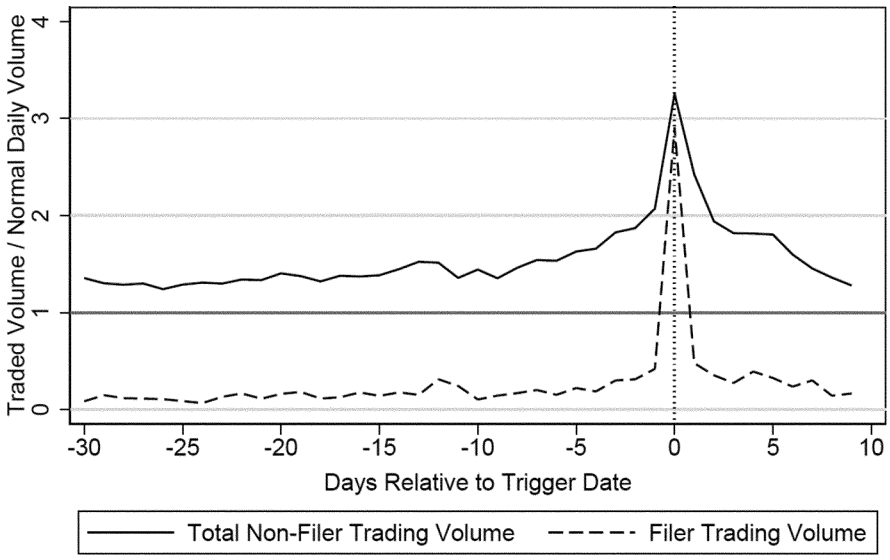
[763] We make the same exclusions from the full sample of non-corporate-action filings as in the case of Figures 2, 3a, 3b, and Table 3 above (excluding late filers and filers with no beneficial ownership reported as of the filing date and retaining only one filing among multiple filings on the same date), resulting in a sample of non-corporate-action filings consisting of 2,370 filings from 2011 through 2021. See *supra* note 718 and accompanying text for more information on the sample restrictions in the analysis.

[764] *See supra* section IV.C.1.a.i.

[765] We focus on abnormal trading volume rather than total trading volume because it is likely that the trades comprising the normal amount of trading volume represent investors making an exchange based on the same information set, even though ex post it may appear that the buyer turned out to be ''lucky'' and the seller ''unlucky,'' as would be the case before the revelation of other positive news.

[766] The estimates in the figure are based on staff analysis of EDGAR filings through programmatic text analysis (to categorize filings, as discussed in section IV.B.3.a.ii above, and to extract the required dates) as well as data from the CRSP database. The figure reflects the 1,686 non-corporate-action filings out of the total 2,370 filings in our analysis that had trading volume data available (generally reflecting issuers listed on the NYSE, NYSE American, NASDAQ, and NYSE Arca exchanges). Abnormal trading volume is computed as the excess of trading volume over the average daily trading volume in the 60-day period beginning 120 days prior to the given date.

Figure 6. Trading volumes around trigger date for non-corporate-action filings from 2011-2021, excluding trading volume on or after actual Schedule 13D filing date



Abnormal trading volume in an issuer's stock by traders other than the filer peaks on the same day the filer's trading peaks (*i.e.,* on the trigger date, when the filer crosses the five percent threshold). However, abnormal trading volumes continue to remain elevated for the rest of the 10-day filing window, including after the amended filing deadline, which occurs at approximately day seven after the trigger date, which may represent purchases by informed bystanders that were aware of the impending campaign. We note that there is also abnormal trading well in advance of the trigger date, and that this and other abnormal trading volume in the graph could reflect trading by informed bystanders, but could also reflect other traders simply reacting to the same news, market conditions, or trends in issuer performance that may have attracted the filer to engage in its transactions.

To understand the potential transfers from selling shareholders to informed bystanders that may be prevented or reduced by a shortened deadline, we focus on abnormal trading volume by traders other than the filer in the days between the fifth business day after the filer crosses the five percent threshold and the actual filing date. As in the case of Figure 6, we exclude trading on the actual filing date because there is typically significant trading volume in reaction to the filing on that date. While it is possible that there is additional trading by informed bystanders on the actual filing date but before the actual time that the filing becomes public, we are unable to distinguish any such trading from trading in reaction to the filing. For this reason, we exclude this trading, and our analysis will not include the transfers between informed bystanders and selling shareholders on the filing date.[767]

In order to estimate potential transfers from selling shareholders to informed bystanders, we also collected information on abnormal returns to understand the amount of appreciation obtained by potential informed bystanders by trading prior to the filing becoming public information. The pattern of abnormal returns[768] varies across scenarios in which the filer completed accumulating their reported stake by five business days after the trigger date but submitted their Schedule 13D filing later, and those in which the filer was still accumulating shares after five business days. Figures 7a and 7b present the average pattern of abnormal returns for these two scenarios separately. In order to align the trigger and filing dates across filings in the graph, we limit the filings in the figure to those that used the full 10-day filing window to file.[769]

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[767] Given that the measured abnormal trading volume trends down over the filing window, as demonstrated in Figure 6, we expect that the effect of excluding this potential intra-day abnormal trading volume is relatively small.

[768] As discussed above, throughout this section (as well as section IV.C.1.a.i above and section IV.C.1.b.i below), an ''abnormal return'' represents the difference between an issuer's market stock return and the CRSP value-weighted market index. *See supra* note 733.

[769] Besides the sample restrictions described *supra* note 763, Figures 7a and 7b are also limited to filings for which stock return data is available (generally, issuers listed on the NYSE, NYSE American, NASDAQ, and NYSE Arca exchanges). This restriction leads to a sample of 2,097 non-corporate-action filings. Filers of 1,669 of these filings completed acquiring their reported stake by the amended deadline, while the filers of the remaining 428 filings continued to accumulate part of their reported stake afterwards. The additional requirement in Figure 7a that the filer used the full 10-day filing window to file results in Figure 7a reflecting 294 non-corporate-action filings, or 18% of the subsample that completed acquiring their stake by the amended deadline. The similar requirement in Figure 7b results in this figure reflecting 205 non-corporate-action filings, or 48% of the subsample that continued to accumulate part of their reported stake after the amended deadline.

Figure 7a. Cumulative abnormal return around filing date for non-corporate-action filings from 2011-2021 filed 10 days after trigger date, and without filer purchases after amended filing deadline

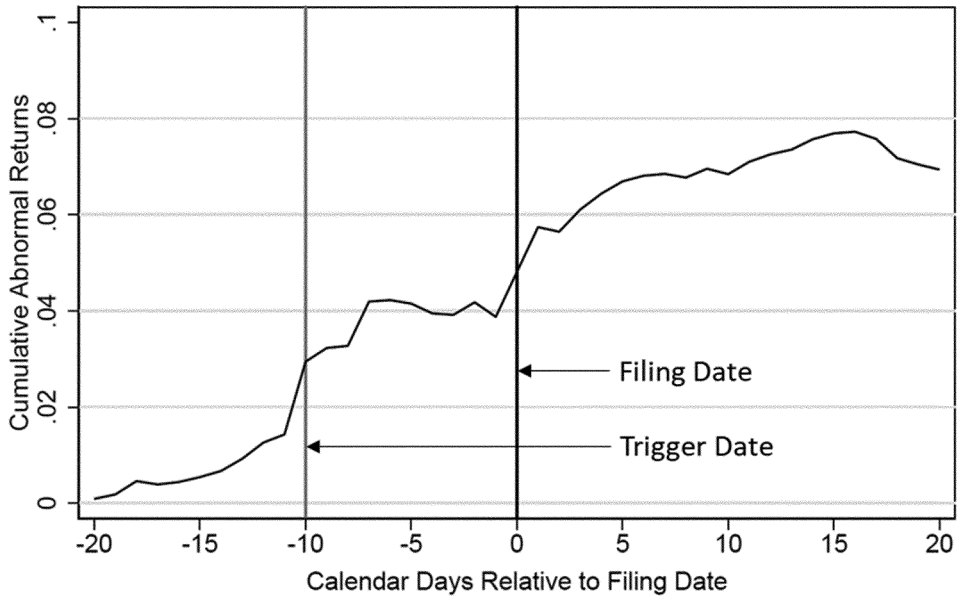
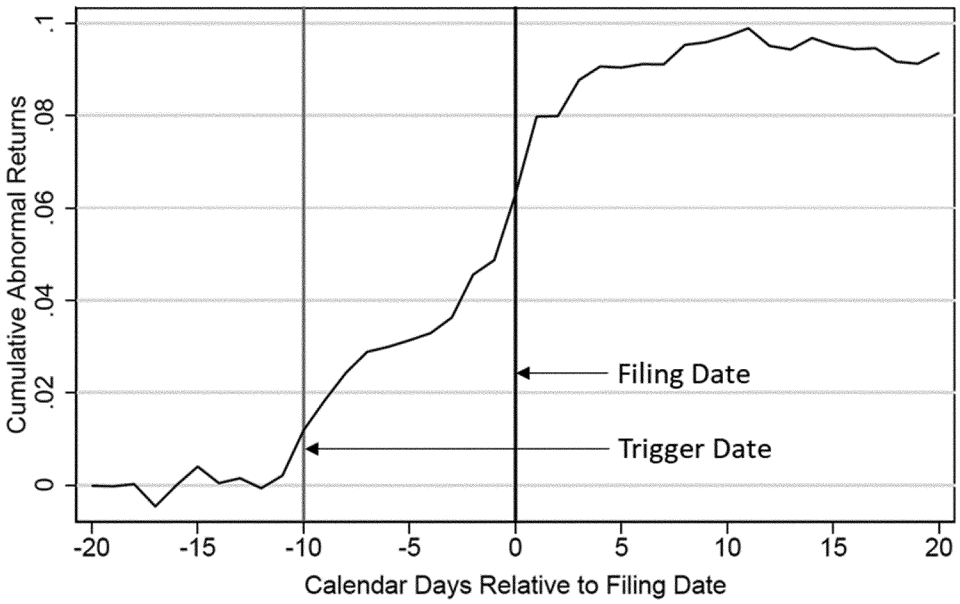


Figure 7b. Cumulative abnormal return around filing date for non-corporate-action filings from 2011-2021 filed 10 days after trigger date, and with filer purchases after amended filing deadline



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The transfers from a selling shareholder to a potential informed bystander between the amended filing deadline and the current filing date would consist of the stock return between the day that they sell and the day after the filing date, when the information previously known to their trading counterparty is known to the whole market. Based on Figures 7a and 7b, there are meaningful abnormal returns between the amended filing deadline (which occurs around day −3 in the figure, as five business days generally corresponds to seven calendar days) and the day after the actual filing date for both subsamples of the filers in our analysis, with a greater abnormal return when the filer is still accumulating shares after five business days (*i.e.,* Figure 7b).

To estimate transfers from selling shareholders to informed bystanders that may be occurring between the amended filing deadline and actual filing dates, and thus might be avoided

under the final rules, we used the data discussed above to conduct the analysis presented in Table 5.[770] As discussed in detail in section IV.C.1.b below, the extent of filer share accumulation after the amended deadline may be associated with the likelihood that filers may modify or forgo these types of campaigns after the effective date of the final amendments. We therefore estimate the transfers separately for filings with the different patterns of filer share accumulation from Table 3.[771]

TABLE 5—ANALYSIS OF POTENTIAL TRANSFERS FROM SELLING SHAREHOLDERS TO INFORMED BYSTANDERS BY DEGREE OF FILER ACCUMULATION BY AMENDED FILING DEADLINE, ANNUALIZED

[2011–2021]

	Percent of stake accumulated by filer by amended deadline			
	(1) 100% (full stake)	(2) <100%	(3) <90% subset of (2)	(4) <75% subset of (3)
(1) Average number of campaigns/year with potential transfers between amended deadline and filing date*	54	41	7	1
Filer/Campaign Characteristics:				
(2) Median abnormal return from amended deadline to day after filing	.5%	1.9%	3.1%	6.9%
Analysis of Transfers:				
(3) Average total abnormal trading volume other than filer's trades between amended deadline and filing date (% shares outstanding)	.8%	.7%	1.5%	2.6%
(4) Average transfers from selling shareholders, per campaign**	$425K	$640K	$1.8M	$5.1M
(5) Aggregate transfers from selling shareholders for this category	$23M/year	$26M/year	$13M/year	$7M/year

* These campaigns represent the subset of the filings in Table 3 for which there are trading days between the fifth day after the trigger date and the filing date.

** Transfers are computed as the sum across days of the abnormal trading volume (less the filer's trades) in shares on a given day between the amended and actual filing date times the abnormal return from that day to the day after the filing date. *See* note 770 for additional details.

Rows 2 and 3 of Table 5 present information on the abnormal returns and abnormal trading volume between five business days after the trigger date (the amended deadline) and the filing date in each subset of campaigns. Both the abnormal returns (which would drive the extent of wealth transferred by trading with an informed bystander in this timeframe) and the abnormal volume (which characterizes the potential number of such trades) are higher for campaigns in which the filer is still accumulating a significant portion of their stake after five business days following the trigger date.

The estimates in Row 5 of Table 5 represent potential transfers from selling shareholders to informed bystanders after five business days following the trigger date for each subset of campaigns based on a day-by-day analysis of the abnormal volume and the potential forgone return for each underlying campaign.[772] For example, the aggregate estimate of potential transfers to informed bystanders that could be avoided by shortening the filing deadline to five business days if no filers forgo campaigns (and filers do not adapt in such a way that these transfers may still occur) is about $49 million per year ($23 million from Column 1 plus $26 million from Column 2). Alternatively, if we assume that filers accumulating 25 percent or more of their stake after five business days forgo such campaigns, the aggregate estimate of potential transfers to informed bystanders that could be avoided would be about $42 million per year ($49 million, as computed above, minus $7 million from Column 4).[773] We note that the wealth transfer estimates in Table 5 do not represent estimates of the benefit of the final rule amendments. Rather, the estimates provide insight into an informational disparity that could weaken trust in the market and

[770] The estimates in the table are based on staff analysis of EDGAR filings through programmatic text analysis (to categorize filings, as discussed in section IV.B.3.a.ii above, to extract the data necessary to determine share accumulation patterns, as discussed *supra* note 719, and to extract the required dates) as well as data from the CRSP database. Estimates of abnormal returns and abnormal trading volumes (Rows 2 and 3) are based on the campaigns for which the required data was available. The estimate of transfers assumes trades on a given day are executed at the average of the closing price on that day and the closing price on the previous day and that the wealth transfer per share traded is the abnormal return experienced based on that starting price until one day after the filing date. For the aggregate estimate of the transfers from selling shareholders, the estimated average transfers from selling shareholders per campaign (in Row 5) is used as a proxy for the transfers from selling shareholders in campaigns for which the data required to produce this estimate was unavailable (about 19% to 49% of campaigns in any given category). Abnormal trading volume is computed as the excess of trading volume over the average daily trade volume in the 60-day period beginning 120 days prior to the given date. We note that one commenter stated that, based on the description of the estimate of transfers in the DERA Memorandum, a more accurate estimate would ''account for abnormal price changes by adjusting for overall stock market variations.'' *See* Lewis Study II (exhibit to letter from EIM IV). The description in the DERA Memorandum was imprecise on this point. The estimates of transfers in the memorandum as well as the estimates presented here are based on abnormal returns that do in fact adjust for market variations. *See supra* notes 733 and 768. Another commenter stated that ''CRSP volume is known to be inaccurate for NYSE-listed stocks because the CRSP data source rounds volume to the nearest hundred.'' *See* letter from Profs. Bishop and Partnoy III. We acknowledge this potential issue in CRSP volume data but note that the average and aggregate statistics that we present in the table should not be meaningfully affected by such rounding error.

[771] The columns of Table 5 reflect the same subsamples of filings as the corresponding columns of Table 3 with the additional restriction that filings are only included if there would have been an opportunity to trade on a day between the amended deadline and the actual filing date.

[772] We acknowledge that the estimates in Row 5 of Table 5 are approximate and may be sensitive to the methodology for estimating abnormal returns. *See supra* note 733.

[773] Similarly, if we assume that filers accumulating 10 percent or more of their stake after five business days forgo such campaigns, the aggregate estimate of potential wealth transfers that could be avoided would be about $36 million per year ($49 million, as computed above, minus $13 million from Column 3).

consequently market participation and capital formation.

The estimates in Table 5 assume that abnormal trading volume on the days between the amended deadline and the actual filing date, other than that representing the filer's own trades, represents trades by informed bystanders. It is possible that the abnormal trading volume represents other traders' reactions to similar news, market conditions, and trends as those to which the filer was reacting.[774] For example, researchers have found that filers time their accumulations to coincide with significant selling by institutions, so it is possible that some of this abnormal volume may represent the extent of the institutional selling pressure.[775] We also acknowledge that informed bystanders, like filers,[776] may adapt to the final amendments by condensing their trades to five business days following the trigger date.

Staff presented a similar quantitative analysis with respect to potential transfers from selling shareholders to informed bystanders under the current rule in the DERA Memorandum. Some commenters stated that the analysis in the DERA Memorandum demonstrated that a shortened filing window would reduce ''harms'' or ''costs'' to selling shareholders.[777] Others stated that the DERA Memorandum's characterization of selling shareholders as ''harmed'' was inappropriate and did not account for the benefits these selling shareholders experienced in terms of, for example, price improvement and improved liquidity as a result of the impending activist campaign.[778]

We acknowledge, as mentioned by commenters, that most investors selling shares during the filing window seem to benefit from the impending activist campaign. In particular, as demonstrated in Figures 7a and 7b, we observe a meaningful amount of stock price appreciation during the filing window for non-corporate-action filings, some of which would accrue to selling shareholders. Despite the assertions of a commenter,[779] the analysis in the DERA Memorandum and the similar analysis in this economic analysis do not characterize the trading between the Schedule 13D filer and a selling shareholder as harmful; in both cases, the analyses focus only on trading between informed bystanders (who are not the filer) and selling shareholders. We also acknowledge concerns that it may be inappropriate to construe the failure to benefit from future stock appreciation when selling shares to the filer as a harm to the selling shareholders, given that the stock appreciation in question results from the actions of the filer and, if there is a more limited opportunity to receive some of the economic benefits resulting from their actions, the filer may have a more limited incentive to initiate a campaign. We do not include sales to the filer in this analysis. Our analysis quantifies the transfer between selling shareholders and informed bystanders that results from the price change between the day of the sale and the day after the filing date. That is, an earlier deadline would potentially benefit these selling shareholders to the detriment of the informed bystanders.

Some commenters addressing the DERA Memorandum indicated that staff provided insufficient evidence of the existence of informed bystanders.[780] One of these commenters added that activists have significant incentives to maintain the confidentiality of their strategies until they are ready to make a public disclosure.[781] We believe the academic studies discussed above support the conclusion that informed bystanders purchase shares in issuers shortly before the filing of Schedule 13D reports pertaining to such issuers. Some of the researchers suggest that filers themselves, in some cases, may leak information about their impending filing; others specifically identify other channels for information leakage unbeknownst to the activist.[782] However, the methodologies used in these studies to identify informed bystanders in specific cases cannot be expanded to reliably identify trades by all informed bystanders in a broad sample. One comment letter suggested that we use Consolidated Audit Trail (''CAT'') data in the analysis of ''informed'' trading but did not specify what methodology we should use.[783] We do not believe this data would allow us to identify which trades may involve a counterparty that benefited from information leakage. We recognize that

[774] One commenter addressing a similar analysis in the DERA Memorandum stated that ''there is no attempt to exclude from this analysis any returns that accrued because the Schedule 13D filer publicly disclosed its intent after the trigger date but before filing the Schedule 13D—which is not an uncommon occurrence.'' *See* letter from EIM IV; *see also* Lewis Study II (exhibit to letter from EIM IV). We acknowledge that a press release by a filer disclosing a campaign in advance of a Schedule 13D filing could provide an alternate explanation for abnormal trading volume (and/or abnormal returns) between the trigger date and filing date of an initial Schedule 13D. However, staff reviewed one year of filings and concluded that such disclosures are relatively rare and are thus not likely to meaningfully affect the estimates presented in Table 5. In particular, staff used EDGAR's full text search function to identify initial Schedule 13D filings made in 2021 that included the term ''press release,'' and then reviewed the resulting filings to determine whether the filer disclosed its plans or proposals between the trigger date and filing date of the initial Schedule 13D. (The instructions to Item 7 of Schedule 13D specify that the filer shall file as exhibits to the Schedule 13D, among other things, ''copies of all written . . . plans or proposals relating to . . . the acquisition of issuer control, liquidation, sale of assets, merger, or change in business or corporate structure, or any other matter as disclosed in Item 4 [of Schedule 13D].'') Staff identified three initial Schedule 13D filings in 2021 for which the filer disclosed the campaign in a press release between the trigger date and filing date (all of which involved a press release made by the filer on the trigger date). None of these filings was included in the sample of Schedule 13D filings analyzed in Table 5 (which includes 101 filings from 2021) based on the sample restrictions that apply to this analysis. Specifically, in two cases, the filings were made on or before the first business day after the amended filing deadline, and in one case the requisite financial information to be included in the analysis was not available for the filing. Overall, given the limited number of filings for which earlier disclosure was identified, we do not believe that identifying and removing such filings from the full eleven-year sample would meaningfully affect the results.

[775] *See, e.g.,* Nickolay Gantchev & Chotibhak Jotikasthira, *Institutional Trading and Hedge Fund Activism,* 64 Mgmt. Sci. 2930 (2018) (''Gantchev & Jotikasthira 2018 Study'') (finding that the timing of Schedule 13D share accumulations is closely tied to institutional liquidity shocks, in that activist purchases closely track institutional sales at the daily frequency).

[776] See section IV.C.1.b.i below for a discussion of how filers may adapt to the amended deadline.

[777] *See* letters from AFREF II; Better Markets II; SCG & NIRI.

[778] *See* letters from CIRCA IV; EIM IV; Profs. Bishop and Partnoy III. In the economic analysis of the Proposing Release, the Commission made somewhat broader statements about effects on selling shareholders, suggesting that all investors who sell their shares during the 10-day window may be harmed. Commenters addressing the Proposing Release made similar statements regarding the characterization of ''harm'' being inappropriate and selling shareholders benefiting from the activity underlying the filing. *See* letters from AIMA; CIRCA I; EIM I; ICM; Pershing Square; Profs. Schwartz and Shavell I; Profs. Schwartz and Shavell II; Profs. Swanson, Young, and Yust; S. Lorne; TRP. Further, some commenters asserted that the notion that these selling shareholders should be able to sell at prices that reflect information in the Schedule 13D filings would entail an unjustified windfall to those selling shareholders, and a transfer of valuable information from the Schedule 13D filer, who expended the effort to research and develop that information. *See* letters from Dodge & Cox; EIM I; ICM; Prof. Gordon.

[779] *See* letter from CIRCA IV.

[780] *See* letters from EIM IV (stating that the presence of harmful conduct is assumed, not demonstrated); Profs. Bishop and Partnoy III (stating that the memorandum provides no support ''for the assertion that purchasers other than the 13D filer are more informed than sellers during the relevant period'').

[781] *See* letter from EIM IV; *see also* Lewis Study II (exhibit to letter from EIM IV) (stating that the analysis ''assumes that the activist has informed select investors about the upcoming campaign before its public announcement'').

[782] *See supra* notes 756–760 and accompanying text.

[783] *See* Lewis Study II (exhibit to letter from EIM IV) (stating that ''DERA could have used consolidated audit trail ('CAT') data that contains information on which traders were participating in the market to estimate a precise measure of the impact but did not do so'' and that ''the analysis of 'informed' trading is an obvious setting to utilize CAT data''); letter from EIM IV.

our own analysis does not directly identify informed bystanders, and may, for example, represent buyers who have learned of the probability of activism through fundamental research. However, we acknowledge those limitations and are unaware of approaches that would allow us to obtain a better estimate of trades by informed bystanders.

Some commenters criticized the DERA Memorandum for failing to describe the likely characteristics or nature of the selling shareholders and their reasons for selling.[784] Some commenters responding to the Proposing Release indicated that it was likely that the selling shareholders were not retail investors but rather sophisticated institutions who could appropriately weigh the possibility that an activist investor may be buying up shares,[785] with one providing an analysis supporting this assertion.[786] We acknowledge that the potential effects of reducing transfers from selling shareholders may be tempered somewhat to the extent the counterparties of the potential informed bystanders are, for example, institutions with liquidity needs, and that there is some evidence that this may be common.[787] However, gains by informed bystanders may be viewed by some market participants as unfair regardless of the counterparties bearing the other side of these transfers.

Some commenters raised concerns related to the statement in the DERA Memorandum that lessening an informational advantage that some market participants may perceive to be unfair could enhance trust in the securities markets and promote capital formation.[788] In particular, one commenter indicated a lack of evidence that activism is contributing to an erosion of trust in the markets,[789] while another requested evidence that the acceleration of filing deadlines in other contexts changed the investors' behavior or enhanced their level of trust in the market.[790] This commenter did not suggest how we might gather such evidence, however, and trust has been shown to be an important determinant of participation.[791]

One comment letter presented an alternative analysis of the effects on selling shareholders based on the computation of abnormal net selling activity, which they state better ''separates any allegedly 'harmed' selling . . . from other trading'' than the analysis in the DERA Memorandum.[792] In particular, these commenters categorize trades as either seller-initiated or buyer-initiated in order to compute abnormal net selling. The commenters concluded that there is no statistically significant evidence of systematic net selling during the five days preceding the filing[793] such that they ''cannot meaningfully infer that any alleged 'harm' has occurred.''

We note that signing trades as seller- and buyer-initiated is generally intended to reflect which side of the trade is demanding liquidity, as opposed to providing liquidity. Net order imbalances therefore provide information about which type of traders (sellers or buyers) are demanding liquidity on a given day, while the opposite side of any order imbalance is borne by liquidity providers (historically, these would be market makers, but today other investors including high-frequency traders typically play this role). An analysis of net order imbalances in the days around Schedule 13D filings can therefore provide information about wealth transfers on these days between those investors that are demanding liquidity versus those providing liquidity.[794] However, we do not believe that trades that are signed as seller-initiated versus buyer-initiated provides sufficient information about which trades are more likely to involve a buyer that has a one-sided informational advantage because of their knowledge of another investor's share accumulations, which is the focus of our analysis.

In summary, informed bystanders may profit, as a result of information leakages rather than from their own fundamental research or effort to improve the issuer's performance, from a near-arbitrage opportunity during the window of time between the trigger date and the date on which the filer's beneficial ownership and plans are made public on a Schedule 13D. In this section, we have presented a quantitative analysis based on historical data that, subject to certain assumptions and limitations, provides a reasonable basis to believe that wealth transfers from selling shareholders to potential informed bystanders can be significant under the current rules.

[784] *See* letters from CIRCA IV (stating that ''it is possible that any such shareholder is selling because it needs cash and thus may be helped and not harmed by the availability of activist buyers''); Profs. Bishop and Partnoy III; *see also* Lewis Study II (exhibit to letter from EIM IV) (stating that the analysis ''overlook[s] market makers and day traders (trading participants who open and close their position between the proposed deadline and the filing date)'' and that such traders ''would not be impacted'').

[785] *See* letters from Profs. Bishop and Partnoy I; CIRCA III; *see also* letter from 65 Professors (suggesting that the Commission could examine whether particular categories of investors are net sellers, and therefore are not harmed in aggregate, during the period prior to the filing of Schedule 13Ds).

[786] *See* letter from Profs. Bishop and Partnoy I; *see also* Ekkehart Boehmer et al., *Tracking Retail Investor Activity,* 76 J. Fin. 2249 (2021) (introducing the algorithm for identifying retail order flow used in the cited comment letter). We note that questions have recently been raised as to the reliability of this algorithm for producing an unbiased estimate of retail order flow. *See, e.g.,* Yashar Barardehi et al., *Uncovering the Liquidity Premium in Stock Returns Using Retail Liquidity Provision* (Working Paper, 2023), *available at https://ssrn.com/abstract=4057713.*

[787] Studies have found that Schedule 13D filer accumulations are timed, on average, coincident with institutional selling pressure. *See, e.g.,* Gantchev & Jotikasthira 2018 Study.

[788] *See* letters from CIRCA IV; EIM IV.

[789] *See* letter from EIM IV.

[790] *See* letter from CIRCA IV.

[791] *See* L. Guiso, P. Sapienza, and L. Zingales, *Trusting the Stock Market,* J. of Fin., 63 (6) (Dec. 2008), at 2557–2600.

[792] These commenters used an algorithm from academic studies to categorize trades in the New York Stock Exchange Trade and Quote (''NYSE TAQ'') dataset as either seller-initiated or buyer-initiated. They then computed abnormal net selling (seller-initiated volume minus buyer-initiated volume, scaled by total trading volume and converted into a percentage by adjusting for lagged net selling volume and the logarithm of market capitalization) for the days around Schedule 13D filing for a sample of activist events from 2011 to 2021. *See* letter from Profs. Bishop and Partnoy III (further explaining that ''if, for every seller-initiated trade, there is an equal and opposite sized buyer-initiated trade, then we cannot meaningfully infer that any alleged 'harm' has occurred. However, if there is a net order imbalance, with more selling activity than buying activity, then we may be able to infer alleged 'harm.' '').

[793] This analysis in the comment letter focused on the proposed amendment to the filing deadline—five calendar days—rather than five business days. We note that this analysis appears to focus on the five days before a Schedule 13D filing date regardless of the number of days that have elapsed since the trigger date. As such, the window analyzed varies relative to the trigger date rather than consistently representing the sixth to tenth days after the trigger date.

[794] That is, we would interpret a lack of systematic net selling in the days before a Schedule 13D filing to indicate that there are no significant transfers between investors demanding liquidity and those providing liquidity as a result of trades during this period and the subsequent price changes. The commenters describe the analysis as identifying the effect on ''natural buyers'' as opposed to market makers. *See* letter from Profs. Bishop and Partnoy III. We note that the positive but statistically insignificant abnormal net selling these commenters identified on nine out of the 10 days preceding a filing is consistent with academic research cited above finding that Schedule 13D filers time their accumulations coincident with institutional selling pressure. *See supra* note 775.

iv. Information Asymmetries and Liquidity

Shortening the Schedule 13D filing deadline and thereby more quickly resolving an information asymmetry between some market participants and the rest of the market is likely to enhance liquidity.

Some commenters to the Proposing Release agreed that a shortened filing deadline would reduce information asymmetries.[795] Others stated that the academic paper cited in the Proposing Release to support the relation between information asymmetry and liquidity is not applicable to the setting at hand,[796] or more generally questioned the basis of statements in the economic analysis of the Proposing Release indicating that the shortened deadline would result in increased liquidity.[797] In response to these comments, we have expanded the literature that we review. We continue to believe that the amendments will reduce information asymmetries and improve liquidity.

Specifically, empirical and theoretical work point to a linkage between information asymmetry and measures of liquidity such as bid-ask spreads and price impact.[798] Generally, a greater proportion of strategic information-based trading (*i.e.,* trading based on private, or non-public, information) in contrast to ''noise trading'' (*i.e.,* trading based on, for example, liquidity needs rather than private information) lowers liquidity in an issuer's securities, as other market participants adjust their behavior in light of the risk of adverse selection (*i.e.,* a situation in which the buyer of an issuer's security has more information than the seller, or vice versa, about the true value of the security).[799] In contrast, liquidity should generally increase when there is a lower proportion of information-based trading to noise trading. For example, a reduced risk of trading with the informed bystanders discussed in the previous section may lead liquidity providers to charge lower bid-ask spreads, resulting in higher liquidity.[800]

We would expect the amended deadline to improve liquidity by lowering information asymmetry. While one study finds theoretically mixed results of shortening the filing deadline with respect to liquidity and efficiency during the period prior to the filing, this study does not address the period subsequent to the now-earlier date.[801] Another study shows that empirical proxies for liquidity are higher than otherwise on days that the activist is accumulating shares, concluding that this is so both because activists submit limit orders and because activists strategically trade when liquidity is higher.[802] This study also does not address the period subsequent to the now-earlier filing date. Reducing the number of days prior to the filing should reduce information asymmetry in the period after the filing (through the date the disclosure would otherwise have been made) because after the filing is made the information about a filer's holdings and intentions is public. Thus, liquidity should improve in this period.[803]

We expect that liquidity benefits are more likely to be associated with the types of filings that we classify as ''non-corporate-action filings,'' and not with ''corporate action filings.'' Indeed, the abnormal stock return patterns presented in Figures 4 and 5 above demonstrate that the latter are, on average, not associated with a meaningful stock price reaction between the amended deadline and the day after the actual filing date. Because only the non-corporate-action filings seem to be associated with significant new information that is not already incorporated in market prices earlier in the filing window, these are the filings that are likely to be associated with meaningful information asymmetries whose duration could be reduced by the shortened filing deadline. As noted above, about 68 percent of timely non-corporate-action filings, or about 152 initial Schedule 13D filings of this type per year, are currently filed after the amended deadline. Based on this historical filing behavior, we expect that the amended filing deadline to result in earlier public disclosure, and thus an earlier stock price reaction and resolution of the related asymmetric information than would otherwise have been experienced, for approximately this number of filings per year, thus enhancing liquidity.

Some commenters stated that an information asymmetry between the filer and the market should not be viewed as problematic,[804] with some referring to such information asymmetries as simply a feature of a functioning market.[805] Some commenters responding to the DERA Memorandum raised similar concerns about the usage of ''information asymmetries'' in that document and a potential implication that these information asymmetries were problematic.

We acknowledge that benefits may stem from the information asymmetry between a Schedule 13D filer and the market. The informational advantage of Schedule 13D filers results, in general, from their own expenditures on research and analysis or from their efforts and expenditures to pursue changes at the issuers in which they accumulate these shareholdings. With a reduced ability to receive some of the economic benefits of their actions, the filer may have reduced incentives to initiate a campaign.[806] Consistent with this view, we have expanded our analysis of the potential costs with respect to reduced activism in section IV.C.1.b below. We have also narrowed the consideration of selling shareholders in the previous section vis-à-vis the Proposing Release to focus on those trading with informed bystanders who are not the filer and yet may profit from the advance knowledge or suspicion of a filer's potential actions, rather than from their own fundamental research or

[795] *See* letters from ABA; AFREF; Better Markets I; FreeportMcMoRan; NIRI.

[796] *See* letters from Profs. Bishop and Partnoy; Profs. Schwartz and Shavell II (referring to Lawrence Glosten and Paul Milgrom, Bid, Ask, and Transaction Prices in a Specialist Market with Heterogeneously Informed Investors, 14 J. FIN. ECON. 71–100 (1985)).

[797] *See* Lewis Study I (exhibit to letter from EIM I); letters from 65 Professors; AIMA; Profs. Bishop and Partnoy.

[798] *See, e.g.,* Albert S. Kyle, *Continuous Auctions and Insider Trading,* 53 Econometrica 1315 (1985) (theoretically modeling a market with informed trading to investigate, among other things, the liquidity characteristics of a speculative market); David Easley et al., *Liquidity, Information, and Infrequently Traded Stocks,* 51 J. Fin. 1405 (1996) (investigating, empirically, the economic importance of information-based trading on bid-ask spreads); *see also Order Competition Rule,* Release No. 34–96495 (Dec. 14, 2022) [88 FR 128 (Jan. 3, 2023)] (for further discussion and analysis on the relationship between adverse selection risk and bid-ask spreads).

[799] *Id.*

[800] *See supra* section IV.C.1.a.iii.

[801] *See* Kerry Back et al., *Activism, Strategic Trading, and Liquidity,* 86 Econometrica 1431 (2018) (presenting a model of a specialist market with an activist trader and finding that the association between liquidity and a reduced number of days for the activist to trade based on their asymmetric information—which in their model is equivalent to reducing the rate of ''noise trading'' or uniformed trading during the same trading window—may be indeterminate during the filing window because of competing effects related to, for example, the potentially increased proportion of informed to uninformed trades in a shorter filing window versus the decreased information asymmetry regarding the activist's shareholding resulting from less noise trading).

[802] *See* Collin-Dufresne & Fos 2015 Study (finding that illiquidity and measures of adverse selection are lower on days that the activist trades, due to market timing and the use of limit orders—*i.e.,* liquidity provision—by activists).

[803] *See supra* note 798.

[804] *See* letters from AIMA; CIRCA I; Dodge & Cox; EIM I; ICM; Prof. Gordon; Profs. Schwartz and Shavell I; Profs. Schwartz and Shavell II; S. Lorne.

[805] *See* letters from EIM I; Profs. Schwartz and Shavell I.

[806] *See, e.g.,* Sanford Grossman & Oliver Hart, *Takeover Bids, the Free-Rider Problem, and the Theory of the Corporation,* 11 Bell J. Econ 42 (1980)

effort to improve the issuer's performance.[807] We have also expanded our consideration of the literature regarding liquidity beyond what was considered in the Proposing Release to reflect additional findings pertinent to the setting of activist campaigns.[808] We believe that the literature cited in the Proposing Release still has relevance in considering, for example, the potential impacts of trading by informed bystanders.[809]

b. Costs

An earlier filing deadline for Schedule 13D may affect significant shareholders seeking to affect control of an issuer. There may be indirect effects as well, as we describe below. We also expect the final amendments to impose relatively minor compliance costs on all Schedule 13D filers.

i. Potential Effects on Activism

By shortening the initial Schedule 13D filing deadline, the final amendments may increase costs of activist campaigns. Commenters expressed mixed views as to whether a shortened filing deadline would reduce activism. Some commenters stated that a shortened filing deadline would not significantly impair activism.[810] Others, however, stated that a shortened filing deadline was likely to reduce the number of activist campaigns,[811] and expressed disagreement with statements in the Proposing Release as to why such a reduction or the impact of any reduction would be limited.[812] Some commenters indicated that the economic analysis in the Proposing Release could have been enhanced by further consideration of the potential effects on activist campaigns, including a quantitative analysis.[813]

A Quantitative Analysis of Historical Activist Campaigns: Assumptions, Findings, and Limitations

We use the data presented in section IV.B.3.a.iii above on filers' current patterns of share purchases to provide some insight into the number and type of filings that have historically involved trading between the amended deadline and their actual filing date.[814]

Our analysis focuses on those 3,067 Schedule 13D filings from 2011 through 2021 that we classify as ''non-corporate-action filings'' (as opposed to ''corporate action filings''),[815] which represent about 20 percent of initial Schedule 13D filings during the sample period, per the first row of Table 2.

As in Figures 2, 3a, and 3b and Table 3 above, we further refine the sample of non-corporate-action filings to exclude late filers and filers with no beneficial ownership reported as of the filing date and to adjust for multiple filings on the same date, resulting in a sample size of 2,370 non-corporate-action filings.[816] Our analysis, presented in Table 6, provides information about the characteristics of current campaigns delineated by filers' degree of accumulation of shares as of the amended deadline.[817]

[807] *See supra* section IV.C.1.a.iii.

[808] *See supra* note 801 and accompanying text.

[809] *See* Lawrence Glosten & Paul Milgrom, *Bid, Ask, and Transaction Prices in a Specialist Market with Heterogeneously Informed Investors,* 14 J. Fin. Econ. 71 (1985) (presenting a theoretical model of a specialist market with trading by insiders, and describing generally how a specialist must recoup the losses suffered in trades with the well informed by gains in trades with noise traders, and that these gains are achieved by setting a spread).

[810] *See* letters from ABA; AFL–CIO; Better Markets I; Labor Unions; SCG; Sen. Baldwin, et al.; *see also infra* note 818 and accompanying text.

[811] *See* letters from AIMA; C. Penner and Prof. Eccles; CIRCA I; Dodge & Cox; EIM I; ICM; M. Frampton; MFA; Prof. Gordon; Profs. Schwartz and Shavell II; Profs. Swanson, Young, and Yust; Profs. Eccles and Rajgopal; Rep. Torres, et al.; Rice Management; S. Lorne; STB; TRP.

[812] *See, e.g.,* letter from AIMA (stating that the fact that some filers already file within five days ''does not justify accelerating the reporting timeline'' because it may merely reflect variation in when filers happen to satisfy their ''aggregate purchasing goal'').

[813] *See* letters from 65 Professors; AIMA; B. Sharfman; EIM I; ICM; MFA; Profs. Bishop and Partnoy I; Prof. Hu; Prof. Webber; Rep. Torres, et al.; SIFMA; SIFMA AMG; STB.

[814] We also considered investigating the effects of alternate deadlines for reporting the acquisition of meaningful ownership stakes in other countries, as suggested by several commenters. *See, e.g.,* Lewis Study I (exhibit to letter from EIM I); and letters from Sen. Baldwin, et al.; WLRK II. However, we concluded that significant differences in rules and practices in other countries as compared to the United States limit our ability to draw direct inferences from the experience of these other countries. Further, we found that confounding events would limit our ability to draw conclusions about the effects of rule changes in these other countries. For example, revisions to Japan's substantial shareholding reporting rules took effect in 2006 and 2007, coincident with the rise of poison pills and the emergence of bear market conditions in Japan. Thus, while activist engagements in Japan declined after 2007, it is difficult to identify the specific role any one of these factors played in this decline. *See, e.g.,* Yasushi Hamao & Pedro Matos, *U.S.-Style Investor Activism in Japan: The First Ten Years?,* 48 J. Jpn. Int. Econ. 29 (2018).

[815] As discussed in section IV.B.3.a.iii above, we found that corporate action filings typically reflect one or two off-market transfers of share ownership, very few of which currently occur after the fifth day following the trigger date. We also anticipate that the terms of these transfers are likely agreed upon in advance. We therefore believe that a shortened filing deadline would not significantly impact the investment activities of the filers of corporate action filings. As discussed in section IV.C.1.viii below, we acknowledge that adjusting to an accelerated deadline could somewhat increase the compliance costs for such filers under the final amendments. As discussed in section IV.C.1.a, the benefits of a shortened initial Schedule 13D filing deadline are expected to be relatively limited for corporate action filings.

[816] We exclude late filers from this analysis because it is difficult to predict how filers that are not in compliance with the current filing deadline will react to a change in this deadline. See *supra* note 718 and accompanying text for more detail on the sample refinements.

[817] These estimates are based on staff analysis of EDGAR filings through programmatic text analysis (to categorize filings, as discussed in section IV.B.3.a.ii above, to extract the data necessary to determine share accumulation patterns, as discussed *supra* note 719, and to extract the required dates) as well as data from the Audit Analytics, CRSP, and Compustat databases. Estimates of average issuer characteristics (Rows 2 through 5) and campaign-level profit and value measures (Rows 9 through 11) are based on the campaigns for which the required data was available. While data availability varies by row and column of the table, every statistic in the table reflects data for at least 81% of the respective sample of filings. The Amihud illiquidity ratio (in Row 4) is computed as in the Gantchev & Jotikasthira 2018 Study. See *supra* note 692 regarding how we identify the ''Prominent Activists'' category (for the purpose of computing Row 6). A filer's unrealized gains on the reported equity stake (used to compute the percentages in Row 9) are based on information on their actual purchases and purchase prices for the 60 days prior to the filing as reported in the Schedule 13D filing, as well as the remainder of ownership acquired before those 60 days, which is assumed to be acquired at the average purchase price reported in the Schedule 13D filing excluding any purchases after the trigger date. Unrealized gains are estimated by comparing these purchase prices to the share price the day after the filing from the CRSP database. Abnormal returns (in Row 10) are computed as the difference between an issuer's stock market return and the CRSP value-weighted market index and are presented for the period extending from 20 business days prior to 20 business days after the filing date. Basing the horizon over which the abnormal returns are computed on business days, rather than calendar days, is consistent with existing studies but differs from the graphs presented in Figures 7a and 7b, which present returns based on calendar days around the filing date (and which thus reflect slightly different estimates). For the aggregate estimate of the increase in shareholder value (in Row 12), the estimated average increase in shareholder value per campaign (in Row 11) is used as a proxy for the shareholder value impact of campaigns for which the data required to produce this estimate was unavailable (about 10% to 19% of campaigns in any given category). We may slightly overestimate the number of campaigns falling in Columns 3 and 4 due to the algorithm by which total reported ownership is extracted from filings. *See supra* note 722. As discussed above, we reviewed all of the filings categorized in Column 4 (*i.e.,* in the light grey bars of Figure 3b) manually and determined that 6% of the filings in this column would not have been categorized in this group if our algorithm to extract total reported ownership from the filing was as precise as our manual review of the documents. However, because the average increase in shareholder value for these filings was relatively low, excluding these filings from Column 4 would not have a meaningful impact on our estimate of the aggregate increase in shareholder value for this category.

TABLE 6—CAMPAIGN CHARACTERISTICS BY DEGREE OF ACCUMULATION BY AMENDED FILING DEADLINE, ANNUALIZED
[2011–2021]

	Percent of Stake accumulated by amended deadline			
	(1) 100% (full stake)	(2) <100%	(3) <90% subset of (2)	(4) <75% subset of (3)
(1) Average number of campaigns/year	173	42	7	1
Targeted Issuer Characteristics:				
(2) Average issuer size (market cap.)	$916M	$1.5B	$1.8B	$1.8B
(3) Average issuer liquidity (turnover) *	1.2%	1.2%	1.5%	1.5%
(4) Average issuer illiquidity (Amihud illiquidity ratio) **	0.13	0.11	0.09	0.08
(5) Percent issuers in S&P 1500	9.7%	14.3%	15.6%	12.5%
Filer/Campaign Characteristics:				
(6) Percent by a Prominent Activist	29.8%	36.3%	43.6%	56.3%
(7) Average beneficial ownership reported in filing	9.1%	7.3%	8.7%	9.5%
(8) Average percentage of reported ownership stake accumulated after amended deadline	0%	5.9%	19.2%	35.3%
(9) Average percentage of filer's unrealized gains on reported equity stake, as of day after filing date, attributable to shares accumulated after amended deadline ***	0%	4.1%	9.1%	22.6
Campaign Value Implications:				
(10) Average return around filing date (cumulative abnormal return, day –20 to 20)	5.7%	8.1%	17.2%	14.4%
(11) Average increase in shareholder value per campaign	$36M	$151M	$222M	$208M
(12) Average aggregate increase in shareholder value across all campaigns combined (based on average number of campaigns per year)	$6.3B/yr	$6.3B/yr	$1.6B/yr	$302M/yr

* Turnover is the average daily trading volume as a percentage of the issuer's shares outstanding, computed over the six-month period before the trigger date.

** The Amihud illiquidity ratio is intended to capture the stock price impact of trading and is computed over the six-month period before the trigger date. See note 817 for more details.

*** Unrealized gains estimated for this purpose reflect estimated gains only on the equity stake reported in the Schedule 13D filing (*i.e.,* excludes unrealized gains from any cash-settled derivative instruments, including swaps, to the extent such instruments did not result in beneficial ownership) and are computed as of the day after the filing (*i.e.,* excludes any impact of changes in stock price or additional stock purchases thereafter). See note 817 for more details.

The columns of Table 6 reflect the same subsamples of filings as the corresponding columns of Table 3 above. A similar analysis with respect to the potential effects of a shortened initial Schedule 13D filing deadline on activism was presented in the DERA Memorandum. Whereas the analysis in the DERA Memorandum was based on the proposed five-calendar day deadline, the analysis summarized in Table 6 is based on the five-business day deadline. One commenter stated that the analysis demonstrated that ''shortening the deadline should not significantly impede activist campaigns'' because ''[t]he overwhelming majority of past filers have acquired at least 75% of their reported stake'' by the amended deadline.[818] Another commenter questioned whether the data supporting the findings with respect to the percentage of past filers that completed their share accumulations by the amended deadline is ''representative of the broader market.'' [819] This commenter recommended that the analysis be expanded to focus on campaigns where the activist filer continued its purchases throughout the 10-day window and reported initial beneficial ownership of 10 percent or more.[820]

We acknowledge that the campaigns in our non-corporate-action sample are heterogeneous, and that the percentage of filers that continued to accumulate shares after the amended deadline would vary across subsamples. For example, Row 6 of Table 6 demonstrates that ''prominent activists'' were somewhat more likely than others to continue to accumulate a significant fraction of their reported beneficial ownership after the amended deadline. Per the commenter's suggestion to focus on filers reporting beneficial ownership of 10 percent or more, we note that Row 7 of Table 6 indicates that the reported initial beneficial ownership was not systematically higher for filers that continue to accumulate shares after the amended deadline in comparison to those that do not. Per the commenter's other suggestion, we note that both Table 6 and Table 5 above do isolate (in Column 2 of each table) the results for those filings that continue to accumulate shares after the amended deadline.

Other commenters, referencing the dollar estimates in the DERA Memorandum, asserted that the analyses demonstrated that the costs of the proposed Schedule 13D filing deadline amendments related to effects on activist campaigns exceed the benefits of the proposed amendments.[821] One commenter stated that the DERA Memorandum ''fail[ed] to adequately quantify the benefits to long-term shareholders of the target issuer in the form of substantially higher share prices.'' [822] In response to these commenters, we note that the dollar campaign values in rows 11 and 12 of Table 6 do not represent cost estimates of the final amendments. Rather, the values reflect the value creation from the historical campaigns.[823] Interpreting these figures as a cost would require assuming all of these campaigns would have been abandoned under a five-

[818] *See* letter from Better Markets II.

[819] *See* letter from CIRCA IV.

[820] *Id.*

[821] *See* Lewis Study II, at 8 (exhibit to letter from EIM IV observing that, historically, ''the average rise in shareholder value for a campaign that requires more than five days to develop a position is $128 million''); letters from CIRCA IV; EIM IV.

[822] *See* letter from CIRCA IV.

[823] The values also do not account for the costs activists incur to conduct the campaigns.

business day filing deadline. Instead, we expect that a five-business day deadline would not have deterred the vast majority of campaigns. Accordingly, we believe that the costs of the final amendments would be significantly less than any of the figures in Table 6 or identified by commenters because we expect that activists will adapt to the amended deadline rather than forgo campaigns. We acknowledge that some activist investors have indicated that the proposed amendments would make them less likely to carry out activist campaigns.[824] Nonetheless, we expect that the vast majority of the value creation reflected in the table above would continue unabated. Results in Row 1 show that 80 percent of campaigns (173 out of 215 campaigns per year) over the period from 2011 to 2021 would not have been affected by a five-business day filing deadline. While the remaining 20 percent (42 out of 215 campaigns per year) could have been affected to some degree, we expect most of these campaigns would still have occurred, as there are several ways activists can adapt to the amended deadline.[825] In particular, as we discuss below in this section, activists can adapt to a shorter deadline using strategies such as (a) accumulating a smaller stake in the issuer's shares; (b) accumulating shares more quickly; or (c) accumulating an economic stake using other instruments, such as cash-settled swaps or other derivatives. We expect that in most if not all cases, they will do so.

A Literature Review

In considering the implications of a potential reduction in activist campaigns, we have expanded our consideration of the existing literature on activist campaigns, as suggested by commenters.[826] There is a large body of literature finding that activist campaigns are, on average, associated with an economically significant increase in shareholder value (*i.e.,* positive abnormal stock returns) around the Schedule 13D filing or other announcement date.[827] As noted in the Proposing Release, the literature does not find that these returns reverse in the long term, though the determination of long-term returns is inherently more complicated than measuring short-term returns.[828] Researchers have also found that the degree of impact that these activities have on shareholder value varies significantly with an issuer's market capitalization, with smaller-cap issuers experiencing significantly larger returns (expressed as a percentage) around the disclosure of an activist campaign than larger-cap issuers.[829] Researchers have debated whether the activists' actions are responsible for any of this increase in value. Some researchers argue that any stock price reaction may instead reflect activists' ability to select issuers that are likely to be taken over or to recover from underperformance for other reasons.[830] However, broader evidence supports the hypothesis that activists' actions are responsible for the vast majority of the increase in value.[831]

[824] *See, e.g.,* letters from CIRCA IV; EIM IV.

[825] *See supra* note 724.

[826] *See* letters from 65 Professors; MFA; Rep. Torres, et al.

[827] Measurement windows in most studies range from five to 40 days around the announcement date, with many also considering longer horizons to address concerns about a potential reversal of the returns. *See, e.g.,* Lucian Bebchuk et al., *The Long-Term Effects of Hedge Fund Activism,* 115 Colum. L. Rev. 1085 (2015) (''Bebchuk et al. 2015 Study'') (estimating an announcement return of about 6% to initial Schedule 13D filings by activist hedge funds from 1994 through 2007, with, on average, no reversal in returns over the following five years); Kedia et al. 2021 Study (demonstrating, in Table IA2 of the internet Appendix, no reversal over five years of the positive one-year buy-and-hold returns for different subsamples of initial Schedule 13D filings by activist hedge funds from 2004 through 2012, based on a variety of models of benchmark returns); Boyson & Pichler 2019 Study (estimating a buy-and-hold return of about 12% over a holding period averaging 2.7 years to campaigns by hedge fund activists from 2001 through 2012); Martijn Cremers et al., *Hedge Fund Activism and Long-Term Firm Value* (Working Paper, Dec. 13, 2018), *available at https://ssrn.com/abstract=2693231* (''Cremers et al. 2018 Study'') (estimating a return of about 6% around the start of activist hedge fund campaigns from 1995 through 2011, with, on average, no reversal in returns over the following five years); Edward Swanson et al., *Are All Activists Created Equal? The Effect of Interventions by Hedge Funds and Other Private Activists on Long-Term Shareholder Value,* 72 J. Corp. Fin. 102144 (2022) (''Swanson et al. 2022 Study'') (estimating returns of 5% to initial Schedule 13D filings in 1994 through 2014, with, on average, no reversal in returns over the following three years); Ed deHaan et al., *Long-Term Economic Consequences of Hedge Fund Activist Interventions,* 24 Rev. Acc. Stud. 536 (2019) (''deHaan et al. 2019 Study'') (estimating, on an equally weighted basis, returns of 5% to initial Schedule 13D filings by activist hedge funds from 1994 through 2011, with, on average, no reversal in returns over the following two years); Brav et al. 2022 Study (estimating an announcement return of about 5% to blockholdings by hedge fund activists from 1994 to 2018, with, on average, no reversal in returns over the following three years). While much of the academic research has focused on blockholdings by activist hedge funds, other studies have found similar stock returns related to Schedule 13D filings by other types of investors. *See, e.g.,* Ulf von Lilienfeld-Toal & Jan Schnitzler, *The Anatomy of Block Accumulations by Activist Shareholders,* 62 J. Corp. Fin. 101620 (2020) (''Lilienfeld-Toal & Schnitzler 2020 Study'') (estimating returns of 7% to 8% around initial Schedule 13D filings by external shareholders in 2001 through 2016, irrespective of filer type); Swanson et al. 2022 Study (estimating returns of 5% around initial Schedule 13D filings in 1994 through 2014, with no statistically significant difference in the returns around filings by hedge funds versus those by other private activists).

[828] *See* Proposing Release at 13885 and *supra* note 827. Several commenters cited a different study than those cited above, with one stating that it ''shows the stock price increase is temporary and in fact the company is often in a weaker economic position post-activist intervention.'' *See* letter from Sen. Baldwin, et al; *see also* letter from Labor Unions. The cited study presents results showing that a measure of firm valuation increases for firms targeted by hedge fund activists relative to a matched sample of similar, non-targeted firms in the year after activists report their ownership, but that there is no statistically significant difference in this metric across the targeted and matched firms over a longer horizon. However, this study does not investigate stock price or stock returns, but instead measures firm valuation as Tobin's Q, which the authors define as ratio of a firm's market value of assets to the replacement value of assets. This metric may therefore reflect changes in a number of factors beyond stock returns, such as changes in debt values and changes in book assets, and cannot be interpreted equivalently to the studies cited above. Further, the results of the matched sample analysis demonstrate that the differential in Tobin's Q diminishes over longer horizons, but not that the improvement among targeted firms is necessarily temporary; it is possible that the gap narrows due to a similar but delayed improvement in the matched control firms. It is also unclear how the study treats targets that are later acquired, which is a common outcome for targeted firms and could bias the long horizon results. Finally, the longer-horizon tests use a different baseline than the shorter-horizon tests (Tobin's Q one year after activists report their ownership is compared to the same metric one year before activists report their ownership, while Tobin's Q five years after activists report their ownership is compared to the same metric five years before activists report their ownership), which may affect the interpretation of the results. *See* Mark DesJardine & Rodolphe Durand, *Disentangling the Effects of Hedge Fund Activism on Firm Financial and Social Performance,* 41 Strateg. Mgmt. J. 1054 (2020) (''DesJardine and Durand 2020 Study'') (with matched sample results presented in Table 7). One commenter noted additional concerns with this study. *See* letter from Profs. Bishop and Partnoy II. A different study using a larger sample of hedge fund activist campaigns finds differing results under multiple matched-sample approaches, with a statistically significant increase in Tobin's Q for targeted firms, including over a five-year horizon. *See* Brav et al. 2022 Study (at Table 9, Panel A).

[829] *See, e.g.,* deHaan et al. 2019 Study (finding that the average long-term returns around hedge fund activism on an equally weighted basis are driven by the smallest 20% of targets by market capitalization); Brav et al. 2022 Study (documenting a roughly 2–3% announcement return for the largest two terciles of targets of activist hedge funds, compared to a roughly 9% announcement return for the smallest tercile of targets, based on market capitalization). We note that a smaller percentage return for an issuer with a larger market capitalization may imply a larger total dollar impact on shareholder value than that associated with a larger percentage return for a smaller issuer.

[830] *See, e.g.,* Cremers et al. 2018 Study; deHaan et al. 2019 Study; Yvan Allaire & François Dauphin, *The Game of 'Activist' Hedge Funds: Cui Bono?,* 31 Int. J. Discl. Gov. 279 (2016).

[831] *See, e.g.,* Brav et al. 2022 Study (finding that the outperformance of issuers targeted by activists persists even when benchmarked against a variety of matched control samples, including a control sample of non-targeted issuers that are closely matched to the targeted issuers based on their condition at the time of targeting as well as changes in performance prior to that time); Rui Albuquerque et al., *Value Creation in Shareholder Activism,* 145 J. Fin. Econ. 153 (2022) (''Albuquerque et al. 2022 Study'') (estimating that only 13% of the total returns associated with activist campaigns could be attributed to stock-picking ability as opposed to the

There is also academic research on the effect of activist campaigns on investors other than shareholders of the targeted issuers. Studies have associated activist campaigns with a positive effect on the operational and financial performance, as well as shareholder value, of issuers other than the targeted issuers, based on the perceived likelihood of a potential activist campaign targeting these other issuers.[832] Other research has found that issuers that are the suppliers or close competitors of the targeted issuers, in certain circumstances, experience decreases in shareholder value around an activist campaign, which researchers have associated with cost-cutting and increased efficiency at the target issuer.[833] These effects on suppliers and competitors of targeted issuers are consistent with activism having beneficial competitive effects related to improvements in operational efficiency, as noted by a commenter.[834] Other academic studies have found that activist campaigns have a mixed impact on debtholders of the targeted issuer, depending on the nature of the campaign's goals and how pursuing those goals would impact both performance and also the level of financial risk of the issuer.[835]

Considerations

Commenters noted that if there are fewer activist campaigns under the amended deadline, there will be reduced shareholder value creation.[836] Commenters also noted that a reduction in activist campaigns would result in decreased corporate accountability and, on average, a reduction in operational efficiency, both because of the reduced direct beneficial effect of activists (on average) on the operations of targeted issuers[837] and because of the reduced indirect beneficial effect of the possibility of becoming a future activist target (or of competition with targeted issuers) on the operational performance of non-targeted issuers.[838] Some commenters indicated that activist investors would continue their activities despite reduced profitability.[839] Others indicated that such reduced profitability and the acceleration of potential defensive responses by the target issuer would impede activism.[840] Some commenters indicated that a reduction in the pursuit of activist campaigns and in the disciplining effect on corporate accountability of the possibility of such campaigns would result in reduced market efficiency,[841] a less optimal allocation of resources,[842] reduced liquidity,[843] and reduced trust in markets because managers are not held accountable.[844]

We acknowledge that a reduction in investment research and in significant shareholdings by investors who undertake such campaigns could reduce

campaigns themselves); Robin Greenwood & Michael Schor, *Investor Activism and Takeovers,* 92 J. Fin. Econ. 362 (2009) (finding that returns associated with Schedule 13D filings are driven by activists' success at getting target firms acquired, and not just selecting targets that are likely to get acquired); Nicole Boyson et al., *Activism Mergers,* 126 J. Fin. Econ. 54 (2017) (finding that even Schedule 13D targets with failed acquisition bids experience improvements in operating performance, financial policy, and positive long-term abnormal returns); Swanson et al. 2022 Study (finding significant abnormal returns associated with the subsets of Schedule 13D filings presenting a variety of non-sale demands, such as demands associated with corporate strategy, and not just for those presenting demands for a sale of all, or part, of the company). Various studies have also associated activist campaigns with operational improvements. *See, e.g.,* Nicole M. Boyson & Robert Mooradian, *Corporate Governance and Hedge Fund Activism,* 14 Rev. Derivatives Res. (2011) (finding an increase in return on assets for issuers that are the subject of hedge fund activist campaigns, relative to similar non-targeted issuers); Alon Brav et al., *The Real Effects of Hedge Fund Activism: Productivity, Asset Allocation, and Labor Outcomes, 28 Rev. Fin. Stud.* 2723 (2015) (''Brav et al. 2015 Study'') (finding an increase in productivity at the plant level for issuers that are the subject of hedge fund activist campaigns, but not for similar plants at non-targeted issuers); Nickolay Gantchev et al., *Activism and Empire Building,* 138 J. Fin. Econ. 526 (2020) (finding that issuers that are the subject of hedge fund activist campaigns reduce value-destructive acquisition activity relative to similar, non-targeted issuers).

[832] *See, e.g.,* Nikolay Gantchev et al., *Governance Under the Gun: Spillover Effects of Hedge Fund Activism,* 23 Rev. Fin. 1031 (2019) (''Gantchev et al. 2019 Study'') (finding that an interquartile increase in the ''threat'' of an activist campaign is associated with operational and financial improvements and a 2.4% positive stock return at the issuers with a high perceived ''threat'' of being targeted); Caroline Heqing Zhu, *The Preventative Effect of Hedge Fund Activism: Investment, CEO Compensation, and Payout Policies,* 17 Int. J. Man. Fin. 401 (2021) (finding that an increase in the likelihood of an activist campaign is associated with proactive corporate policy changes and improved operating performance in the form of an increase in return on assets).

[833] *See, e.g.,* Hadiye Aslan, *Shareholders Versus Stakeholders in Investor Activism: Value for Whom?,* 60 J. Corp. Fin. 101548 (2020) (finding reduced profit margins and stock prices reflecting a negative announcement return of about –1.5% for the suppliers of an issuer targeted by an activist hedge fund relative to suppliers of other issuers and finding that the economic effects on suppliers are stronger for the suppliers of target firms with high cost efficiency or operating margin improvements after the activist campaign); Hadiye Aslan & Praveen Kumar, *The Product Market Effects of Hedge Fund Activism,* 119 J. Fin. Econ. 226 (2016) (finding a negative announcement return for those close competitors of an issuer targeted by an activist hedge fund that do not themselves face the ''threat'' of activist hedge fund campaign, while those close competitors that do face such a ''threat'' experience positive announcement returns; and finding that the impact on competing firm performance is stronger for targets with, among other things, a greater improvement in productivity).

[834] *See* Lewis Study II (exhibit to letter from EIM IV). Several other commenters also questioned the DERA Memorandum's inclusion of a discussion of shareholders of a target's suppliers and competitors. *See* letters from EIM IV; CIRCA IV. We acknowledge that effects on these shareholders represent transfers rather than market-level economic benefits or costs of activism (*e.g.,* costs to these shareholders may result even when the market benefits as a whole from enhanced operational efficiency and competition). As noted, we refer to the impact on entities other than the target issuer here as evidence that activism can have beneficial competitive effects, rather than to place a primary emphasis on consideration of shareholders of issuers other than the target issuers in determining appropriate disclosure deadlines and related amendments.

[835] *See, e.g.,* April Klein & Emanuel Zur, *The Impact of Hedge Fund Activism on the Target Firm's Existing Bondholders,* 24 Rev. Fin. Stud. 1735 (2011) (estimating that bonds of targeted issuers experience, on average, a negative announcement return of about –4% to activist hedge fund campaigns); Hadiye Aslan & Hilda Maraachlian, *Wealth Effects of Hedge Fund Activism* (Working Paper, 2018), *available at https://ssrn.com/abstract=993170* (estimating that bonds of targeted issuers experience, on average, a positive announcement return of about 2% to activist hedge fund campaigns, but with variation based on the type of campaign: bondholders benefit the most for those with governance-related goals, while those calling for restructuring the issuer lead to bondholder losses); Jayanthi Sunder et al., *Debtholder Responses to Shareholder Activism: Evidence from Hedge Fund Interventions,* 27 Rev. Fin. Stud. 3318 (2014) (examining changes in bank loan spreads upon activist hedge fund campaigns and finding that spreads increase in response to merger-related or restructuring campaigns but decrease in response to those that seek to address governance-related issues).

[836] *See* letters from 65 Professors; AIMA; C. Penner and Prof. Eccles; CIRCA I; EIM I; M. Frampton; MFA; Profs. Swanson, Young, and Yust; PSCM; Profs. Eccles and Rajgopal; Rice Management; S. Lorne. One comment letter provided an analysis in which the commenters concluded that ''net investors benefit significantly during the relevant time period,'' estimating a $12 million benefit to net investors per campaign based on their computation of the net order imbalance and stock returns from each day through 30 days after the Schedule 13D filing dates. *See* letter from Profs. Bishop and Partnoy III.

[837] See *supra* note 831 for detail on studies that have associated activist campaigns with operational improvements.

[838] *See supra* note 832. Reductions in operational efficiency and the associated weakening of competition could result in greater shareholder value at some supplier and competitor firms of potential targets, per the academic research cited above, but this would not represent a market-level benefit. *See supra* note 834. *See also* letters from 65 Professors; AIMA; C. Penner and Prof. Eccles; CIRCA I; CIRCA IV; Dodge & Cox; EIM I; ICM; M. Frampton; MFA; Prof. Gordon; Profs. Schwartz and Shavell I; Prof. Webber; PSCM; Profs. Eccles and Rajgopal; Rep. Torres, et al.

[839] *See* letters from AFREF; Better Markets I; HMA II; SCG; WLRK I.

[840] *See* letters from AIMA; CIRCA I; Dodge & Cox; EIM I; ICM; M. Frampton; MFA; Prof. Gordon; Profs. Schwartz and Shavell I; Profs. Swanson, Young, and Yust; Profs. Eccles and Rajgopal; Rep. Torres, et al.; S. Lorne; STB; TRP.

[841] *See* letters from AIMA; Dodge & Cox; EIM I; MFA; Profs. Swanson, Young, and Yust; Profs. Eccles and Rajgopal; Rice Management; STB.

[842] *See* letters from 65 Professors; EIM I; Rep. Torres, et al.; TRP.

[843] *See* letters from AIMA; EIM I.

[844] *See* letters from C. Penner and Prof. Eccles; Dodge & Cox; EIM I.

market efficiency (and thereby the efficient allocation of resources) because of the role that investments based on such research and analysis play in moving stock prices closer to their fundamental values. A reduction in such activities could also reduce liquidity, as noted by commenters,[845] by lessening liquidity provision in the securities market by these investors (through, *e.g.,* limit orders) as they build their stakes. We acknowledge the beneficial effects of activism to the market. However, our analysis of historical data indicates that 80 percent of campaigns were completed by the amended deadline, with 97 percent of campaigns having completed 90 percent of their stakes by the amended deadline.[846] We therefore expect the majority of campaigns will be largely unaffected by the deadline. In addition, for those campaigns that would be affected by the deadline, we expect the activists will adapt to the shortened deadline and continue to pursue the campaigns, thereby preserving the beneficial effects of their activism.[847]

Some commenters indicated that activist campaigns are not uniformly beneficial, and that the short-term price reaction to such campaigns may not translate into positive shareholder value impacts in the long-term.[848] Some commenters stated that a reduction in such campaigns and the threat of such campaigns could be beneficial because it would reduce the pressure on issuers to make changes in governance, payouts, or investments that are not in the interest of long-term shareholders.[849] One commenter stated that activist campaigns are a deterrent to going public,[850] implying that a reduction in such activities could encourage more companies to enter the public markets. We acknowledge that activist campaigns are heterogeneous. While the average impact of activist campaigns on shareholder value is likely to be positive in the long-term as well as the short-term,[851] some campaigns may have a negative impact on shareholder value either in the short- or long-term. It is possible that some of the activist campaigns that are less likely to occur after the adoption of the final rules would have decreased shareholder value, such that activists forgoing those campaigns could benefit shareholders. A lower risk of facing an activist campaign could, per the commenter cited above, also be a positive factor in the decision of additional companies to enter the public markets. That said, the final amendments are not intended to discourage activism. Instead, they reflect our attempt to ensure investors receive material information in a timely manner while, at the same time, maintaining the balance between issuers of securities and the shareholders who seek to exert influence or control over issuers that Congress sought when enacting section 13(d).

Some commenters stated that certain types of activist campaigns were more likely to be forgone as a result of a shortened deadline. For example, some commenters stated that a reduction in campaigns was more likely among those campaigns targeting smaller issuers with lower trading volumes[852] or for certain types of activist campaigns (*e.g.,* those pursuing changes at an issuer rather than a potential sale of the issuer).[853] Some commenters noted that the final amendments may reduce competition among investors who pursue activist campaigns,[854] as more sophisticated and experienced investors may be better able to adapt to the final amendments. We acknowledge that the final amendments may have differential impacts on different types of activist campaigns. For instance, it may be more costly for a filer to accelerate the completion of its stake under a shortened filing window for smaller, less liquid issuers. However, in Table 6 above, we find that the targets of filers who currently continue to accumulate a significant fraction of their stake after the five-business day deadline are, on average, slightly larger and more liquid than other targets. Further, studies cited earlier in this section find that the abnormal stock returns around the announcement of activist campaigns are lower for larger issuers. These lower expected gains from campaigns at larger issuers could make investors less likely to bear additional costs to conduct such a campaign by one of the adaptation strategies discussed (rather than forgoing the campaign) relative to potential campaigns at smaller issuers even if these costs of doing so are lower than they would be at smaller, less liquid issuers, as noted above.

To summarize, while the amended filing deadline may make a minority of campaigns less profitable and, as a result, could potentially reduce shareholder value creation, we do not expect a substantial reduction in the extent of activism as most historical campaigns would not have been impacted by the amended filing deadline and since activists may adapt to accommodate the amended deadline and we expect that in most if not all cases, they will do so.

Implications of Changes to Activist Campaigns

As referenced above, filers have various ways to adapt to the amended filing deadlines and we expect that many filers will likely use these methods of adaption to the amended filing deadline where they remain incentivized to pursue their campaigns. For example, some filers may proceed with smaller stakes, other filers may accumulate shares more quickly during the amended filing window (or add to their stake after the filing date), while others may acquire an economic interest in the issuer, such as by using cash-settled swaps or other derivatives. We expect that such adaptations are most likely to arise in the context of non-corporate-action filings in which filers would otherwise have continued to accumulate shares on the open market after the amended filing deadline (*i.e.,* campaigns like those represented in Columns 2, 3, and 4 of Table 6).[855] Some commenters stated that investors have a target share accumulation that would be required to make a campaign worthwhile and that in some cases this target would not be achievable under the amended deadline.[856] One of these commenters noted that investors may file early if they reach their target ownership before the filing deadline, but implied that one should not assume

[845] *See supra* note 843.

[846] *See supra* section IV.B.3.a.iii, Table 3.

[847] Although we believe that activists whose campaigns are impacted by the shortened deadline are likely to adapt and continue with their campaigns, we note that there are costs likely associated with those adaptations, as discussed below. Thus, although the market is likely to benefit from an activist campaign that continues as a result of such adaptations, the costs associated with those adaptations may reduce the extent of such benefits. Nevertheless, because those campaigns would still proceed, the potential reduction in benefits resulting from the costs associated with an adaptation likely would be significantly less than the elimination of all the potential benefits if the campaign were abandoned outright.

[848] *See* letters from AFREF; Better Markets I; Labor Unions; NIRI; R. Steel and Prof. Goshen; SCG; Sen. Baldwin, et al.; WLRK I.

[849] *See* letters from AFREF; NIRI; SCG; Sen. Baldwin, et al.

[850] *See* letter from SCG.

[851] *See, e.g.,* Bebchuk et al. 2015 Study; Kedia et al. 2021 Study; Boyson & Pichler 2019 Study; Cremers et al. 2018 Study; Swanson et al. 2022 Study; deHaan et al. 2019 Study; Brav et al. 2022 Study; Lilienfeld-Toal & Schnitzler 2020 Study; Swanson et al. 2022 Study.

[852] *See* letters from CIRCA I; ICM; Prof. Gordon.

[853] *See* letter from Profs. Swanson, Young, and Yust.

[854] *See* Lewis Study I (Exhibit to letter from EIM I); letter from MFA.

[855] As discussed in section IV.C.1.b.i above, we believe that the process of acquiring shares is unlikely to be significantly impacted in most other cases.

[856] *See* letters from AIMA; CIRCA I; ICM; Prof. Gordon.

from observing these filings that they can reach their target ownership with the same speed in all instances.[857] We note also that some commenters stated that the proposed five-calendar day filing window would provide activist investors ample time to accrue a significant stake,[858] implying that filers would be able to adapt to the revised deadline. While a filer's adaptation strategy will ultimately be based on its assessment of the benefits and costs of various available strategies, which will likely vary across filers and specific situations, we expect that most of the profitable campaigns will continue to be profitable notwithstanding the five-business day filing deadline. In these cases, we expect activists to use adaptation strategies rather than forgo the campaigns. And, we expect that most campaigns will not be constrained by the amended filing deadline as, historically, 97 percent of campaigns achieved 90 percent of their position by the amended deadline.[859]

The degree to which the benefits associated with earlier disclosure under a shortened filing deadline would be achieved also depends on how the filers respond to the shortened deadline. As an adaptation strategy, some filers may simply proceed with acquiring a smaller stake in an issuer, notwithstanding the reduced potential profits.

Alternatively, filers could adapt to the amended filing deadline by accumulating shares more quickly during the modified filing window or adding to their stake after the filing date. Such approaches are likely to preserve more fully both the current shareholder value impact of the campaigns and the benefits of earlier disclosure. We acknowledge that these adaptations would entail greater costs to filers because the additional shares would likely be purchased at higher prices than under the current accumulation pattern.[860] Further, in some cases post-filing purchases may be precluded because issuers could react to the disclosure by adopting low-threshold poison pills or other defensive measures. While some commenters suggest that adaptations that rely on accumulating shares more quickly could further reduce market efficiency should volatility increase as a result of aggressive purchasing,[861] we do not believe that a temporary increase in volatility would be disruptive enough to override the benefits to price informativeness mentioned above.

Filers could also adapt by instead acquiring an economic interest in the issuer, such as by using cash-settled swaps or other derivatives.[862] Although these instruments would not replace the ownership of shares in the issuer, and generally do not provide voting rights, they may have the effect of providing economic exposure to the issuer without triggering the section 13(d) beneficial ownership reporting obligation. Such economic exposure would allow filers to remain financially incentivized to pursue campaigns that create shareholder value, as opposed to forgoing such campaigns solely due to the shortened filing deadline.

Some commenters indicated that such a heavier reliance by activist investors on derivatives may be an unintended consequence of a shortened Schedule 13D filing window.[863] Adaptations involving the use of derivatives would generally entail some incremental costs to these investors because of the premiums charged by counterparties for these products, and, as noted, would not provide the investors with voting rights beyond those associated with any shares they otherwise beneficially own. That said, such approaches may often be the most cost-effective alternative for activist investors and may preserve the shareholder benefits associated with the campaigns.

An increased reliance on these products may, in certain situations, reduce the overall benefits associated with a shortened filing deadline by reducing the likelihood that disclosure of economic interests would occur any earlier than under the status quo. In particular, cash-settled swaps and related derivatives do not generally give rise to beneficial ownership as they do not generally provide voting or disposition rights over the reference securities.[864] They therefore generally fall outside the scope of the primary purpose of the Schedule 13D filings and the section 13(d) beneficial ownership reporting system, which are focused on disclosure of a filer's accumulation of equity securities that provide rights that could allow the filer to control or influence control over an issuer. Nevertheless, it is possible that some market participants may look to Schedule 13D filings (in particular, Item 6 of Schedule 13D) for information about a filer's accumulation of economic interests, such as cash-settled swaps and derivatives without voting or disposition rights. Acquisition of these instruments could allow a filer to obtain more than five percent of economic interest in an issuer's covered class and then, at a later point, cross the five percent beneficial ownership threshold through holding or acquiring equity securities of the covered class—triggering the requirement for a Schedule 13D filing in five business days—at a later date. In this scenario, there is no delay in the disclosure of the information that Schedule 13D filings and section 13(d) are intended to provide—the beneficial ownership of the equity securities that provide voting and disposition rights. However, the filer does delay disclosure relative to obtaining the purely economic exposure of more than five percent of the issuer represented by the cash-settled swaps or derivatives. As such, an investor's pattern of accumulation of economic interest, relative to when their campaign is revealed to the market, may not differ from that under the status quo. In fact, depending on the degree of reliance on cash-settled derivative securities, complete disclosure of an investor's total economic interest in an issuer may, under the final rules, be reduced or further delayed than under the baseline, such as in cases where, notwithstanding acquisition of these instruments, the investor beneficially owns five percent or less of a covered class and no Schedule 13D filing obligation is triggered. Still, we cannot predict the extent to which investors will adapt by accumulating cash-settled swaps or derivatives in lieu of equity securities, including because cash-settled swaps and derivatives generally represent only an economic interest in the issuer, with no voting rights or disposition rights with respect to the reference securities, and therefore cannot be presumed to be

[857] *See* letter from AIMA.

[858] *See* letters from ABA; Better Markets I; NASDAQ; SCG; WLRK I.

[859] *See* Table 3 and *supra* note 724.

[860] In the case of stock purchases after an earlier filing date, these shares would be purchased at the higher stock price that prevails after the filing date (*i.e.,* the price reflecting the market's knowledge of the filer's intentions). Accumulating shares more quickly would generally entail purchases at higher prices because, all else equal, larger order sizes or more aggressive trading has greater price impact. *See, e.g.,* Albert S. Kyle, *Continuous Auctions and Insider Trading,* 53 Econometrica 1315 (1985).

[861] *See* letters from AIMA; EIM I; Rice Management; STB.

[862] Staff have noted that some Schedule 13D filers already make use of cash-settled derivatives referencing the issuer in which they report beneficial ownership. *See, e.g.,* Memorandum of the Staff of the Division of Economic and Risk Analysis, *Supplemental Data and Analysis Regarding the Proposed Reporting Thresholds in the Equity Security-Based Swap Market* (June 20, 2023), *available at https://www.sec.gov/comments/s7-32-10/s73210-207819-419422.pdf.* Thus, it is plausible that at least some filers could adapt to the amendments by making greater use of these instruments. *See* Security-Based Swaps Release for a discussion of the circumstances in which a holder of a SBS currently may be deemed the beneficial owner of the class of equity securities referenced by the swap.

[863] *See* letter from Profs. Swanson, Young, and Yust.

[864] *See supra* section II.B.3.

equivalents to equity securities that do provide such rights.

Initial Schedule 13D filings signal to the market that an investor may intend to influence an issuer, often through activism. For market participants that value such signals, regardless of beneficial ownership, an increased reliance by activist investors on financial instruments that generally do not trigger the section 13(d) beneficial ownership reporting obligations, such as cash-settled swaps or derivatives, may reduce the overall benefits associated with a shortened filing deadline by reducing the likelihood that disclosure of such information would occur any earlier than under the status quo.

We note that one commenter stated that potential adaptations presented in the DERA Memorandum are ''neither cost-free nor viable,'' [865] and we recognize that the amended filing deadline may make a minority of campaigns more costly, including as a result of the adaptations. Similarly, we acknowledge that there would be costs, and reduced benefits, to the extent activism is reduced as a result of the final rules. However, we do not expect a substantial reduction in the extent of activism as historical evidence suggests most campaigns would not be impacted by the amended filing deadline.

ii. Compliance Costs

A shortened initial Schedule 13D filing deadline may increase compliance costs for beneficial owners who have an obligation to file an initial Schedule 13D under the final rules. For example, beneficial owners who regularly make significant stock investments could incur a one-time cost to update their information technology systems to monitor securities transactions and generate alerts and reports in time to accommodate the rule change. They may also need to allocate more resources on an ongoing basis to monitor their holdings in accordance with the amended deadline so that they can meet their obligation to file an initial Schedule 13D. In addition, external service providers and advisers may charge higher fees for expedited processing and/or for weekend services, which may be more frequently required under the final amendments. Compliance costs may increase both in the context of non-corporate-action filings and corporate action filings. The compliance costs could be more significant for some filers (*e.g.,* those with more complex affiliate structures or investment strategies) than others.

Commenters identified additional compliance challenges that may arise as a result of the shortened initial Schedule 13D deadline. For example, some commenters noted aspects of the initial Schedule 13D filing process that have not become simplified as a result of technological advancements, including nuanced legal analysis, drafting of narratives, and certain data collection, determinations, and computations that are accomplished manually or with reliance on external resources.[866] Others noted issues for first-time filers that may be hard to resolve within five business days, such as the processing time (including delays) for receiving EDGAR filing codes,[867] or stated that compliance burdens would be greater for non-institutional filers or smaller institutional filers lacking certain infrastructure or personnel,[868] and that the accelerated filing deadline may require an increased reliance on third parties.[869]

We acknowledge that not all aspects of preparing and submitting an initial Schedule 13D have been simplified by technology, and that the amended filing deadline may increase certain compliance costs given the need to complete these tasks in a shorter timeframe. We also acknowledge that the incremental compliance burdens may be greater for smaller, less experienced filers than for other filers due to their more limited internal resources and expertise in preparing filings. In particular, these filers are less likely to have operational systems and processes in place to facilitate compliance with the revised filing deadline. They are also likely to be more reliant on external advisers and service providers, who may charge higher fees for expedited processing and/or for weekend services.

2. Shortened Schedule 13G Filing Deadlines

The final amendments to Rules 13d–1(b), (c), and (d) and 13d–2(b), (c), and (d) shorten the filing deadlines for both initial and amended Schedule 13G filings as well as, in certain cases, increasing their frequency.[870] As discussed in more detail in section II.A.2 above, under the final amendments, QIIs and Exempt Investors will be required to file an initial Schedule 13G within 45 days after calendar quarter-end if, as of the end of that quarter, their beneficial ownership exceeds five percent (rather than the current deadline of 45 days after the calendar year-end at which beneficial ownership exceeds five percent). The filing obligation for QIIs will be accelerated from 10 days to five business days after month-end if, as of such month-end, their beneficial ownership exceeds 10 percent. Passive Investors will be required to file an initial Schedule 13G within five business days (rather than the current deadline of 10 days) after crossing the five percent beneficial ownership threshold. All three filer types will be required to file a Schedule 13G amendment within 45 calendar days after any calendar quarter-end at which there is a material change in the information previously reported in a Schedule 13G (rather than the current deadline of 45 days after any calendar year-end at which there are ''any changes'' in the information previously reported). For QIIs and Passive Investors, the requirement to file a Schedule 13G amendment upon exceeding 10 percent beneficial ownership or an increase or decrease in beneficial ownership thereafter of more than five percent will be accelerated. Specifically, QIIs will be required to file an amendment five business days (rather than the current deadline of 10 days) after any month-end at which beneficial ownership meets one of these thresholds, while Passive Investors will be required to file an amendment within two business days (rather than the current deadline of ''promptly'') after beneficial ownership meets one of these thresholds.

A. Benefits

Academic research has provided evidence that at least some Schedule 13G filings contain value-relevant information that is not already incorporated in market prices, as discussed in more detail below.[871] The acceleration of such Schedule 13G filings under the final rules may thus benefit market participants. Specifically,

[865] *See* letter from EIM IV (also stating that potential adaptations ''would fundamentally alter how an activist assembles its exposure to a given company in ways that would impair the ability of an activist to pursue a particular campaign'').

[866] *See* letters from ABA; Dodge & Cox; IAA; MSBA; STB.

[867] *See* letters from MSBA; STB.

[868] *See* letters from A. Day; E. Fraser; Perkins Coie.

[869] *See* letter from E. Fraser.

[870] For the purpose of this economic analysis, we refer to an ''increased frequency'' of Schedule 13G filings under the final amendments because the frequency of Schedule 13G filings is generally expected to increase overall. However, the frequency of filings will not necessarily increase in all cases. If there is only one material change (or no such change) in the information reported in a Schedule 13G filing over the course of a year, then the reporting frequency generally will be the same as under the current regime.

[871] *See infra* notes 883–885 and accompanying text.

investors and issuers, with earlier access to the information and an updated stock price, may be able to make better-informed investment and resource allocation decisions. At an economy level, this better-informed decision-making may improve the efficiency of resource allocation overall.

Some commenters agreed that the proposed acceleration of beneficial ownership reporting as a whole, including the proposed revisions to Schedule 13G filing deadlines, would make material information available to all investors in a more timely manner.[872] Some commenters also specified reasons that the information in Schedule 13G filings in particular is important to investors and issuers.[873] For example, one commenter stated that there are ''significant risks and impacts of large holdings on investors irrespective of the stated intentions of a large position holder,'' such as the risk of stock price volatility if a large shareholding were to be sold.[874] Another commenter stated that the disclosure of beneficial owners in Schedule 13G filings, together with Schedule 13D filings, ''help inform the education and advocacy efforts of those with a stake in . . . important votes.'' [875] Other commenters indicated that information about all large shareholders facilitates issuer efforts to identify and engage with these shareholders in order to elicit their views and ideas.[876]

On the other hand, some commenters stated that they do not believe there is a ''harmful'' information asymmetry or other problem that justifies an acceleration of the Schedule 13G deadlines,[877] or indicated that the earlier disclosure of the information in Schedule 13G filings would be of limited, if any, benefit.[878] For example, some indicated that the concerns that could justify accelerating Schedule 13D filings would not equally apply to Schedule 13G filings.[879] Some commenters stated that the information in Schedule 13G filings is unlikely to be material because of the passive intent of the filers [880] or because of existing disclosures (such as Schedule 13F or Form N–PORT [881] for some QIIs, or registration statements for some Exempt Investors) that provide similar information.[882]

Given commenters' statements regarding a lack of material information in Schedule 13G filings and limited benefits from the acceleration of these filings, we reconsidered the evidence on the market impact of these filings. Initial Schedule 13G filings by hedge funds in particular have consistently been associated by multiple academic studies with, on average, a statistically significant positive stock price reaction around the filing date.[883] Similarly, one study found that all initial Schedule 13G filings that are not submitted 45 days after the end of the calendar year (*i.e.,* generally Schedule 13G filings by Passive Investors, including some hedge funds, which are required to be made within 10 days of the trigger date) are associated, on average, with a statistically significant stock market reaction.[884] This study also finds that initial Schedule 13G filings submitted 45 days after the end of the calendar year (*i.e.,* generally Schedule 13G filings by QIIs and Exempt Investors, which include some hedge funds) are not associated with a meaningful stock market reaction on average.[885] It is unclear whether this finding with respect to post-year-end filings, in contrast to the findings with respect to other Schedule 13G filings, is attributable to the different types of persons filing on a calendar-year-end filing schedule or by an effect of the year-end filing schedule itself on the significance of the information to the market by the time it is reported on Schedule 13G. Overall, this and other studies provide support for commenters' assertions that at least some Schedule 13G filings contain market-moving information.

Some commenters stated that any benefits of the proposed filing deadlines would be limited due to an increase in inaccurate filings as a result of the accelerated preparation of filings or due to a risk of information overload from the increased number of filings.[886] The filing deadlines we are adopting in the final amendments for Schedule 13G require, in many cases, less frequent filing, and provide longer windows prior to filing, than the proposed filing deadlines. Accordingly, the adopted filing deadlines, as compared to the proposed filing deadlines, may mitigate the risk of inaccurate filings or information overload suggested by commenters.

One commenter stated that the Commission did not address ''*which* investors stand to benefit'' from the proposed accelerated filing deadlines, and indicated that, while retail and long-term investors would not benefit, ''sophisticated short-term professional investors'' would profit at the expense of the investors filing Schedule 13G.[887] While we are unable to predict with a reasonable degree of confidence which specific investors or categories of investors are likely to benefit most from the acceleration of disclosures, we note that the revisions to the final deadlines relative to the proposed amendments in many cases should mitigate the commenter's concern that the benefits

[872] *See* letters from ABA; AFREF; EEI; FedEx; Freeport-McMoRan; Nasdaq.

[873] *See* letters from AFREF; HMA I; Nasdaq; SCG.

[874] *See* letter from HMA I.

[875] *See* letter from AFREF.

[876] *See* letters from Nasdaq; SCG.

[877] *See* letters from ICI I; MFA; MSBA; SIFMA; SIFMA AMG; SSC; TIAA; TRP.

[878] *See* letters from ABA; MFA; TRP.

[879] *See* letters from ICI I; MSBA; SIFMA; TIAA.

[880] *See* letters from ABA; MFA; MSBA; STB.

[881] Though a commenter referenced Form N–Q, we note that this form has been rescinded and similar information is now disclosed in Form N–PORT.

[882] *See* letters from ABA; MFA; SIFMA AMG.

[883] *See, e.g.,* Albuquerque et al. 2022 Study (finding that Schedule 13G filings by hedge funds are associated with an average cumulative abnormal return of about 1.2% over the period from 30 days before to 10 days after the filing date); Alex Edmans et al., *The Effect of Liquidity on Governance,* 26 Rev. Fin. Stud. 1443 (2013) (''Edmans et al. 2013 Study'') (finding that Schedule 13G filings by hedge funds are associated with an average cumulative abnormal return of 0.8% over the period from one day before to one day after the filing date); and Christopher Clifford, *Value Creation or Destruction? Hedge Funds as Shareholder Activists,* 14 J. Corp. Fin. 323 (2008) (''Clifford 2008 Study'') (finding that Schedule 13G filings by hedge funds are associated with an average cumulative abnormal return of 1.6% over the period from two days before to two days after the filing date, and that there are similar positive cumulative abnormal returns around the filing date for filings submitted within 10 days of the trigger date and for all Schedule 13G filings by hedge funds regardless of the timing of the filing). These researchers vary in their interpretation of these results, with some attributing the positive returns to a governance role of the filers (*i.e.,* a contribution to the promotion of corporate accountability) and others asserting that the positive return may be a reflection of the market's view of the filers' stock-picking ability. There may be further potential explanations for the market reaction. For example, the presence of certain significant shareholders (*e.g.,* an investor known to pursue activist strategies at some of the issuers in which they invest, or an institutional investor known to have voted in the past in favor of changes proposed by activists) could provide information about the likelihood of a future activist campaign or the likelihood of success of such a campaign. *See, e.g.,* Kedia et al. 2021 Study (finding that the composition of institutional ownership of an issuer is associated with both the likelihood of being targeted by an activist campaign and the outcomes of such campaigns).

[884] *See* Albuquerque et al. 2022 Study (finding, in a sample of all Schedule 13G filings from 1996 to 2016, that Schedule 13G filings that are not made 45 days after calendar year-end, but are instead made on any other day, experience a statistically significant cumulative abnormal return of 0.59% around the filing date).

[885] *See* Albuquerque et al. 2022 Study (finding, in sample of all Schedule 13G filings from 1996 to 2016, that the cumulative abnormal return around the filing date for all such filings made 45 days after calendar year-end is not distinguishable from zero).

[886] *See* letters from MFA; NVCA; STB.

[887] *See* letter from TRP.

would accrue primarily to short-term traders at the expense of Schedule 13G filers.[888] In particular, as discussed below, the lower frequency of disclosure and increased filing windows being adopted, relative to the proposed amendments, should reduce the risk that parties (including short-term professional investors) profit by anticipating and ''front-running'' the trades of the filer.[889] We also acknowledge that the benefits are likely to vary across filings, across filer types, and across issuers. For example, there may be lower benefits in cases where alternate, existing disclosures provide similar information on a similar timeframe, such as with respect to QIIs that also file Form 13F.

The economic analysis in the Proposing Release also indicated that the proposed frequency of Schedule 13G filings could have particular informational benefits resolving a concern whereby, currently, QIIs and Exempt Investors may avoid beneficial ownership reporting by selling down their positions by the end of the calendar year.[890] Some commenters indicated that statements in the Proposing Release that investors may currently avoid beneficial ownership reporting in this way were unsubstantiated or inconsistent with their experience.[891] We acknowledge that it is unclear whether and to what extent investors sell down securities holdings before calendar year-end to avoid beneficial ownership reporting, as well as what motives would be likely to drive such behavior, particularly given that many filers would likely be required to disclose such holdings before year-end on other forms and schedules in any event. We are unable to undertake a systematic quantitative analysis of such behavior because we can only observe holdings that are sold before year-end when they are reported on Form 13F or through other disclosures, which are precisely the situations that present less of a concern with respect to the lack of a Schedule 13G filing during that period. We also acknowledge that it is unclear how material any information about the filers' beneficial ownership may be in these cases in light of the short-term or transient nature of this ownership and the academic research discussed above.[892] That said, by requiring disclosure at the end of a quarter, the final amendments may reduce the opportunities to avoid a Schedule 13G filing, which could elicit incremental value-relevant information to the benefit of market participants as more filings are disclosed.

b. Costs

All Schedule 13G filers may incur one-time compliance costs to update their systems and processes to comply with the revised filing deadlines, such as updating any information technology systems used to monitor beneficial ownership and generate associated alerts and reports. All such filers are also likely to incur incremental ongoing compliance costs to review beneficial ownership on a more frequent basis and potentially (to the extent that there are material changes in the information previously reported) prepare more frequent Schedule 13G filings. These ongoing costs may include costs associated with gathering information from multiple sources, determining whether changes are material, and, if changes are deemed to be material, drafting a filing, validating its content, obtaining signatures, processing the filing into the required format (via internal personnel or an external EDGAR filing agent), and submitting it. In addition, filing agents (and potentially other external advisers) may charge higher fees for expedited processing and/or for weekend services, which may be more frequently required (particularly for Passive Investors) under the accelerated deadlines.

Some commenters, although not expressly distinguishing between the Schedule 13D and Schedule 13G requirements, stated that they did not expect the proposed accelerated deadlines to be overly burdensome on filers,[893] with one stating that filers are ''highly likely to be sophisticated and experienced investors with the proper resources to file promptly.'' [894]

Other commenters stated that they expected significant increases in compliance burdens from the proposed Schedule 13G filing deadlines which were not sufficiently accounted for in the Proposing Release, citing, for example, the significant increase in the required frequency of reporting and of monitoring holdings;[895] that many investors must file Schedule 13G for many different issuers;[896] and that filers may not already have the required systems in place or have access to the required infrastructure and personnel to comply.[897]

Some commenters also noted various practical challenges that would make it difficult to complete all of the required steps to submit an accurate Schedule 13G within the proposed filing windows (*i.e.,* five business days, five calendar days, or one business day), such as steps that require manual work or cannot be expedited through the use of technology;[898] constraints with respect to the availability and system capacity of any outside staff or services that are used;[899] issues related to the necessary involvement of multiple parties, entities, or signatories;[900] and a lack of sufficient time to validate the content of the filing.[901] Some commenters noted that first-time, non-institutional, or smaller filers may face particular challenges in complying with the proposed filing deadlines.[902]

In response to the concerns about compliance costs and challenges related to the proposed amendments, we note that, for QIIs and Exempt Investors, the final amendments require a lower frequency of initial and amended filings (generally quarterly as opposed to monthly) and allow more time to prepare filings (45 calendar days as opposed to five business days) as compared to the proposed amendments. Many of these filers (about 84 percent of QIIs and 10 percent of Exempt Investors in 2022, per Table 4 above) already file Form 13F on a similar schedule. As indicated by some commenters,[903] filers may thus be better equipped to assess their holdings and (potentially) prepare Schedule 13G filings on a quarterly schedule. Further, under the final amendments, QIIs should be able to monitor beneficial ownership that could exceed 10 percent of a covered class (or, thereafter, change by more than five percent) on a monthly basis, as they do now, rather than daily, as may have been required under the proposed amendments. Passive Investors will also

[888] *See* letter from TRP.

[889] See section IV.C.2.b below for further discussion of ''front-running'' risks.

[890] *See* Proposing Release at 13882.

[891] *See* letters from ICI I; SIFMA; TIAA.

[892] See *supra* note 885 regarding research finding no significant stock market return, on average, around year-end filings of Schedule 13G. See also *supra* note 883 regarding potential reasons for a significant stock market reaction around some Schedule 13G filings, all of which would be weakened in the case of a short-term or transient holding.

[893] *See* letters from Anonymous 10; Freeport-McMoRan; J. Soucie.

[894] *See* letter from Freeport-McMoRan.

[895] *See* letters from ABA; ICI I; MFA; SIFMA AMG.

[896] *See* letters from IAA; ICI I; MFA.

[897] *See* letters from ICI I; SIFMA; SIFMA AMG.

[898] *See* letters from E. Fraser; IAA; MSBA; STB; TIAA.

[899] *See* letters from MSBA; STB.

[900] *See* letters from MSBA; SSC; STB.

[901] *See* letters from ABA; MFA; SSC; STB.

[902] *See* letters from E. Fraser; ICI I; MFA; MSBA; STB.

[903] *See* letters from IAA; ICI I; SIFMA; SIFMA AMG; SSC; TRP.

be permitted to submit most Schedule 13G amendments on a quarterly cadence (rather than monthly, as proposed), with 45 calendar days (rather than five business days, as proposed) after the end of the period to submit the filings, though their initial filings will be required within five business days after the trigger date (rather than five calendar days, as proposed). They will also be permitted to file a Schedule 13G amendment within two business days of their holdings exceeding 10 percent of a covered class (or, thereafter, for changes of five percent or more), rather than one business day, as proposed. Finally, to provide time to implement the new Schedule 13G filing deadlines, compliance is not required until September 30, 2024.

We acknowledge that the incremental compliance burdens of the revised deadlines may be greater for smaller, less experienced filers than for other filers due to their more limited internal resources and expertise in preparing filings. In particular, these filers are less likely to have operational systems and processes in place that would facilitate compliance with the revised filing deadlines. The compliance burdens may be greatest for smaller, less experienced Passive Investors when filing an initial Schedule 13G, as these investors may, for example, be most likely to incur fees for expedited processing and/or for weekend services given the revised deadline for their filings (five business days after the trigger date) and their likely reliance on external advisors and service providers. That said, all of the changes relative to the proposed amendments should at least partially mitigate commenters' concerns about compliance costs and challenges discussed above, including for first-time, non-institutional, or smaller filers. For example, under the Proposed Amendments, Schedule 13G filers could have been required to file as many as 12 amendments per year under the month-end filing deadline in Rule 13d–2(b). Under the final amendments, however, Schedule 13G filers' burdens may be significantly lower, as the quarter-end filing deadline in amended Rule 13d–2(b) results in a maximum of four amendments per year pursuant to that rule.

We also acknowledge that the accelerated Schedule 13G filing deadlines may give rise to incremental free-riding and front-running risks. That is, there is a risk that more frequent filings with a shorter filing window may reveal a filer's proprietary information or trading strategies to other market participants, thus allowing those participants to ''free ride'' by copying the filer's strategies without incurring the same cost as the fund to research, identify and devise profitable strategies.[904] Further, more frequent filings with a shorter filing window could also allow other investors to better anticipate trades of the filers. These other investors may attempt to ''front run'' or trade ahead of filers to capture any impact on the prices of traded securities.[905] Any increase in free-riding and front-running may ultimately diminish a filer's investment returns and thus harm the filer and any clients or investors of the filer. Such risks may also reduce incentives to engage in research and analysis about potential shareholdings or to pursue some investment opportunities, which may reduce market efficiency and the efficient allocation of capital to its most productive uses. Any related reduction in the number of significant shareholders of issuers may also reduce the operational efficiency of affected issuers, due to the role large shareholders may play in the promoting of corporate accountability either through direct monitoring of management or the threat of exiting an investment.[906]

Some commenters disagreed with the Commission's statement in the Proposing Release that the risks of front-running and free-riding associated with the proposed Schedule 13G filing deadlines were likely to be low,[907] raising concerns that both the proposed frequency of reporting and the proposed filing windows (*i.e.,* five business days, five calendar days, or one business day) would lead to significant risks of revealing proprietary trading strategies and, because disclosure may be required while trades or trading strategies are still in progress, of facilitating predatory trading.[908] We believe that the revised deadlines in the final amendments relative to the proposed amendments should reduce these risks, particularly for filers that are already reporting holdings on a similar timeframe on Form 13F. That said, confidential treatment requests for Form 13F filings that may allow some filers to defer disclosing some or all of their holdings on that form [909] are not available for Schedule 13G filings, so even Form 13F filers and their clients may bear some additional risk of free-riding and front-running when filing Schedule 13G.

There could also be negative effects on competition in the market for investment management services from accelerated Schedule 13G filing deadlines, as noted by some commenters.[910] In particular, the free-riding and front-running risks discussed above could reduce incentives for investment managers to construct proprietary investment strategies, and any increased compliance burdens may increase barriers to entry. However, for the reasons discussed above, we expect such risks and burdens, and therefore any resulting effect on competition, to be mitigated under the revised filing deadlines as compared to the proposed filing deadlines.

3. Other Amendments

a. Revised Filing Deadline for Schedule 13D Amendments

The final amendment to Rule 13d–2(a) revises the filing deadline for amendments to Schedule 13D to two business days after the date on which a material change occurs, as compared to

[904] *See, e.g.,* Marno Verbeek & Yu Wang, *Better than the Original? The Relative Success of Copycat Funds,* 37 J. Bank. Fin. 3454 (2013) (studying potential free-riding behavior and finding that some funds duplicate the disclosed asset holdings of actively managed mutual funds, and that free-riding on the portfolios disclosed by ''past winning funds'' generates significantly better performance net of trading costs and expenses than the vast majority of mutual funds).

[905] *See, e.g.,* Sophie Shive & Hayong Yun, *Are Mutual Funds Sitting Ducks?* 107 J. Fin. Econ. 220 (2013) (studying potential front-running behavior and finding that hedge funds trade on expected mutual fund flows, and that this type of anticipatory trading is stronger after 2004 when quarterly portfolio disclosure was required of mutual funds).

[906] *See, e.g.,* Edmans et al. 2013 Study (finding that initial Schedule 13G filings are followed by improvements in operating performance and associating this relation with the role of significant shareholders); *see also* Alex Edmans & Clifford Holderness, *Blockholders: A Survey of Theory and Evidence,* 1 Handb. Econ. Corp. Gov. 541 (2017); Andrei Shleifer & Robert Vishny, *Large Shareholders and Corporate Control,* 94 J. Pol. Econ. 461 (1986).

[907] *See* Proposing Release at 13886.

[908] For comments regarding the proposed frequency of reporting, see letters from Dodge & Cox; IAA; ICI I; SSC; TIAA; TRP. For comments regarding the proposed filing windows, see letters from Dodge & Cox; IAA; TRP.

[909] For example, information about holdings in reportable securities that would reveal a filer's ongoing program of acquisition or disposition of a reportable security, open risk arbitrage positions, and investment strategies that utilize block positioning may be eligible for confidential treatment with respect to Form 13F for the period of time necessary to effectuate the filer's strategy. *See Section 13(f) Confidential Treatment Requests,* letter from staff of Division of Investment Management (June 17, 1998), available at *https://www.sec.gov/investment/divisionsinvestmentguidance13fpt2htm.*

[910] *See* letters from MFA (stating that the proposed Schedule 13G filing requirements would ''create more substantial barriers to entry, thereby discouraging new potential entrants to the investment management market''); TIAA (stating that the proposed Schedule 13G filing requirements would put ''investment advisers—particularly active advisers—at a real competitive disadvantage'' due to ''competitors attempting to copy or trade ahead of QIIs' investment strategies and engage in other manipulative trading practices'').

the baseline requirement that amendments be filed ''promptly'' after such date.

We believe that replacing the ''promptly'' requirement with a bright-line, two-business day requirement will provide greater clarity as to when material changes are to be disclosed, which could reduce any current filer confusion. In addition, to the extent that the revised deadline results in earlier disclosure of some Schedule 13D amendments than under the baseline, this deadline may allow the information to be incorporated into market prices earlier, allow market participants to make better-informed investment decisions, and enhance the efficiency of resource allocation at the economy level. For those filers that would not otherwise have filed their amendments within two business days after a material change, the revised deadline for Schedule 13D amendments may somewhat increase compliance costs.

In particular, these filers may bear greater costs due to the need to complete the necessary tasks (including gathering information from multiple sources, determining whether changes are material, drafting and validating the content of the filing, obtaining signatures, processing the filing into the required format via internal personnel or an external EDGAR filing agent, and submitting the filing) more quickly. In addition, filing agents (and potentially other external advisers) may charge higher fees for expedited processing and/or for weekend services, which may be more frequently required under the revised deadline. There may also be compliance challenges involved in accessing external advisers or coordinating among multiple signatories or parties in a short timeframe. Any such costs and challenges are likely to be more burdensome for small, non-institutional, and less experienced filers with fewer in-house resources. In particular, these filers are less likely to have operational systems and processes in place that would facilitate compliance with the revised filing deadline and are likely to be more reliant on external advisers and service providers. The compliance costs and challenges are also likely to be greater for institutional filers with more complex business organizations, including those with sub-advisory relationships common in the investment management industry.

One commenter asserted that the ''promptly'' standard under Rule 13d–2(a) has ''generally been understood'' to mean within two business days.[911] Accordingly both the benefits and costs of the revised deadline for Schedule 13D amendments will likely be limited in the case of Schedule 13D amendments that would have been made within two business days even in the absence of the final amendments. Some commenters questioned whether a revised deadline for Schedule 13D amendments would materially improve the information available to investors and other market participants,[912] with two commenters questioning the benefits with respect to specific subsets of filers [913] and one stating that ''there have been very few, if any, abuses associated with the current 'promptly' regime and . . . it has worked well and effectively.'' [914] We acknowledge that the extent of any benefits of the revised deadline are likely to vary across filers, types of filings, and issuers, with greater benefits associated with those Schedule 13D amendments that have more of a market impact (*e.g.,* because they report a more significant change in holdings or plans) and that also would otherwise have been filed a greater number of days after the material change.

The proposed amendments would have required amendments to Schedule 13D to be filed one business day after the date on which a material change occurs. Many commenters raised concerns about compliance challenges and costs associated with the limited time that would be available to consider the need for, prepare, and submit a filing under this proposed deadline.[915] While some of the commenters raising such concerns indicated that more than two days may be required to complete the required tasks,[916] some identified a two business day deadline as a more practicable period for compliance.[917] We agree with these commenters and therefore expect that the revision of this filing deadline to two business days, rather than one business day, after the date on which a material change occurs will mitigate some concerns about difficulties in complying with the amended deadline.

b. Amendments to Item 6 of Schedule 13D

The final amendment to Item 6 of Schedule 13D makes explicit that cash-settled derivative securities (including cash-settled SBS) that use the issuer's securities as a reference security are included among the types of contracts, arrangements, understandings, and relationships that must be disclosed under that Item. This final amendment will not change the treatment of derivative securities for the purpose of determining beneficial ownership. To the extent that this final amendment elicits additional disclosure that may not otherwise have been provided, investors and the market may benefit from a more complete understanding of all of a filer's interests in an issuer. In particular, this final amendment may provide more information about the overall economic exposure of the filer to the issuer, which may be associated with the actions the filer may be expected to take and thus the shareholder value impact associated with the filing.[918] However, filers could incur additional compliance costs to the extent that they have not already been providing such disclosure. In particular, filers may need to expend additional internal resources and/or consult external advisors to draft the required disclosures and to monitor interests in cash-settled derivative securities in order to report any material changes. In section V.C below we estimate for purposes of the Paperwork Reduction Act of 1995 (''PRA'') that this final amendment will impose, on average, an additional 0.1 burden hour per filing.

One commenter indicated that the inclusion of SBS in Item 6 would not provide incremental benefits beyond other disclosures, including disclosures that are under consideration in a different proposed rulemaking.[919] We continue to believe that, given current disclosure requirements, the final amendment to Item 6 may elicit additional disclosure that may not otherwise have been provided. Further, to the extent some of this information may be made public in other documents, investors may benefit from being able to review all of a filer's interests in an issuer in a single location.

[911] *See* letter from EIM I.

[912] *See* letters from AIMA; NVCA; STB. One of these commenters specified that, in the context of venture capital funds making distributions of shares to their limited partners, a one-business day filing deadline would risk ''erroneously signaling a sell-off to the market,'' harming liquidity and market efficiency, particularly for thinly traded companies that are more likely to be dominated by retail investors. *See* letter from NVCA.

[913] *See* letters from NVCA; STB.

[914] *See* letter from AIMA.

[915] *See* letters from ABA; AIMA; IAA; ICI I; EEI; EIM I; Hoak; MFA; MSBA; NVCA; Perkins Coie; STB.

[916] *See* letters from AIMA; ICI I; STB.

[917] *See* letters from IAA; EIM I; Hoak; NVCA; Perkins Coie.

[918] *See, e.g.,* Lilienfeld-Toal & Schnitzler 2020 Study (suggesting that the percentage of beneficial ownership reported in Schedule 13D is an indicator of the types of actions the filer may be expected to take and finding that this percentage is a statistically significant predictor of the announcement returns around the filing date).

[919] *See* letter from IAA; *see also* Schedule 10B Proposal.

c. Structured Data Requirement for Schedules 13D and 13G

The final rules require all disclosures reported on Schedules 13D and 13G other than the exhibits to be submitted using 13D/G-specific XML. We continue to believe, as discussed in the Proposing Release, that requiring the disclosures in a structured, machine-readable data language will improve the public dissemination and accessibility of the information in these disclosures by facilitating its extraction and analysis. Some commenters agreed that a structured data requirement would enhance the benefits of the disclosures by making the information easier to access and analyze.[920]

We expect that the structured data requirement will impose some incremental compliance costs on filers. In section V.C below we estimate for purposes of the PRA that these requirements will impose, on average, an additional 0.5 burden hour per filing. One commenter expressed concern that structured data requirement would be unduly burdensome for small beneficial owners.[921] Filers will have the option of using a fillable web form that converts inputted disclosures into 13D/G-specific XML, which should limit the incremental burden on filers that elect to use this approach. In particular, we expect that the availability of a fillable web form should, due to its ease of use, mitigate the concern raised by a commenter that the structured data requirement would be unduly burdensome for small beneficial owners. Filers who instead choose to submit filings directly in 13D/G-specific XML may bear implementation costs of establishing related compliance processes and expertise and/or, as one commenter indicated, ongoing costs of working with third-party vendors.[922] Making submissions directly in 13D/G-specific XML is an approach that may be more likely to be taken by filers expecting to submit larger numbers of Schedule 13D and Schedule 13G filings, such as QIIs. We expect the costs of submitting Schedule 13D/G directly in 13D/G-specific XML will vary based on prior experience with encoding and transmitting structured disclosures. Per Table 4 in section IV.B.3.b above, 84 percent of the QIIs filing initial Schedule 13Gs in 2022 were also Schedule 13F filers, and thus have such experience.

One commenter, while supporting the proposed structured data requirement, raised concerns about the additional time necessary to comply with the structured data requirement within the shortened filing windows that were proposed.[923] We acknowledge that the structured data requirement will increase the amount of time needed to submit filings. We believe the extended time permitted to file Schedule 13D and Schedule 13G amendments, and, for QIIs and Exempt Investors, to file initial Schedule 13G filings under the final rules as compared to the proposed deadlines should mitigate some of the concerns raised by this commenter about the time required to comply with the structured data requirement.

d. Amendments to Regulation S–T

The final amendments to Regulation S–T revise the time by which Schedule 13D and 13G filings must be submitted in order to be deemed to have been filed on a given business day from 5:30 p.m. to 10 p.m. Eastern Standard Time or Eastern Daylight Saving Time, whichever is currently in effect, on that day. This change may, on the margin, mitigate the incremental compliance challenges and costs associated with the revised filing deadlines, particularly for filers located in a different time zone than the Commission's principal office or those operating in multiple time zones. Some commenters agreed that these extended filing hours would benefit filers in light of the shortened filing deadlines.[924]

The final amendments to Regulation S–T also make temporary hardship exemptions under Rule 201 of Regulation S–T unavailable with respect to Schedule 13D and 13G filings. We expect this change to have no meaningful economic effects as filers will be able to request a filing date adjustment under existing Rule 13(b) of Regulation S–T under similar circumstances as a temporary hardship exemption.[925]

D. Reasonable Alternatives to the Final Rules

We considered many alternatives to the final rules. Some of these are discussed earlier in this release. In this section, we present certain significant alternatives and a discussion of their benefits and costs relative to the final rules.

1. Alternative Filing Deadlines

We considered both earlier and later (and more and less frequent) filing deadlines relative to those that we are adopting. In general, earlier (or more frequent) filing deadlines may have increased the benefits, but also the costs, of the amendments, while later (or less frequent) deadlines would have decreased the costs but also the benefits of the amendments. The economic implications of some alternative filing deadlines (namely, those that were proposed but not adopted) are discussed in more detail above.

With respect to the initial Schedule 13D filing deadline, which will be five business days after the trigger date, we also considered a deadline of greater or fewer days after the trigger date. Additionally, we considered deadlines stated in calendar days as opposed to business days, which, when applied to the same number of days (*i.e.,* five calendar days), would have the effect of decreasing the number of days a person would have to file an initial Schedule 13D in cases where weekends or holidays fall in the middle of the filing window. In general, a shorter deadline and the resulting earlier disclosures may have increased the benefits discussed above for those non-corporate-action filings that would not already be considered timely with respect to such shorter deadline. A shorter deadline may also have further reduced the risk discussed above of shareholders selling to informed bystanders prior to a Schedule 13D filing (as demonstrated in Figure 6 above), which may have further enhanced trust in markets and capital formation.

However, a shorter deadline may also have increased the number of activist campaigns forgone compared to the amended filing deadlines, due to two effects. First, a shorter deadline would mean that, given current share accumulation patterns, there would be a greater number of potential campaigns for which filers would have to consider whether or not to proceed and if so, how.[926] Second, the likelihood of adapting may decrease if it is more difficult for filers to adapt to an even shorter deadline than that which we are adopting. An increase in forgone activist campaigns may have further reduced shareholder value creation. A reduction in the pursuit of activism may also have related negative effects on operational efficiency, market efficiency, liquidity,

[920] *See, e.g.,* letters from ICI I; M. Slavens.

[921] *See* letter from A. Day.

[922] *See* letter from ICI I.

[923] *Id.*

[924] *See* letters from IAA; ICI I.

[925] Commission staff may grant the request if it appears that the adjustment is appropriate and consistent with the public interest and the protection of investors. *See* Rule 13(b) of Regulation S–T.

[926] *See supra* Figures 2, 3a, and 3b for the percentage of filers that have completed accumulating all, 90%, or 75% respectively of their reported stake by each calendar day after the trigger date.

and capital formation, as discussed in the context of the adopted deadline above.

In the case of a longer deadline, the implications for the incremental benefits and costs would have been the reverse of those for a shorter deadline. We note that there is no clear breakpoint in either the accumulation pattern of filers or in the abnormal trading volume prior to Schedule 13D filings that could help to support a particular filing deadline, including five-business day deadline we are adopting.

A deadline expressed in calendar days would also have incremental effects beyond a direct effect on the length of the filing window. In particular, such a deadline would decrease the consistency in the total number of business hours that persons would have to continue accumulating shares and to draft and submit a filing after their trigger date.[927] For example, a five-calendar day deadline may represent anywhere from two to five business days depending on the occurrence of weekends and holidays after the trigger date. This inconsistency may distort the campaigns that are pursued by activists or the timing of these campaigns. For example, an activist who crosses the five percent threshold on a Monday would generally have five trading days from the trigger date to accumulate further shares and potentially increase their profits prior to filing and informing the market of their activity. In contrast, an activist who reaches the same threshold on a Friday prior to a Federal holiday on the following Monday would only have two trading days after the trigger date to accumulate shares before making a Schedule 13D filing. Because investors who reach the threshold near a weekend or holiday would thus be at a relative disadvantage, activists may be relatively more incentivized to pursue campaigns at issuers where liquidity conditions (*i.e.,* availability and ease of share purchase transactions) facilitate crossing the five percent threshold early in a week at a lower cost.[928] Any effect of this kind, in turn, would have a detrimental effect on operational efficiency at the market level by influencing which campaigns are more likely to be pursued.

A deadline expressed in calendar days could also increase compliance costs, given that external service providers and advisers may charge higher fees for weekend or holiday services, which may be more frequently required under a deadline expressed in calendar days. However, a deadline expressed in calendar days would increase the consistency in the total number of calendar days that persons would have to submit a filing. For example, five business days may represent anywhere from seven to 10 calendar days. If a significant amount of investment, advisory, drafting, or other activities in preparation of a Schedule 13D filing takes place on weekends and holidays, it is possible that this inconsistency in calendar days would advantage some filers over others (*i.e.,* those who are better positioned to work over weekends and holidays versus those who are not).

With respect to the initial Schedule 13G filing deadline for Passive Investors, which will be five business days after the trigger date, we also considered longer and shorter deadlines (and the use of deadlines expressed in business as opposed to calendar days, which would have had the effect of lengthening the deadline for the same number of stated days). A longer deadline would have eased commenters' concerns about the compliance costs and complications for Passive Investors.[929] However, researchers have found that those Schedule 13G filings that are not made 45 days after year-end (*i.e.,* generally Schedule 13G filings by Passive Investors) are associated, on average, with a statistically significant positive abnormal stock return,[930] albeit smaller than that generally found for Schedule 13D filings.[931] This result may imply that at least some of these disclosures contain material information whose earlier disclosure could benefit investors (and which may have enhanced the efficiency of resource allocation at the economy level). A longer deadline would have reduced any such benefits. In the case of a shorter deadline, the implications for the incremental benefits and costs would have been the reverse of those for a longer deadline.

2. Tiered Approaches

We considered ''tiered'' approaches to the initial Schedule 13D filing deadline, in contrast to the uniform approach to the filing deadline being adopted. We considered, for example, maintaining the current 10-day deadline for acquisitions of more than five percent but no more than 10 percent of a covered class while instituting an amended, shorter deadline in cases where beneficial ownership exceeds 10 percent. We also considered whether the deadline for the initial Schedule 13D filing should vary based on a specified characteristic of the issuer of the covered class, such as its market capitalization or trading volume. Finally, we considered maintaining the 10-day deadline for those filers that elect to ''stand still'' by not acquiring additional beneficial ownership of the covered class once the five percent threshold has been crossed until the corresponding Schedule 13D is filed.

One commenter stated that a tiered approach that would maintain a 10-day deadline for filing a Schedule 13D pertaining to beneficial ownership in micro-, small-, and mid-capitalization issuers ''may serve to limit the impact that reforms to Rule 13d–1(a) have on shareholder engagement and monitoring,'' particularly at micro-, small-, and mid-capitalization issuers where, in the commenter's view, ''such effective engagement and monitoring is most necessary.'' [932] Another commenter suggested requiring persons who cross certain higher thresholds (*e.g.,* a 10 percent beneficial ownership threshold) or who accumulate certain amounts after crossing the five percent threshold (*e.g.,* an additional three percent) file their initial Schedule 13D on the proposed accelerated timeline, but ''allowing investors who trigger Schedule 13D filings for more technical reasons and who are not accumulating stock in connection with a potential activist engagement (*e.g.,* proxy contests or intended take-private activity) to continue filing under the current regime.'' [933] This commenter also supported maintaining the 10-day deadline for ''an investor who crosses the 5% threshold but acquires no additional stock after the initial crossing transaction,'' stating that ''there is no informational disadvantage for existing investors in such circumstances'' and that in some cases there is ''earlier disclosure by the issuer relating to the [crossing] transaction'' and therefore ''little purpose [is] served by accelerating the timeline for the investor to prepare its disclosure.'' [934]

We acknowledge that there is significant heterogeneity in the benefits and costs of the amended filing deadline across different types of filers and

[927] *See, e.g.,* letter from Profs. Bishop and Partnoy III (recommending a five-business day deadline because it would be ''consistent with other regulatory and trading practices,'' and noting that ''the unit of analysis in examining trading should be trading days'').

[928] See Gantchev & Jotikasthira 2018 Study regarding the role of institutional selling demand on the timing of Schedule 13D trigger dates.

[929] *See, e.g.,* letters from IAA; MSBA.

[930] *See supra* note 884.

[931] *See supra* note 827.

[932] *See* letter from ICM.

[933] *See* letter from STB.

[934] *Id.*

issuers. For example, as discussed above, these benefits and costs are likely to vary across ''corporate action'' as compared to ''non-corporate-action'' filings,[935] across issuers of different sizes,[936] and by the identity of the filer.[937] Ideally, a tiered approach would be used to accelerate disclosure specifically in circumstances where the benefits of accelerated disclosure are greater and the costs of accelerated disclosure are lower. However, there are many important dimensions across which the benefits and costs are likely to vary, complicating the task of designing a tiered approach. Further, the subgroups of filings that are associated with the greatest costs under an accelerated filing deadline (and where there thus could be significant advantages of maintaining the 10-day deadline) are also the same subgroups associated with the greatest benefits under an accelerated deadline, while those associated with lower costs are associated with lower benefits.[938] This pattern mitigates our ability to improve the costs of the amendments by implementing a tiered approach.

3. Modify Structured Data Requirement

We considered modifying the proposed structured data requirement for Schedules 13D and 13G. We considered, for example, requiring only the quantitative disclosures reported on Schedules 13D and 13G to be provided in a structured data language. Narrowing the scope of the structuring requirement in this way could simplify the resulting dataset to include only the information that might be used most widely by market participants, analysts, and Commission staff for aggregation, comparison, and analysis, which may better suit those users who wish to focus their analysis on such information and forgo the additional step of filtering out other data. However, the non-quantitative disclosures on Schedules 13D and 13G, such as textual narratives and identification checkboxes, are also likely to be valuable for many data users, including market participants, analysts, and Commission staff, to access and analyze in an efficient and automated manner. In addition, we expect that the incremental cost savings to filers of requiring only the quantitative disclosures to be structured would be low, because filers would only be forgoing the costs of inputting their textual and checkbox disclosures into fillable web forms (or of tagging those disclosures directly or by means of a filing agent) rather than broader costs associated with structured data implementation more generally. For these reasons, we have determined not to modify the scope of the structured data requirement.

One commenter recommended that the Commission opt for the XBRL data language, rather than creating an XML schema designed specifically for beneficial ownership reporting.[939] This commenter stated that using the XBRL standard, rather than the proposed 13D/G-specific XML requirements, would result in significantly lower costs and greater efficiencies for filers, users of filings, and the Commission, while also enhancing the benefits of a structured data requirement by facilitating improved data quality and the ability to commingle the data with other datasets. We acknowledge that different structured data languages entail different costs and benefits for filers and data users.[940] We believe that 13D/G-specific XML is more suitable than XBRL for Schedules 13D and 13G because it facilitates the use of a fillable form that should result in a lower cost of complying with the structured data requirement compared to XBRL, particularly for smaller and infrequent filers. Under an XBRL requirement, filers (including smaller and infrequent filers) would incur costs and burdens associated with tagging the disclosures (*e.g.,* software licensing costs, time spent applying tags) or with paying a third party to do so. Thus, although some Schedule 13D and Schedule 13G filers, such as those currently subject to Inline XBRL reporting requirements (*e.g.,* filers that are Commission registrants) or that otherwise have experience with XBRL may realize some efficiencies under an XBRL alternative, we believe the cost savings expected to arise from having a fillable form option under the 13D/G-specific XML requirements would have a more substantial positive impact with respect to filers as a whole.

In addition, while some Schedule 13D and Schedule 13G filers and data users may have familiarity with XBRL data and software, such filers and data users likely also have familiarity with data structured in form-specific XML languages on EDGAR. For instance, the Commission has found the use of form-specific XML on section 16 ownership reporting forms to have had positive impacts on filers (with respect to compliance costs) and users (in terms of data usability) of those disclosures without imposing significantly higher implementation costs on the Commission than other structured data requirements impose.[941] For these reasons, we are requiring 13D/G-specific XML rather than Inline XBRL for Schedules 13D and 13G.

V. Paperwork Reduction Act

A. Summary of the Collections of Information

Certain provisions of our rules, schedules and forms that will be affected by the final amendments contain ''collection of information'' requirements within the meaning of the PRA.[942] The Commission published a notice requesting comment on changes to these collection of information requirements in the Proposing Release and submitted these requirements to the Office of Management and Budget (''OMB'') for review in accordance with the PRA.[943] The hours and costs associated with maintaining, disclosing, or providing the information required by the final amendments constitute paperwork burdens imposed by such collection of information. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information requirement unless it displays a currently valid OMB control number.

The title for the affected collections of information is ''Regulation 13D and Regulation 13G; Schedule 13D and Schedule 13G'' (OMB Control No. 3235–0145). These schedules contain item

[935] See section IV.B.3.a.ii above for definitions of these terms and section IV.C.1 above for discussions in which we conclude that both the benefits and costs of the shortened initial Schedule 13D filing deadline are likely to be limited for corporate action filings.

[936] Academic research has associated smaller issuer market capitalization with a higher positive abnormal stock return around the filing of an initial Schedule 13D. *See supra* note 829. A higher positive abnormal stock return may imply higher costs if there is less such activism under an accelerated filing timeline but also higher benefits to investors from accelerating disclosure due to the greater importance of the information to the market.

[937] Academic research has associated Schedule 13D filers' reputations (based on their financial clout, expertise, or aggressive style of engagement) with the size of the positive abnormal stock return around the filing. *See, e.g.,* C. N. V. Krishnan et al., *The Second Wave of Hedge Fund Activism: The Importance of Reputation, Clout, and Expertise,* 40 J. Corp. Fin. 296 (2016); and Travis Johnson & Nathan Swem, *Reputation and Investor Activism: A Structural Approach,* 139 J. Fin. Econ. 29 (2021). As discussed *supra* note 936, a higher positive abnormal stock return may imply both higher costs and higher benefits of accelerating the filing deadline.

[938] See *supra* notes 936–937 for examples of some such subgroups.

[939] *See* letter from XBRL US.

[940] See *supra* section IV.C.3.c for a discussion of costs associated with the 13D/G-specific XML requirements.

[941] *See* Securities and Exchange Commission, Office of Structured Disclosure, Insider Transactions Data Sets, *available at https://www.sec.gov/dera/data/form-345.*

[942] 44 U.S.C. 3501 *et seq.*

[943] 44 U.S.C. 3507(d); 5 CFR 1320.11.

and other requirements that outline the information a reporting person must disclose.[944] The schedules were adopted under the Exchange Act. A description of the final amendments can be found in section II above, and a discussion of the economic effects of the final amendments can be found in section IV above. Compliance with the information collections is mandatory. Responses to the information collections are not kept confidential and there is no mandatory retention period for the information disclosed.

B. Summary of Comment Letters on PRA Estimates

In the Proposing Release, the Commission requested comment on the PRA burden hour and cost estimates and the analysis used to derive the estimates. We did not receive any comment letters in response to the request for comment on the PRA estimates and analysis included in the Proposing Release.

C. Burden and Cost Estimates for the Final Amendments

Below we estimate the incremental and aggregate effect on the paperwork burden as a result of the final amendments. As discussed in section II above, we have made a number of changes from the Proposed Amendments, and we have adjusted our estimates accordingly. For example, in the Proposing Release, the Commission estimated paperwork burden increases for Forms 3, 4, and 5 as well as Schedules 13D and 13G associated with proposed Rules 13d–3(e) and 13d–5(b)(1)(i) and (ii) and (b)(2)(i). Because we are not adopting those proposed rules, we have adjusted the paperwork burden estimates from the Proposing Release accordingly. In addition, rather than basing our PRA estimates on the actual number of Schedule 13D and 13G filings in calendar year 2020, as the Commission did in the Proposing Release, we base our PRA estimates with respect to the final amendment to Rule 13d–2(b), in part, on the actual number of Schedule 13G filings in calendar year 2022.[945]

At the outset, we note that the current OMB inventory for Regulation 13D–G reflects 8,587 annual responses. This number is based on the number of initial Schedule 13D and 13G filings made. We think that the better approach is for the PRA to reflect the burdens arising from both the initial Schedule 13D and 13G filings and amended Schedule 13D and 13G filings. Accordingly, we first update the existing PRA burden estimates to reflect this new approach. Specifically, we are updating the current OMB inventory from 8,587 annual responses to 29,793 annual responses to reflect the average number of initial and amended Schedule 13D and 13G filings per year that were made in calendar years 2020, 2021, and 2022.[946] We then estimate the PRA impact of the final amendments using the updated inventory numbers as the baseline. Table 1 below illustrates the resulting incremental change to the total annual compliance burden in hours and in costs. Additionally, we note that the current OMB inventory for the above-referenced collections of information reflect an average of hourly rate of $400 per burden hour borne by outside professionals. Similarly, in the Proposing Release, the Commission used an estimated cost of $400 per hour, recognizing that the costs of retaining outside professionals may vary depending on the nature of the professional services.[947] The Commission recently determined to increase the estimated costs of such hourly rate to $600 per hour[948] to adjust the estimate for inflation from Aug. 2006.[949] Accordingly, we first update the existing PRA burden estimates to reflect this new cost estimate, as set out in the following Table 1.

PRA TABLE 1—CHANGE IN PRA BURDEN DUE TO UPDATING INVENTORY NUMBERS

Current OMB inventory			Updated inventory			Increased burden due to update		
Current annual responses (A)	Current burden hours (B)	Current cost burden (C)	Updated annual responses (D)±	Updated burden hours (E)±±	Updated cost burden (F)±±±	Increase in number of responses (G) = (D) − (A)	Increase in burden hours (H) = (E) − (B)	Increase in cost burden (I) = (F) − (C)
8,587	27,412	$32,894,000	29,792	40,329	$72,591,600	21,205	12,917	$39,697,000

± *See supra* note 946.

±± The current OMB inventory reflects an average of 14.5 burden hours for each Schedule 13D filing and an average of 12.4 burden hours for each Schedule 13G filing. As noted above, however, the current OMB inventory only included initial Schedule 13D and 13G filings, and so these average burden hours were estimates with respect only to initial filings. Because Schedule 13D and 13G amendments generally contain a fraction of the information contained in an initial filing and because of the likely efficiencies associated with preparing an amendment based on the information disclosed in an initial filing, we estimate average burden hours per filing of 3 hours per Schedule 13D amendment and 2 hours per Schedule 13G amendment. When applied to the updated average annual number of initial Schedule 13D filings (1,288), Schedule 13D amendments (4,012), initial Schedule 13G filings (7,849), and Schedule 13G amendments (16,644), *see supra* note 946, this reflects a total of 161,315 burden hours (when rounded to the nearest whole number). In addition, the current OMB inventory assumes that 25% of the burden associated with a Schedule 13D or 13G filing is borne by the reporting persons and 75% is borne by outside professionals. Thus, assuming that 25% of the total burden hours associated with Schedule 13D and 13G filings (161,315) is borne by the reporting persons yields a total of 40,329 internal burden hours (when rounded to the nearest whole number).

±±± The current OMB inventory reflects a total cost burden of $32,894,000 for Regulation 13D–G, reflecting an average of hourly rate of $400 per burden hour borne by outside professionals. As noted above, we are increasing this cost estimate to $600 per hour. Further, as noted above, assuming that 75% of the total burden hours associated with Schedule 13D and 13G filings (161,315) is borne by the reporting persons yields a total of 120,986 burden hours borne by outside professionals (when rounded to the nearest whole number). As such, we calculate the updated cost burden by multiplying (x) $600 by (y) 120,986.

[944] *See* 17 CFR 240.13d–101 and 240.13d–102.

[945] *Compare* Proposing Release at 13892, n.273, *with infra* note 952.

[946] In calendar year 2020, there were 5,288 Schedule 13D filings (comprised of 1,148 initial filings and 4,140 amendments) and 22,080 Schedule 13G filings (comprised of 6,436 initial filings and 15,644 amendments) for a total of 27,368 filings. *See* DERA Memorandum at nn.3 & 24. In addition, during calendar year 2021, there were 5,434 Schedule 13D filings (comprised of 1,555 initial filings and 3,879 amendments) and 24,874 Schedule 13G filings (comprised of 8,676 initial filings and 16,198 amendments) for a total of 30,308 filings. *See id.* at 1, 8. Finally, in calendar year 2022, there were 5,179 Schedule 13D filings (comprised of 1,161 initial filings and 4,018 amendments) and 26,523 Schedule 13G filings (comprised of 8,433 initial filings and 18,090 amendments) for a total of 31,702 filings. *See supra* section IV.B.3. Taking the three-year average of these amounts results in an average of 29,792 Schedule 13D and 13G filings per year, comprised of 1,288 initial Schedule 13D filings, 4,012 Schedule 13D amendments, 7,849 initial Schedule 13D filings, and 16,644 Schedule 13G amendments, when rounded to the nearest whole number.

[947] *See* Proposing Release at 13894, n.280.

[948] We recognize that the costs of retaining outside professionals may vary depending on the nature of the professional services, but for purposes of this PRA analysis, we estimate that such costs would be an average of $600 per hour.

[949] *See Listing Standards for Recovery of Erroneously Awarded Compensation,* Release No. 33–11126 (Oct. 26, 2022) [87 FR 73076 (Nov. 28, 2022)].

We believe that the final amendments potentially could increase the number of responses to this updated collection of information for Schedules 13D and 13G. Specifically, although we do not anticipate an increase in this collection due to our final amendment to Rule 13d–1, our final amendment to Rule 13d–2(b) with respect to the standard that requires an amendment to Schedule 13G could potentially increase the number of Schedule 13G amendments filed annually.[950] For purposes of this PRA, therefore, we estimate that there could be an additional 41,679 annual responses to the collection of information under Regulation 13D–G[951] as a result of the final amendment to Rule 13d–2.[952]

In addition to a potential increase in the number of annual responses, we expect that the final amendments will change the estimated burden per response for Regulation 13D–G. For both Schedule 13D and Schedule 13G filers, we expect that the structured data requirement will increase the estimated burden per response by requiring that the disclosures in those schedules be made using the 13D/G-specific XML. In addition, for Schedule 13D filers, we expect that the final amendment to Item 6 of Schedule 13D potentially could increase the estimated burden per response by specifying that disclosure is required under Item 6 for the use of cash-settled derivative securities with respect to an issuer's securities.[953]

The burden estimates were calculated by estimating the number of parties we anticipate would expend time, effort, and/or financial resources to generate, maintain, retain, disclose or provide information in connection with the final amendments and then multiplying by the estimated amount of time, on average, such parties would devote in response to the final amendments. The following table summarizes the calculations and assumptions used to derive our estimates of the aggregate increase in burden corresponding to the final amendments.

PRA TABLE 2—CALCULATION OF INCREASE IN BURDEN HOURS RESULTING FROM THE FINAL AMENDMENTS

	Schedule 13D initial filings (A)	Schedule 13D amendments (B)	Schedule 13G initial filings (C)	Schedule 13G amendments (D)
Number of Responses [a]	1,288	4,012	7,848	58,323
Burden Hours Per Response [b]	15.1	3.5	12.9	2.5
Column Total [c]	19,449	14,042	101,239	145,808
Aggregate Increase in Burden Hours [d]	119,223			

[a] As noted in PRA Table 1 and *supra* note 946, the updated OMB inventory will reflect 29,793 total Schedule 13D and 13G filings, comprised of 5,300 Schedule 13D filings and 24,493 Schedule 13G filings (in each case comprised of both initial filings and amendments). When taking into account the potential effects of the amendment to Rule 13d–2(b) we estimate that the number of Schedule 13G filings could increase by 41,679, for a total of 66,172 annual Schedule 13G filings. *See supra* note 952.

[b] As noted in PRA Table 1, the current OMB inventory reflects an average of 14.5 burden hours for each Schedule 13D filing and an average of 12.4 burden hours for each Schedule 13G filing. We use these per filing burden hours as a baseline for estimating the burden impact of the final amendments. We estimate that the new structured data requirement will increase the burden per response for Schedule 13D and 13G filings (both initial and amended filings) by 0.5 burden hours. Our assumption is that the burden will be greatest in the first year after adoption, as filers adjust to the new requirements and update their Schedule 13D and 13G preparation and filing processes accordingly. We estimate that the burden of the structured data requirement will be 1 hour in the first year and 0.25 hours in each of the following two years for a three-year average of 0.5 burden hours. Further, for the amendments to Item 6 of Schedule 13D, we estimate they will increase the burden by 0.1 hours for each initial Schedule 13D filing. Although these amendments could, in some cases, substantially increase the amount of disclosure made pursuant to Item 6, we believe that this estimate accurately reflects that only a relatively small percentage of all Schedule 13D filers hold cash-settled derivative securities and, therefore, will be required to make additional disclosures. In addition, we also expect that any increased burden may be offset in part by the amendment to Item 6 that deletes the ''but not limited to'' proviso. Finally, because not every Schedule 13D amendment will respond to Item 6, we apply this increase only to initial filings. Taken together, we estimate that the amendments could increase the annual burden hours per initial Schedule 13D filing by 0.6 hours and increase the annual burden hours for each Schedule 13D amendment, and each initial Schedule 13G filing and Schedule 13G amendment by 0.5 hours. When added to the current averages, we estimate that, as a result of the final amendments, the new average per filing burden hours will be 15.1 hours for initial Schedule 13D filings, 3.5 hours for Schedule 13D amendments, 12.9 hours for initial Schedule 13G filings, and 2.5 hours for Schedule 13G amendments.

[950] For example, Rule 13d–2(b) currently requires that a Schedule 13G be amended 45 days after the calendar year-end in which any change occurred to the information previously reported. Under our amendment to Rule 13d–2(b), a Schedule 13G will have to be amended within 45 days after the end of the calendar quarter in which a material change occurred to the information previously reported. Although an amendment under Rule 13d–2(b) currently is required for ''any'' change in the information previously reported, that rule only requires that one amendment be filed annually, if at all. Under the revisions we are adopting to that rule, although the standard for determining an amendment obligation would only arise upon a ''material'' change to the information previously reported, the rule changes could theoretically result in numerous amendments being filed on an annual basis, with as many as four Schedule 13G amendments being filed annually pursuant to revised Rule 13d–2(b).

[951] To the extent that a person or entity incurs a burden imposed by Regulation 13D–G, it is encompassed within the collection of information estimates for Regulation 13D–G. This burden includes the preparation, filing, processing and circulation of initial and amended Schedules 13D and 13G.

[952] As discussed in section IV.B.3 *supra,* a total of 18,090 Schedule 13G amendments were filed in calendar year 2022. Upon further review of that data set, we note that 15,100, or 83.47% of those Schedule 13G amendments were made within the first 45 days of calendar year 2022. In addition, we note for calendar years 2020, 2021, and 2022, there were an average of 16,644 Schedule 13G amendments filed each year. *See supra* note 946. Because Rule 13d–2(b) currently has a Schedule 13G amendment deadline of within 45 days after calendar year-end, we assume that 83.47% of the 16,644 Schedule 13G amendments filed each year, or 13,893 filings (when rounded to the nearest whole number), were made pursuant to Rule 13d–2(b). As noted above, our amendment to Rule 13d–2(b) could result in a beneficial owner filing four Schedule 13G amendments annually pursuant to Rule 13d–2(b), as compared to the one annual amendment that currently may be required by Rule 13d–2(b). *See supra* note 950. As such, for purposes of this PRA, we estimate that there will be 55,572 Schedule 13G amendments filed annually pursuant to Rule 13d–2(b) as a result of our amendment (calculated by multiplying (x) the 13,893 annual responses currently attributable to Rule 13d–2(b) by (y) four), resulting in 41,679 additional responses to the collection of information under Regulation 13D–G (calculated as the difference between (x) the 55,572 annual responses estimated to be attributable to Rule 13d–2(b) as a result of the amendments and (y) the 13,893 annual responses currently attributable to Rule 13d–2(b)). We note, however, that this estimate likely reflects the upper limit of the potential increases in the number of annual Regulation 13D–G responses as a result of our amendment to Rule 13d–2(b) because (1) the amendment revises Rule 13d–2(b) to require a Schedule 13G be amended only for a ''material'' change to the information previously reported, as compared to the current requirement that an amendment be filed for ''any'' change to the information previously reported, (2) the information previously reported by many Schedule 13G filers may not change materially on a quarterly basis, and (3) some of the Schedule 13G amendments filed in the first 45 days of a given calendar year may not have been made pursuant to Rule 13d–2(b).

[953] We further expect, however, that this potential increase may be offset in part by the amendment to Item 6 that deletes the ''including but not limited to'' proviso.

[c] Derived by multiplying the number of responses in each column by the burden hours per response, and rounded to the nearest whole number.

[d] Derived by adding together the hours from "Column Totals" (280,538 hours) and subtracting from that total burden hours associated with Schedule 13D and 13G filings for Regulation 13D–G, as noted under PRA Table 1 (161,315).

The table below illustrates the incremental change to the total annual compliance burden in hours and in costs as a result of the final amendments. The table sets forth the percentage estimates we typically use for the burden allocation for each response.

PRA TABLE 3—CALCULATION OF AGGREGATE INCREASE IN BURDEN HOURS RESULTING FROM THE FINAL AMENDMENTS

Total number of estimated responses (A) †	Total increase in burden hours (B) ††	Increase in internal hours (C) ††† = (B) × 25%	Increase in outside professional hours (D) ††† = (B) × 75%	Increase in outside professional costs (E) = (D) × $600
71,471	119,223	29,806	89,417	$53,650,200

† This number reflects an estimated increase of 41,679 annual responses to the updated Regulation 13D–G collection of information set forth in PRA Table 1. *See supra* note 952 and accompanying text. PRA Table 1 reflects an updated baseline total of 29,792 responses filed annually for Regulation 13D–G.

†† Calculated as the sum of annual burden hour increases estimated for Schedule 13D and 13G filings. *See supra* PRA Table 2, "Aggregate Increase in Burden Hours."

††† The estimated increases in Columns (C) and (D) are rounded to the nearest whole number.

Below we summarize the requested paperwork burden for Regulation 13D–G that will be submitted to OMB for review in accordance with the PRA, including the estimated total reporting burdens and costs, under the final amendments. This table includes both the adjustments to the PRA inventory reflected in PRA Table 1 and the aggregate burden increase resulting from the final rules reflected in PRA Table 3.

PRA TABLE 4—REQUESTED PAPERWORK BURDEN FOR REGULATION 13D–G UNDER THE FINAL AMENDMENTS

Current burden			Program change			Revised burden		
Current annual responses (A)	Current burden hours (B)	Current cost burden (C)	Increase in number of responses (D) ±	Increase in burden hours (E) ±±	Increase in cost burden (F) ±±±	Annual responses (G) = (A) + (D)	Burden hours (H) = (B) + (E)	Cost burden (I) = (C) + (F)
8,587	27,412	$32,894,000	62,884	42,723	$93,347,200	71,471	70,135	$126,241,200

± Calculated as the sum of (x) the 21,205 increase in the number of annual responses as a result of the update of the current OMB inventory (from Column (G) in PRA Table 1) and (y) the 41,679 increase in the number of annual responses as a result of the final amendments (*see supra* note 952 and accompanying text).

±± Calculated as the sum of (x) the 12,917 increase in the number of burden hours as a result of the update of the current OMB inventory (from Column (H) in PRA Table 1) and (y) the 29,806 increase in the number of burden hours as a result of the final amendments (from Column (C) in PRA Table 3).

±±± Calculated as the sum of (x) the $39,697,000 increase in the cost burden as a result of the update of the current OMB inventory (from Column (G) in PRA Table 1) and (y) the $53,650,200 increase in the cost burden as a result of the final amendments (from Column (E) in PRA Table 3).

VI. Regulatory Flexibility Act Certification

The Regulatory Flexibility Act ("RFA") [954] requires Federal agencies, in promulgating rules, to consider the impact of those rules on small entities. Section 603(a) of the RFA generally requires the Commission to undertake an initial regulatory flexibility analysis of all proposed rules, or rule amendments, to determine the impact of the proposed rulemaking on "small entities," [955] while section 604(a) requires that the Commission generally provide a final regulatory flexibility analysis of rules it is adopting.[956] Section 605(b) of the RFA states that these requirements shall not apply to any proposed or final rule or rule amendment if the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.[957] The Commission certified in the Proposing Release that the Proposed Amendments would not have a significant economic impact on a substantial number of small entities for purposes of the RFA.[958]

For purposes of Commission rulemaking in connection with the RFA, a small entity includes: (1) when used with reference to an "issuer" or a "person," other than an investment company, an "issuer" or "person" that, on the last day of its most recent fiscal year, had total assets of $5 million or less; [959] or (2) a broker-dealer with total capital (net worth plus subordinated liabilities) of less than $500,000 on the date in the prior fiscal year as of which its audited financial statements were prepared pursuant to 17 CFR 240.17a–5(d), or, if not required to file such statements, a broker-dealer with total capital (net worth plus subordinated liabilities) of less than $500,000 on the last business day of the preceding fiscal year (or in the time that it has been in business, if shorter); and is not affiliated with any person (other than a natural person) that is not a small business or small organization.[960] An investment company, including a business development company,[961] is considered to be a "small business" if it, together

[954] 5 U.S.C. 601 *et seq.*

[955] Section 601(b) of the RFA permits agencies to formulate their own definitions of "small entities." *See* 5 U.S.C. 601(b). The Commission has adopted definitions for the term "small entity" for the purposes of Commission rulemaking in accordance with the RFA. Those definitions, as relevant to this rulemaking, are set forth in 17 CFR 240.0–10 and, with respect to investment companies, 17 CFR 270.0–10.

[956] *See* 5 U.S.C. 603(a), 604(a).

[957] *See* 5 U.S.C. 605(b).

[958] Proposing Release at 13895–96.

[959] *See* 17 CFR 240.0–10(a).

[960] *See* 17 CFR 240.0–10(c).

[961] Business development companies are a category of closed-end investment company that are not registered under the Investment Company Act [15 U.S.C. 80a–2(a)(48) and 80a–53–64].

with other investment companies in the same group of related investment companies, has net assets of $50 million or less as of the end of its most recent fiscal year.[962]

A description of the final amendments can be found in section II above, and a discussion of the economic effects of the final amendments can be found in section IV above. Although the final amendments will apply to beneficial owners regardless of their size, we believe that the vast majority of the beneficial owners that will be subject to the amendments will not be ''small entities'' for purposes of the RFA. For example, the amendments to the filing deadlines in Rules 13d–1 and 13d–2, as well as the amendments to Rules 13 and 201 of Regulation S–T and the structured data requirement, only apply to persons who beneficially own more than five percent of a covered class of securities, thus providing a basis to conclude that such a person is unlikely to fall within the definition of ''small entity.'' In addition, to the extent that the final amendments to the filing deadlines apply to members of a group, in addition to individual entities, we believe that members of a group generally would be larger investors and similarly are unlikely to fall within the definition of ''small entity.''

We did not receive any comment letters in response to the request for comment on the RFA certification in the Proposing Release.[963] Although some commenters asserted that certain of the Proposed Amendments would be unduly burdensome for smaller and non-institutional beneficial owners,[964] those commenters did not indicate (or provide data that would suggest) that those beneficial owners would be small entities for purposes of the RFA. Thus, those comments do not alter our belief that the vast majority of the beneficial owners that will be subject to the amendments will not be small entities for purposes of the RFA. In addition, the final amendments include some modifications to the Proposed Amendments. As discussed in more detail in section II above, we are not adopting proposed Rule 13d–3(e), nor are we adopting many of the proposed amendments to Rules 13d–5 and 13d–6. We also have adopted longer deadlines than proposed for initial and amended Schedule 13G filings. We believe these modifications generally would reduce any burdens of the final amendments in the event any small entity becomes subject to them. Moreover, we do not believe that these modifications alter the basis upon which the Commission made the certification in the Proposing Release.

For the foregoing reasons, the Commission certifies, pursuant to 5 U.S.C. 605(b), that the final amendments will not have a significant economic impact on a substantial number of small entities for purposes of the RFA.

Statutory Authority

We are adopting the rule amendments contained in this release under the authority set forth in sections 3(b), 13, and 23(a) of the Exchange Act.

List of Subjects

17 CFR Part 232

Administrative practice and procedure, Reporting and recordkeeping requirements, Securities.

17 CFR Part 240

Reporting and recordkeeping requirements, Securities.

Text of Amendments

For the reasons set out in the preamble, the Commission is amending title 17, chapter II, of the Code of Federal Regulations as follows:

PART 232—REGULATION S–T—GENERAL RULES AND REGULATIONS FOR ELECTRONIC FILINGS

■ 1. 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, 78o(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.

* * * * *

■ 2. Amend § 232.13 by:
■ a. Revising paragraph (a)(4); and
■ b. Designating the note following paragraph (a)(4) as note 1 to paragraph (a).

The revision reads as follows:

§ 232.13 Date of filing; adjustment of filing date.

(a) * * *

(4) Notwithstanding paragraph (a)(2) of this section, a Form 3, 4, or 5 (referenced in §§ 249.103, 249.104, and 249.105 of this chapter, respectively), a Schedule 14N (referenced in § 240.14n–101 of this chapter), a Form 144 (referenced in § 239.144 of this chapter), or a Schedule 13D or Schedule 13G, inclusive of any amendments thereto (§§ 240.13d–101 and 240.13d–102 of this chapter), submitted by direct transmission commencing on or before 10 p.m. Eastern Standard Time or Eastern Daylight Time, whichever is currently in effect, shall be deemed filed on the same business day.

* * * * *

§ 232.201 [Amended]

■ 3. Amend § 232.201(a) introductory text by:
■ a. Removing the word ''or'' that immediately precedes ''an Asset Data File''; and
■ b. Adding after the phrase ''Asset Data File (as defined in § 232.11),'' the phrase ''or a Schedule 13D or Schedule 13G (§§ 240.13d–101 and 240.13d–102 of this chapter),''.

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

■ 4. The authority citation for part 240 continues to read, in part, as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78c–3, 78c–5, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78j–4, 78k, 78k–1, 78*l,* 78m, 78n, 78n–1, 78o, 78o–4, 78o–10, 78p, 78q, 78q–1, 78s, 78u–5, 78w, 78x, 78dd, 78*ll,* 78mm, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, 7201 *et seq.,* and 8302; 7 U.S.C. 2(c)(2)(E); 12 U.S.C. 5221(e)(3); 18 U.S.C. 1350; and Pub. L. 111–203, 939A, 124 Stat. 1376 (2010); and Pub. L. 112–106, sec. 503 and 602, 126 Stat. 326 (2012), unless otherwise noted.

* * * * *

Section 240.13d-3 is also issued under Public Law 111–203 § 766, 124 Stat. 1799 (2010).

* * * * *

■ 5. Amend § 240.13d–1 by revising paragraphs (a), (b)(1)(i) and (iii), (b)(2), (c) introductory text, (d), (e)(1) introductory text, (e)(1)(ii), (f)(1), (g), (i), and (j) to read as follows:

§ 240.13d–1 Filing of Schedules 13D and 13G.

(a) Any person who, after acquiring directly or indirectly the beneficial ownership of any equity security of a class which is specified in paragraph (i)(1) of this section, is directly or indirectly the beneficial owner of more than five percent of the class shall, within five business days after the date of the acquisition, file with the Commission, a statement containing the information required by Schedule 13D (§ 240.13d-101).

(b) * * *

(1) * * *

(i) Such person has acquired such securities in the ordinary course of the person's business and not with the purpose nor with the effect of changing or influencing the control of the issuer, nor in connection with or as a

[962] 17 CFR 270.0–10(a).

[963] Proposing Release at 13896.

[964] *See, e.g.,* letters from A. Day; E. Fraser; MFA; *see also* letters from B. Mason; S. Thornburg.

participant in any transaction having such purpose or effect, including any transaction subject to § 240.13d–3(b), other than activities solely in connection with a nomination under § 240.14a–11; and

* * * * *

(iii) Such person has promptly notified any other person (or group within the meaning of section 13(d)(3) of the Act) on whose behalf it holds, on a discretionary basis, securities exceeding five percent of the class, of any acquisition or transaction on behalf of such other person which might be reportable by that person under section 13(d) of the Act. This paragraph (b)(1)(iii) only requires notice to the account owner of information which the filing person reasonably should be expected to know and which would advise the account owner of an obligation such account owner may have to file a statement, or an amendment thereto, pursuant to section 13(d) of the Act.

* * * * *

(2) The Schedule 13G filed pursuant to paragraph (b)(1) of this section shall be filed within 45 days after the end of the calendar quarter in which the person became obligated under paragraph (b)(1) of this section to report the person's beneficial ownership as of the last day of the calendar quarter, *provided,* that it shall not be necessary to file a Schedule 13G unless the percentage of the class of equity security specified in paragraph (i)(1) of this section beneficially owned as of the end of the calendar quarter is more than five percent; *however,* if the person's direct or indirect beneficial ownership exceeds 10 percent of the class of equity securities prior to the end of the calendar quarter, the initial Schedule 13G shall be filed within five business days after the end of the first month in which the person's direct or indirect beneficial ownership exceeds 10 percent of the class of equity securities, computed as of the last day of the month.

(c) A person who would otherwise be obligated under paragraph (a) of this section to file a statement on Schedule 13D (§ 240.13d–101) may, in lieu thereof, file with the Commission, within five business days after the date of an acquisition described in paragraph (a) of this section, a short-form statement on Schedule 13G (§ 240.13d–102). *Provided,* that the person:

* * * * *

(d) Any person who, as of the end of any calendar quarter, is or becomes directly or indirectly the beneficial owner of more than five percent of any equity security of a class specified in paragraph (i)(1) of this section and who is not required to file a statement under paragraph (a) of this section by virtue of the exemption provided by section 13(d)(6)(A) or (B) of the Act (15 U.S.C. 78m(d)(6)(A) or 78m(d)(6)(B)), or because the beneficial ownership was acquired prior to December 22, 1970, or because the person otherwise (except for the exemption provided by section 13(d)(6)(C) of the Act (15 U.S.C. 78m(d)(6)(C))) is not required to file a statement, shall file with the Commission, within 45 days after the end of the calendar quarter in which the person became obligated to report under this paragraph (d), a statement containing the information required by Schedule 13G (§ 240.13d–102).

(e)(1) Notwithstanding paragraphs (b) and (c) of this section and § 240.13d–2(b), a person that has reported that it is the beneficial owner of more than five percent of a class of equity securities in a statement on Schedule 13G (§ 240.13d–102) pursuant to paragraph (b) or (c) of this section, or is required to report the acquisition but has not yet filed the schedule, shall immediately become subject to paragraph (a) of this section and § 240.13d–2(a) and shall file a statement on Schedule 13D (§ 240.13d–101) within five business days if, and shall remain subject to those requirements for so long as, the person:

* * * * *

(ii) Is at that time the beneficial owner of more than five percent of a class of equity securities described in paragraph (i)(1) of this section.

* * * * *

(f)(1) Notwithstanding paragraph (c) of this section and § 240.13d–2(b), persons reporting on Schedule 13G (§ 240.13d–102) pursuant to paragraph (c) of this section shall immediately become subject to paragraph (a) of this section and § 240.13d–2(a) and shall remain subject to those requirements for so long as, and shall file a statement on Schedule 13D (§ 240.13d–101) within five business days after the date on which the person's beneficial ownership equals or exceeds 20 percent of the class of equity securities.

* * * * *

(g) Any person who has reported an acquisition of securities in a statement on Schedule 13G (§ 240.13d–102) pursuant to paragraph (b) of this section, or has become obligated to report on Schedule 13G (§ 240.13d–102) but has not yet filed the Schedule, and thereafter ceases to be a person specified in paragraph (b)(1)(ii) of this section or determines that it no longer has acquired or holds the securities in the ordinary course of business shall immediately become subject to paragraph (a) or (c) of this section (if the person satisfies the requirements specified in paragraph (c)) and § 240.13d–2(a), (b), or (d), and shall file, within five business days thereafter, a statement on Schedule 13D (§ 240.13d–101) or amendment to Schedule 13G, as applicable, if the person is a beneficial owner at that time of more than five percent of the class of equity securities.

* * * * *

(i)(1) For the purpose of this section, the term *equity security* means any equity security of a class which is registered pursuant to section 12 of the Act, or any equity security of any insurance company which would have been required to be so registered except for the exemption contained in section 12(g)(2)(G) of the Act, or any equity security issued by a closed-end investment company registered under the Investment Company Act of 1940; *provided,* such term shall not include securities of a class of non-voting securities.

(2) For the purpose of this section, the term *business day* means any day, other than Saturday, Sunday, or a Federal holiday, from 12 a.m. to 11:59 p.m., Eastern Time.

(j) For the purpose of sections 13(d) and 13(g) of the Act, any person, in determining the amount of outstanding securities of a class of equity securities, may rely upon information set forth in the issuer's most recent quarterly or annual report, and any current report subsequent thereto, filed with the Commission pursuant to the Act, unless such person knows or has reason to believe that the information contained therein is inaccurate.

* * * * *

■ 6. Amend § 240.13d–2 by:

■ a. Revising paragraphs (a) through (d); and

■ b. Removing the sectional authority citation from the end of the section.

The revisions read as follows:

§ 240.13d–2 Filing of amendments to Schedules 13D or 13G.

(a) If any material change occurs in the facts set forth in the Schedule 13D (§ 240.13d–101) required by § 240.13d–1(a), including, but not limited to, any material increase or decrease in the percentage of the class beneficially owned, the person or persons who were required to file the statement shall file or cause to be filed with the Commission an amendment disclosing that change within two business days after the date of such change. An

acquisition or disposition of beneficial ownership of securities in an amount equal to one percent or more of the class of securities shall be deemed ''material'' for purposes of this section; acquisitions or dispositions of less than those amounts may be material, depending upon the facts and circumstances.

(b) Notwithstanding paragraph (a) of this section, and provided that the person filing a Schedule 13G (§ 240.13d–102) pursuant to § 240.13d–1(b) or (c) continues to meet the requirements set forth therein, any person who has filed a Schedule 13G (§ 240.13d–102) pursuant to § 240.13d–1(b), (c), or (d) shall amend the statement within 45 days after the end of each calendar quarter if, as of the end of the calendar quarter, there are any material changes in the information reported in the previous filing on that Schedule; *provided, however,* that an amendment need not be filed with respect to a change in the percent of the class outstanding previously reported if the change results solely from a change in the aggregate number of securities outstanding. Once an amendment has been filed reflecting beneficial ownership of five percent or less of the class of securities, no additional filings are required unless the person thereafter becomes the beneficial owner of more than five percent of the class and is required to file pursuant to § 240.13d–1.

(c) Any person relying on § 240.13d–1(b) that has filed its initial Schedule 13G (§ 240.13d–102) pursuant to § 240.13d–1(b) shall, in addition to filing any amendments pursuant to paragraph (b) of this section, file an amendment on Schedule 13G (§ 240.13d–102) within five business days after the end of the first month in which the person's direct or indirect beneficial ownership, computed as of the last day of the month, exceeds 10 percent of the class of equity securities. Thereafter, that person shall, in addition to filing any amendments pursuant to paragraph (b) of this section, file an amendment on Schedule 13G (§ 240.13d–102) within five business days after the end of the first month in which the person's direct or indirect beneficial ownership, computed as of the last day of the month, increases or decreases by more than five percent of the class of equity securities. Once an amendment has been filed reflecting beneficial ownership of five percent or less of the class of securities, no additional filings are required by this paragraph (c).

(d) Any person relying on § 240.13d–1(c) that has filed its initial Schedule 13G (§ 240.13d–102) pursuant to § 240.13d–1(c) shall, in addition to filing any amendments pursuant to paragraph (b) of this section, file an amendment on Schedule 13G (§ 240.13d–102) within two business days after acquiring, directly or indirectly, greater than 10 percent of a class of equity securities specified in § 240.13d–1(d), and thereafter within two business days after increasing or decreasing its beneficial ownership by more than five percent of the class of equity securities. Once an amendment has been filed reflecting beneficial ownership of five percent or less of the class of securities, no additional filings are required by this paragraph (d).

* * * * *

■ 7. Amend § 240.13d–3 by:

■ a. Revising paragraphs (d)(3) introductory text and (d)(4); and

■ b. Removing the sectional authority citation from the end of the section.

The revisions read as follows:

§ 240.13d–3 Determination of beneficial owner.

* * * * *

(d) * * *

(3) A person who in the ordinary course of such person's business is a pledgee of securities under a written pledge agreement shall not be deemed to be the beneficial owner of such pledged securities until the pledgee has taken all formal steps necessary which are required to declare a default and determines that the power to vote or to direct the vote or to dispose or to direct the disposition of such pledged securities will be exercised, provided, that:

* * * * *

(4) A person engaged in business as an underwriter of securities who acquires securities through such person's participation in good faith in a firm commitment underwriting registered under the Securities Act of 1933 shall not be deemed to be the beneficial owner of such securities until the expiration of 40 days after the date of such acquisition.

■ 8. Revise § 240.13d–5 to read as follows:

§ 240.13d–5 Acquisition of beneficial ownership.

(a) A person who becomes a beneficial owner of securities shall be deemed to have acquired such beneficial ownership for purposes of section 13(d)(1) of the Act, whether such acquisition was through purchase or otherwise. However, executors or administrators of a decedent's estate generally will be presumed not to have acquired the beneficial ownership held by the decedent's estate until such time as such executors or administrators are qualified under local law to perform their duties.

(b)(1)(i) When two or more persons agree to act together for the purpose of acquiring, holding, voting or disposing of equity securities of an issuer, the group formed thereby shall be deemed to have acquired beneficial ownership, for purposes of sections 13(d) and (g) of the Act, as of the date of such agreement, of all equity securities of that issuer beneficially owned by any such persons.

(ii) A group regulated as a person pursuant to section 13(d)(3) of the Act shall be deemed to have acquired beneficial ownership, as determined under paragraph (a) of this section and for purposes of sections 13(d)(1) and (2) of the Act, if any member of the group becomes the beneficial owner of additional equity securities in the same class beneficially owned by the group after the group's formation. The beneficial ownership so acquired shall be reported as being held by the group through the earlier of {x} the date of the group's dissolution or {y} the date of that member's withdrawal from the group.

(iii) Notwithstanding paragraph (b)(1)(ii) of this section, a group regulated under section 13(d)(3) of the Act shall not be deemed to have acquired beneficial ownership, as determined under paragraph (a) of this section, if, after the group's formation, a member of the group becomes the beneficial owner of additional equity securities in the same class beneficially owned by the group through a sale by or transfer from another member of the group.

(2)(i) A group regulated as a person pursuant to section 13(g)(3) of the Act shall be deemed to have become the beneficial owner, for purposes of sections 13(g)(1) and (2) of the Act, if any member of the group becomes a beneficial owner of additional equity securities in the same class held by the group after the group's formation and through the earlier of {x} the date of the group's dissolution or {y} the date of that member's withdrawal from the group.

(ii) Notwithstanding paragraph (b)(2)(i) of this section, a group regulated under section 13(g)(3) of the Act shall not be deemed to have become the beneficial owner of additional equity securities in the same class beneficially owned by the group if, after the group's formation, a member of the group becomes the beneficial owner of additional equity securities in the same class beneficially owned by the group

through a sale by or transfer from another member of the group.

■ 9. Revise § 240.13d–6 to read as follows:

§ 240.13d–6 Exemption of certain acquisitions.

(a) The acquisition of securities of an issuer by a person who, prior to such acquisition, was a beneficial owner of more than five percent of the outstanding securities of the same class as those acquired shall be exempt from section 13(d) of the Act; provided, that:

(1) The acquisition is made pursuant to preemptive subscription rights in an offering made to all holders of securities of the class to which the preemptive subscription rights pertain;

(2) Such person does not acquire additional securities except through the exercise of such person's pro rata share of the preemptive subscription rights; and

(3) The acquisition is duly reported, if required, pursuant to section 16(a) of the Act and the rules and regulations thereunder in this part.

(b) A group shall be deemed not to have acquired any equity securities beneficially owned by the other members of the group solely by virtue of their concerted actions relating to the purchase of equity securities directly from an issuer in a transaction not involving a public offering; provided, that:

(1) All the members of the group are persons specified in § 240.13d–1(b)(1)(ii);

(2) The purchase is in the ordinary course of each member's business and not with the purpose nor with the effect of changing or influencing control of the issuer, nor in connection with or as a participant in any transaction having such purpose or effect, including any transaction subject to § 240.13d–3(b);

(3) There is no agreement among or between any members of the group to act together with respect to the issuer or its securities except for the purpose of facilitating the specific purchase involved; and

(4) The only actions among or between any members of the group with respect to the issuer or its securities subsequent to the closing date of the non-public offering are those which are necessary to conclude ministerial matters directly related to the completion of the offer or sale of the securities.

§ 240.13d–7 [Removed and Reserved]

■ 10. Remove and reserve § 240.13d–7.

■ 11. Amend § 240.13d–101 by:

■ a. Removing the note that reads ''Note: Schedules filed in paper format shall include a signed original and five copies of the schedule, including all exhibits. See Rule 13d–7 for other parties to whom copies are to be sent.''; and

■ b. Revising Item 6 and the paragraph following the ''Name/Title'' block.

The revisions read as follows:

§ 240.13d–101 Schedule 13D—Information to be included in statements filed pursuant to § 240.13d–1(a) and amendments thereto filed pursuant to § 240.13d–2(a).

* * * * *

Item 6. Contracts, Arrangements, Understandings or Relationships With Respect to Securities of the Issuer. Describe any contracts, arrangements, understandings, or relationships (legal or otherwise) among the persons named in Item 2 and between such persons and any person with respect to any securities of the issuer, including any class of such issuer's securities used as a reference security, in connection with any of the following: call options, put options, security-based swaps or any other derivative securities, transfer or voting of any of the securities, finder's fees, joint ventures, loan or option arrangements, guarantees of profits, division of profits or loss, or the giving or withholding of proxies, naming the persons with whom such contracts, arrangements, understandings, or relationships have been entered into. Include such information for any of the securities that are pledged or otherwise subject to a contingency the occurrence of which would give another person voting power or investment power over such securities except that disclosure of standard default and similar provisions contained in loan agreements need not be included.

* * * * *

The original statement shall be signed by each person on whose behalf the statement is filed or such person's authorized representative. If the statement is signed on behalf of a person by such person's authorized representative (other than an executive officer or general partner of the filing person), evidence of the representative's authority to sign on behalf of such person shall be filed with the statement; *provided, however,* that a power of attorney for this purpose which is already on file with the Commission may be incorporated by reference. The name and any title of each person who signs the statement shall be typed or printed beneath such person's signature.

* * * * *

■ 12. Amend § 240.13d–102 by:

■ a. Revising Item 8 and the paragraph following the ''Name/Title'' block; and

■ b. Removing the note at the end of the section.

The revisions read as follows:

§ 240.13d–102 Schedule 13G—Information to be included in statements filed pursuant to § 240.13d–1(b), (c), and (d) and amendments thereto filed pursuant to § 240.13d–2.

* * * * *

Item 8. Identification and Classification of Members of the Group

If a group has filed this schedule pursuant to § 240.13d–1(b)(1)(ii)(K), so indicate under Item 3(k) and attach an exhibit stating the identity and Item 3 classification of each member of the group. If a group has filed this schedule pursuant to Rule 13d–1(c) or Rule 13d–1(d), attach an exhibit stating the identity of each member of the group.

* * * * *

The original statement shall be signed by each person on whose behalf the statement is filed or such person's authorized representative. If the statement is signed on behalf of a person by such person's authorized representative other than an executive officer or general partner of the filing person, evidence of the representative's authority to sign on behalf of such person shall be filed with the statement; *provided, however,* that a power of attorney for this purpose which is already on file with the Commission may be incorporated by reference. The name and any title of each person who signs the statement shall be typed or printed beneath such person's signature.

* * * * *

By the Commission.

Dated: October 10, 2023.

Vanessa A. Countryman,

Secretary.

[FR Doc. 2023–22678 Filed 11–6–23; 8:45 am]

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FEDERAL REGISTER

Vol. 88 Tuesday,

No. 214 November 7, 2023

Part III

The President

Notice of November 3, 2023—Continuation of the National Emergency With Respect to the Threat From Securities Investments That Finance Certain Companies of the People's Republic of China

Federal Register
Vol. 88, No. 214
Tuesday, November 7, 2023

Presidential Documents

Title 3—

The President

Notice of November 3, 2023

Continuation of the National Emergency With Respect to the Threat From Securities Investments That Finance Certain Companies of the People's Republic of China

On November 12, 2020, by Executive Order 13959, the President declared a national emergency pursuant to the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*) to deal with the unusual and extraordinary threat to the national security, foreign policy, and economy of the United States constituted by the threat from securities investments that finance certain companies of the People's Republic of China (PRC).

The President found that the PRC is exploiting United States capital to resource and enable the development and modernization of its military, intelligence, and other security apparatuses, which continues to allow the PRC to directly threaten the United States homeland and United States forces overseas. Through the national strategy of Military-Civil Fusion, the PRC increases the size of the country's military-industrial complex by compelling civilian Chinese companies to support its military and intelligence activities. Those companies, though remaining ostensibly private and civilian, directly support the PRC's military, intelligence, and security apparatuses and aid in their development and modernization. At the same time, those companies raise capital by selling securities to United States investors that trade on public exchanges both here and abroad, lobbying United States index providers and funds to include these securities in market offerings, and engaging in other acts to ensure access to United States capital.

The President further found that the PRC's military-industrial complex, by directly supporting the efforts of the PRC's military, intelligence, and other security apparatuses, constituted an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States.

On January 13, 2021, the President signed Executive Order 13974 amending Executive Order 13959.

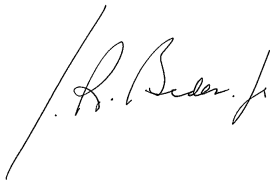
On June 3, 2021, I signed Executive Order 14032, which expanded the scope of the national emergency declared in Executive Order 13959. I found that additional steps are necessary to address that national emergency, including the threat posed by the military-industrial complex of the PRC and its involvement in military, intelligence, and security research and development programs, and weapons and related equipment production under the PRC's Military-Civil Fusion strategy. In addition, I found that the use of Chinese surveillance technology outside the PRC and the development or use of Chinese surveillance technology to facilitate repression or serious human rights abuse constituted unusual and extraordinary threats to the national security, foreign policy, and economy of the United States, and I expanded the national emergency to address these threats. Executive Order 14032 amended Executive Order 13959 and revoked Executive Order 13974 in its entirety.

The threat from securities investments that finance certain companies of the PRC and certain uses and development of Chinese surveillance technology continue to pose an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States.

For this reason, the national emergency declared in Executive Order 13959 of November 12, 2020, expanded in scope by Executive Order 14032 of

June 3, 2021, must continue in effect beyond November 12, 2023. Therefore, in accordance with section 202(d) of the National Emergencies Act (50 U.S.C. 1622(d)), I am continuing for 1 year the national emergency declared in Executive Order 13959 with respect to the threat from securities investments that finance certain companies of the PRC and expanded in Executive Order 14032.

This notice shall be published in the *Federal Register* and transmitted to the Congress.



THE WHITE HOUSE,
November 3, 2023.

[FR Doc. 2023–24776
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