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## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

### 7 CFR Part 205

**[Doc. No. AMS–NOP–22–0002]**

## National Organic Program: 2023 and 2024 Sunset Review and Substance Renewals

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** 2023 and 2024 sunset review and renewals.

**SUMMARY:** This document announces the renewal of substances listed on the National List of Allowed and Prohibited Substances (National List) within the U.S. Department of Agriculture's (USDA) organic regulations. This document reflects the outcome of the 2023 and 2024 sunset review processes and addresses recommendations submitted to the Secretary of Agriculture (Secretary), through the USDA's Agricultural Marketing Service (AMS), by the National Organic Standards Board (NOSB).

**DATES:** Applicable May 29, 2023.

**FOR FURTHER INFORMATION CONTACT:** Jared Clark, Standards Division, Telephone: (202) 720–3252; Fax: (202) 260–9151.

**SUPPLEMENTARY INFORMATION:**

### Background

On December 21, 2000, the Secretary established the Agricultural Marketing Service's (AMS) National Organic Program (NOP) and the USDA organic regulations (65 FR 80547, December 21, 2000). Within the USDA organic regulations (7 CFR part 205) is the National List of Allowed and Prohibited Substances (or ''National List''). The National List identifies the synthetic substances that may be used and the nonsynthetic (natural) substances that may not be used in organic crop and livestock production. It also identifies the nonorganic substances that may be used in or on processed organic products.

The Organic Foods Production Act of 1990 (OFPA), as amended (7 U.S.C. 6501–6524), and the USDA organic regulations specifically prohibit the use of any synthetic substance in organic production and handling unless the synthetic substance is on the National List (§§ 205.601, 205.603 and 205.605(b)). Section 205.105 also requires that any nonorganic agricultural substance and any nonsynthetic nonagricultural substance used in organic handling be on the National List (§§ 205.605(a) and 205.606).

The OFPA at 7 U.S.C. 6518 authorizes the NOSB, operating in accordance with the Federal Advisory Committee Act (section 1 *et seq.,* 5 U.S.C. App.2), to evaluate substances for organic production and handling and to advise the Secretary on the USDA organic regulations. The OFPA ''sunset provision'' (7 U.S.C. 6517(e)) requires review of all substances included on the National List within five years of their addition to or renewal on the list.

As required in OFPA, the NOSB considered any new information about a substance's impact on human health and the environment, its necessity, and its consistency with organic production and handling. The NOSB then voted on whether to remove the substance from the National List, with a ⅔ majority needed to recommend removal of a substance.

As delegated by the Secretary, AMS evaluates the NOSB's reviews and recommendations for compliance with the National List substance evaluation criteria in the OFPA at 7 U.S.C. 6518(m) and other federal statutes or regulations. AMS also considers public comments submitted in association with the sunset review process, as described in the notice published on September 16, 2013 (78 FR 56811).

AMS published notices in the **Federal Register** announcing the NOSB meetings (Spring 2021 & 2022 and Fall 2021 & 2022) and invited public comments on the 2023 and 2024 sunset review of the substances included in the tables below. AMS also hosted public webinars prior to these NOSB meetings to provide additional opportunities for public comment. At these public meetings, the NOSB reviewed substances scheduled to sunset from the National List and recommended that they either be removed or remain on the National List.

AMS has reviewed and accepted all NOSB sunset review recommendations for substances with sunset dates in 2023 and 2024. AMS is renewing the listings of these substances until 2028 and 2029, respectively.[1] AMS determined that the substance allowances listed in this notice are still necessary because of the unavailability of organic forms or wholly natural substitutes for the specified uses (section 6517(c)(1)(A)(ii)). The renewal of these substances will avoid potential disruptions to the organic industry that may otherwise result from removal from the National List. AMS also has determined that the prohibited nonsynthetic substances listed in this notice should remain prohibited because their use remains inconsistent with organic production (section 6517(c)(2)(A)(ii)).

In 2016, the NOSB passed a proposal to redistribute material reviews across several years. Because most materials were added to the National List when the organic regulations published, the majority of sunset reviews occurred in the same year. This resulted in an inefficient use of resources and time. To adjust this, the NOSB and NOP redistributed the National List substances more evenly over a five-year span. To maintain this distribution, some substances in this notice will have a sunset date less than five years from their current date. This document covers the last year of this redistribution.[2]

In addition to the substances in the tables below, this document renews beta-carotene extract color, included on the National List at § 205.606(d)(2). This substance currently has a sunset date of May 29, 2023, but was reviewed early by the NOSB in 2020 along with the other allowed agricultural, non-organic colors. AMS discussed these meetings and renewals in the 2021 and 2022 sunset renewals (August 3, 2021; 86 FR 41699). This document renews beta-carotene extract color and establishes a

[1] National Organic Program, National List Sunset Dates, March 23, 2022, *https://www.ams.usda.gov/sites/default/files/media/NOP-SunsetDates.pdf.*

[2] National Organic Standards Board, formal recommendation, sunset review efficient work load reorganization, November 18, 2016, *https://www.ams.usda.gov/sites/default/files/media/PDSSunsetreorg.pdf.*

new sunset date for this substance of March 15, 2027, to match the sunset dates of the other colors.

The following tables list specific substance allowances and prohibitions renewed by this notice.

TABLE 1—NATIONAL LIST SUBSTANCES RENEWED UNTIL MAY 29, 2028

| Substance | Use conditions |
|---|---|
| § 205.601 Synthetic substances allowed for use in organic crop production. | |
| Calcium hypochlorite | As described under § 205.601(a)(2)(i). |
| Chlorine dioxide | As described under § 205.601(a)(2)(ii). |
| Hypochlorous acid—generated from electrolyzed water | As described under § 205.601(a)(2)(iii). |
| Sodium hypochlorite | As described under § 205.601(a)(2)(v). |
| Copper sulfate | As described under § 205.601(a)(3). |
| Ozone gas | As described under § 205.601(a)(5). |
| Peracetic acid | As described under § 205.601(a)(6). |
| Copper sulfate | As described under § 205.601(e)(4). |
| Magnesium oxide | As described under § 205.601(j)(5). |
| Peracetic acid | As described under § 205.601(i)(8). |
| EPA List 3—Inerts of unknown toxicity | As described under § 205.601(m)(2). |
| § 205.602 Nonsynthetic substances prohibited for use in organic crop production. | |
| Calcium chloride | As described under § 205.602(c). |
| Rotenone | As described under § 205.602(f). |
| § 205.603 Synthetic substances allowed for use in organic livestock production. | |
| Activated Charcoal | As described under § 205.603(a)(6). |
| Calcium borogluconate | As described under § 205.603(a)(7). |
| Calcium propionate | As described under § 205.603(a)(8). |
| Calcium hypochlorite | As described under § 205.603(a)(10)(i). |
| Chlorine dioxide | As described under § 205.603(a)(10)(ii). |
| Hypochlorous acid—generated from electrolyzed water | As described under § 205.603(a)(10)(iii). |
| Sodium hypochlorite | As described under § 205.603(a)(10)(iv). |
| Kaolin pectin | As described under § 205.603(a)(17). |
| Mineral oil | As described under § 205.603(a)(20). |
| Nutritive supplements | As described under § 205.603(a)(21). |
| Propylene glycol | As described under § 205.603(a)(27). |
| Sodium chlorite, acidified | As described under § 205.603(a)(28). |
| Sodium chlorite, acidified | As described under § 205.603(b)(9). |
| Zinc sulfate | As described under § 205.603(b)(11). |
| § 205.605 Nonagricultural (nonorganic) substances allowed as ingredients in or on processed products labeled as ''organic'' or ''made with organic (specified ingredients or food group(s)).'' | |
| Agar-agar | As described under § 205.605(a)(2). |
| Animal enzymes | As described under § 205.605(a)(3). |
| Calcium sulfate—mined | As described under § 205.605(a)(8). |
| Carrageenan | As described under § 205.605(a)(9). |
| Glucono delta-lactone | As described under § 205.605(a)(14). |
| Tartaric acid | As described under § 205.605(a)(28). |
| Cellulose | As described under § 205.605(b)(11). |
| Calcium hypochlorite | As described under § 205.605(b)(12)(i). |
| Chlorine dioxide | As described under § 205.605(b)(12)(ii). |
| Hypochlorous acid—generated from electrolyzed water | As described under § 205.605(b)(12)(iii). |
| Sodium hypochlorite | As described under § 205.605(b)(12)(iv). |
| Potassium hydroxide | As described under § 205.605(b)(26). |
| Potassium lactate | As described under § 205.605(b)(27). |
| Silicon dioxide | As described under § 205.605(b)(29). |
| Sodium lactate | As described under § 205.605(b)(33). |

TABLE 2—NATIONAL LIST SUBSTANCES RENEWED UNTIL JANUARY 28, 2029

| Substance | Use conditions |
|---|---|
| § 205.601 Synthetic substances allowed for use in organic crop production. | |
| Soluble boron products | As described under § 205.601(j)(7)(i). |
| Sulfates, carbonates, oxides, or silicates of zinc, copper, iron manganese, molybdenum, selenium, and cobalt. | As described under § 205.601(j)(7)(ii). |
| Squid byproducts—from waste processing only | As described under § 205.601(j)(10). |
| § 205.603 Synthetic substances allowed for use in organic livestock production. | |
| Chlorhexidine | As described under § 205.603(a)(9). |
| Elemental sulfur | As described under § 205.603(b)(2). |
| Lidocaine | As described under § 205.603(b)(5). |
| § 205.606 Nonorganically produced agricultural products allowed as ingredients in or on processed products labeled as ''organic.'' | |
| Potassium acid tartrate | As described under § 205.606(p). |

TABLE 3—NATIONAL LIST SUBSTANCES RENEWED UNTIL OCTOBER 30, 2029

| Substance | Use conditions |
|---|---|
| § 205.601 Synthetic substances allowed for use in organic crop production. | |
| Herbicides, soap-based | As described under § 205.601(b)(1). |
| Biodegradable biobased mulch film | As described under § 205.601(b)(2)(iii). |
| Boric acid | As described under § 205.601(e)(3). |
| Sticky traps/barriers | As described under § 205.601(e)(9). |
| Elemental sulfur | As described under § 205.601(h)(2). |
| Coppers, fixed—copper hydroxide, copper oxide, copper oxychloride | As described under § 205.601(i)(2). |
| Copper sulfate | As described under § 205.601(i)(3). |
| Polyoxin D zinc salt | As described under § 205.601(i)(11). |
| Humic acids | As described under § 205.601(j)(3). |
| Vitamins C and E | As described under § 205.601(j)(9). |
| § 205.602 Nonsynthetic substances prohibited for use in organic crop production. | |
| Lead salts | As described under § 205.602(d). |
| Tobacco dust (nicotine sulfate) | As described under § 205.602(j). |
| § 205.603 Synthetic substances allowed for use in organic livestock production. | |
| Glucose | As described under § 205.603(a)(13). |
| Tolazoline | As described under § 205.603(a)(29). |
| Copper sulfate | As described under § 205.603(b)(1). |
| § 205.605 Nonagricultural (nonorganic) substances allowed as ingredients in or on processed products labeled as ''organic'' or ''made with organic (specified ingredients or food group(s)).'' | |
| Attapulgite | As described under § 205.605(a)(4). |
| Bentonite | As described under § 205.605(a)(5). |
| Diatomaceous earth | As described under § 205.605(a)(10). |
| Magnesium chloride | As described under § 205.605(a)(17). |
| Nitrogen—oil free grades | As described under § 205.605(a)(20). |
| Sodium carbonate | As described under § 205.605(a)(27). |
| Acidified sodium chlorite | As described under § 205.605(b)(1). |
| Carbon dioxide | As described under § 205.605(b)(10). |
| Sodium phosphates | As described under § 205.605(b)(34). |
| § 205.606 Nonorganically produced agricultural products allowed as ingredients in or on processed products labeled as ''organic.'' | |
| Casings, from processed intestines | As described under § 205.606(b). |
| Pectin (non-amidated forms only) | As described under § 205.606(o). |

**Authority:** 7 U.S.C. 6501–6524.

**Erin Morris,**

*Associate Administrator, Agricultural Marketing Service.*

[FR Doc. 2023–07886 Filed 4–13–23; 8:45 am]

**BILLING CODE P**

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

**[Docket No. FAA–2023–0925; Project Identifier AD–2023–00255–T; Amendment 39–22411; AD 2023–07–09]**

**RIN 2120–AA64**

## Airworthiness Directives; The Boeing Company Airplanes

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final rule; request for comments.

**SUMMARY:** The FAA is superseding Airworthiness Directive (AD) 2022–27–07, which applied to certain The Boeing Company Model 747–400 and 747–8 series airplanes. AD 2022–27–07 required inspecting for wear of the transfer pump housing inlet check valves and transfer pump motor impeller inlet adapters for the horizontal stabilizer fuel tank and doing corrective actions, if necessary. This AD was prompted by the discovery that certain airplanes were incorrectly included in the applicability of AD 2022–27–07. This AD continues to require inspecting for wear of the transfer pump housing inlet check valves and transfer pump motor impeller inlet adapters for the horizontal stabilizer fuel tank and doing corrective actions, if necessary. This AD also removes certain airplanes from the applicability, redefines the definition of an ''activated'' horizontal stabilizer fuel tank, and limits the installation of affected parts. The FAA is issuing this AD to address the unsafe condition on these products.

**DATES:** This AD is effective May 1, 2023.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of January 13, 2023 (87 FR 80028, December 29, 2022).

The FAA must receive comments on this AD by May 30, 2023.

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

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

*AD Docket:* You may examine the AD docket at *regulations.gov* by searching for and locating Docket No. FAA–2023–0925; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, any comments received, and other information. The street address for Docket Operations is listed above.

Material Incorporated by Reference:

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

• You may view this referenced service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. It is also available at *regulations.gov* by searching for and locating Docket No. FAA–2023–0925.

**FOR FURTHER INFORMATION CONTACT:** Samuel Dorsey, Aerospace Engineer, Propulsion Section, FAA, Seattle ACO Branch, 2200 South 216th St., Des Moines, WA 98198; phone: 206–231–3415; email: *Samuel.j.dorsey@faa.gov.*

**SUPPLEMENTARY INFORMATION:**

## Comments Invited

The FAA invites you to send any written data, views, or arguments about this final rule. Send your comments to an address listed under **ADDRESSES**. Include ''Docket No. FAA–2023–0925 and Project Identifier AD–2023–00255–T'' at the beginning of your comments. The most helpful comments reference a specific portion of the final rule, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend this final rule because of those comments.

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

## Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this AD contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this AD, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this AD. Submissions containing CBI should be sent to Samuel Dorsey, Aerospace Engineer, Propulsion Section, FAA, Seattle ACO Branch, 2200 South 216th St., Des Moines, WA 98198; phone: 206–231–3415; email: *Samuel.j.dorsey@faa.gov.* Any commentary that the FAA receives that is not specifically designated as CBI will be placed in the public docket for this rulemaking.

## Background

The FAA issued AD 2022–27–07, Amendment 39–22292 (87 FR 80028, December 29, 2022) (AD 2022–27–07), for certain The Boeing Company Model 747–400 and 747–8 series airplanes. AD 2022–27–07 required inspecting for wear of the transfer pump housing inlet check valves and transfer pump motor impeller inlet adapters for the horizontal stabilizer fuel tank and doing corrective actions, if necessary. AD 2022–27–07 also limited the installation of affected parts. AD 2022–27–07 was prompted by reports of wear-through of the transfer pump motor impeller inlet adapter of a transfer pump for the horizontal stabilizer fuel tank caused by contact between the transfer pump housing inlet check valve and the transfer pump motor impeller inlet adapter. The FAA issued AD 2022–27–07 to address the development of an ignition source within the horizontal stabilizer fuel tank resulting from wear to the transfer pump housing inlet check valves and transfer pump motor impeller inlet adapters of the horizontal stabilizer fuel tank. This condition, in combination with flammable fuel vapors, could result in a fuel tank explosion and consequent loss of the airplane.

## Actions Since AD 2022–27–07 Was Issued

Since the FAA issued AD 2022–27–07, the agency received comments from Boeing and Delta Air Lines (Delta) identifying errors affecting the applicability of AD 2022–27–02. These errors are discussed in detail along with additional issues in the following section.

## Request To Clarify Component Descriptions in AD 2022–27–07

Boeing requested that the FAA clarify the component descriptions throughout AD 2022–27–07. Boeing explained that the inlet check valve is part of the transfer pump housing assembly, while the inlet adapter is part of the transfer pump motor impeller assembly. When referring to the inlet check valve, Boeing suggested consistent use of ''transfer pump housing inlet check valve(s).'' And, when referring to the inlet adapter, Boeing suggested consistent use of ''transfer pump motor impeller inlet adapter.''

The FAA agrees and has updated this AD accordingly.

## Request To Exclude Unaffected Parts From the Applicability of AD 2022–27–07

Boeing requested that AD 2022–27–07 be revised to exclude certain parts that are not affected by the unsafe condition addressed in that AD. Boeing pointed out that the standard Model 747–400 and –8 airplanes utilize Crane Aerospace Hydro-Aire transfer pump housings and transfer pump motor impellers having part numbers (P/Ns) 60–703200–x and 60–72101–x respectively, where x represents all dash numbers, and those are the parts that are subject to the unsafe condition. Clarifying, Boeing stated that it received FAA approval in 2003 to use alternate FR-HiTemp Limited fuel pumps and housings as an option on Model 747–400 airplanes. Boeing further explained that incorporation of the approved alternate FR-HiTemp Limited part numbers was approved by the FAA as an alternative method of compliance for AD 2001–21–07, Amendment 39–12478 (66 FR 54652, October 30, 2001), against the Crane Aerospace Hydro-Aire transfer pump housings and transfer pump motor impellers. Boeing asserted that the associated certification system safety assessment and design data reviews for the alternate part numbers concluded that the unsafe condition cited in AD 2022–27–07 does not exist because the interface designs are significantly different from the Crane Aerospace Hydro-Aire design, such that the same unsafe wear condition cannot develop.

The FAA agrees for the reasons provided by Boeing. Therefore, the applicability of this AD has been revised to specify that this AD applies to airplanes equipped with an activated horizontal stabilizer fuel tank with Crane Aerospace Hydro-Aire horizontal stabilizer fuel transfer pump housings and transfer pump motor impellers. Therefore, airplanes without Crane Aerospace Hydro-Aire horizontal stabilizer fuel transfer pump housings and transfer pump motor impellers are not subject to this AD.

**Request To Exclude Certain Airplanes From the Applicability of AD 2022–27–07**

Boeing requested that airplanes delivered with no horizontal stabilizer fuel tank installed in production and airplanes with provisioned, but non-functional horizontal stabilizer fuel tanks be removed from the applicability of AD 2022–27–07. Boeing pointed out that the definition of an ''activated'' tank in paragraph (g)(3) of AD 2022–27–07 is one that is ''. . . considered to be ''activated'' if it is not deactivated by an approved alteration,'' which might inadvertently affect airplanes delivered with a horizontal stabilizer fuel tank in a permanent non-functional state, as well as airplanes provisioned for future activation to a fully functional state at the operator's discretion.

Boeing explained that Model 747 airplanes were delivered in three primary certified configurations: passenger configurations with no horizontal stabilizer fuel tank installed in production, passenger configurations with a fully functional horizontal stabilizer fuel tank installed in production by operator selection of this offered option, and all freighter configurations with no horizontal stabilizer fuel tank installed in production. Further, Boeing explained that some passenger airplanes were delivered with various configurations of exercised customer options for the horizontal stabilizer fuel tank, and all of these options were with non-functional horizontal stabilizer fuel tanks, but with provisions to support later activation to fully functional configurations via Boeing service bulletins at the operator's discretion. The various provisional configurations Boeing described ranged from partial installation of only horizontal stabilizer fuel tank fuel transfer line shrouds to isolation of the horizontal stabilizer fuel tank from its dedicated refuel/defuel/transfer lines at both the center wing fuel tank and the horizontal stabilizer fuel tank interfaces by disconnecting and capping of same, de-energizing of fuel pump power circuits, among other actions required for certification as a non-functional horizontal stabilizer fuel tank.

In all of the provisioned, non-functional configurations, Boeing asserted that the fuel and fuel vapor is prevented from entering the horizontal stabilizer fuel tank, as it is isolated from any fuel supply or communication with non-horizontal stabilizer fuel tanks, nor was any fuel or fuel vapors introduced during production. Therefore, Boeing argued that airplanes in configurations with no horizontal stabilizer fuel tanks installed in production and those with provisioned, but non-functional horizontal stabilizer fuel tanks have effectively eliminated the unsafe condition addressed by AD 2022–27–07 due to the elimination of the potential for flammable fuel vapor with the horizontal stabilizer fuel tank. However, Boeing points out that these airplane configurations, by their nature, do not have associated instructions for an ''approved alteration'' to deactivate the horizontal stabilizer fuel tank, but are still subject to AD 2022–27–07, based on the applicability and definition of an ''activated'' horizontal stabilizer fuel tank.

The FAA agrees that airplanes without a horizontal stabilizer fuel tank installed in production are not affected by this AD for the reasons provided by Boeing. The applicability of this AD has been revised to specify that this AD does not apply to airplanes with horizontal stabilizer fuel tanks that cannot be fueled without further modification (*i.e.,* the tanks are sealed and disconnected from the airplane fuel system).

In addition, the definition of ''activated'' specified in paragraph (g)(3) of AD 2022–27–07 has been revised in this AD. For the purposes of this AD, a horizontal stabilizer tank is considered to be ''activated'' if it is not deactivated in production or deactivated by an approved alteration.

The FAA does not agree to specifically remove airplanes with provisioned, but non-functional horizontal stabilizer fuel tanks from the applicability of this AD. Since the horizontal stabilizer tank, unless deactivated as specified in paragraph (g)(3) of this AD, is provisioned to be activated at a future date, the FAA has determined that those airplanes should be subject to this AD. However, no action is required by this AD for those airplanes until the horizontal stabilizer tank is activated.

**Request To Clarify Publication Date of Service Information Required by AD 2022–27–07**

Delta requested that the FAA clarify the publication date of Boeing Multiple Operator Message MOM–MOM–22–0549–01B(R1). Delta pointed out that the message date is listed as both November 29, 2022 (U.S. Pacific Standard Time (PST)) and November 30, 2022 (Greenwich Mean Time (GMT)), while the message sent date is identified as November 29, 2022. Therefore, Delta suggested that the AD should either be clear that the date used is the date the message was sent or that the dates provided in the message date field of the message are in both PST and GMT.

The FAA agrees to clarify. The message was published at 1615 PST on November 29, 2022, which was 0015 GMT on November 30, 2022. The message was then sent to operators at 0017 GMT on November 30, 2022, which was 1617 PST on November 29, 2022 (not stated on the message). Boeing Multiple Operator Message MOM–MOM–22–0549–01B(R1), dated November 29, 2022, was published in the U.S. time zone using PST; therefore, that is the date the FAA AD referenced. No change to this AD has been made in this regard.

**Request To Add Specific Part Numbers in Parts Installation Limitation of AD 2022–27–07**

Delta requested that either the parts installation limitation in paragraph (k) of AD 2022–27–07 be revised to include specific part numbers for the affected parts or that it direct operators to the referenced service information for that information. Delta asserted that the lack of reference to specific affected part numbers may be interpreted to mean any and all transfer pump motor impeller inlet assemblies or transfer pump housing inlet check valves (or assembly containing either), even though the referenced service information is limited to specific Crane Aerospace Hydro-Aire pumps and transfer pump housing inlet check valves.

The FAA partially agrees and has revised the parts installation limitation specified in paragraph (k) of this AD. Paragraph (k) of this AD limits the affected parts to Crane Aerospace Hydro-Aire horizontal stabilizer fuel transfer pump housings and transfer pump motor impellers. Furthermore, as previously described, in order to remove the airplanes not affected by the unsafe condition, the FAA has revised the applicability of this AD by specifying the AD applies to airplanes equipped with Crane Aerospace Hydro-Aire horizontal stabilizer fuel transfer pump housings and transfer pump motor impellers.

**FAA's Determination**

The FAA is issuing this AD because the agency has determined the unsafe condition described previously is likely to exist or develop in other products of the same type design.

**Related Service Information Under 1 CFR Part 51**

This AD requires Boeing Multiple Operator Message MOM–MOM–22–0549–01B(R1), dated November 29,

2022, which the Director of the Federal Register approved for incorporation by reference as of January 13, 2023 (87 FR 80028, December 29, 2022). This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

**AD Requirements**

This AD requires accomplishing the actions specified in the service information already described. This AD also limits the installation of affected parts.

**Interim Action**

This AD is considered to be interim action. The inspection reports that are required by this AD will enable the manufacturer to obtain better insight into the nature, cause, and extent of the wear-through, and eventually to develop final action to address the unsafe condition. Further, the main and center wing tanks utilize the same pump design but are currently not subject to the same unsafe condition due to the shutoff logic of the transfer pumps. However, if that should change or once final action has been identified, the FAA might consider further rulemaking.

**Justification for Immediate Adoption and Determination of the Effective Date**

Section 553(b)(3)(B) of the Administrative Procedure Act (APA) (5 U.S.C. 551 *et seq.*) authorizes agencies to dispense with notice and comment procedures for rules when the agency, for ''good cause,'' finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under this section, an agency, upon finding good cause, may issue a final rule without providing notice and seeking comment prior to issuance. Further, section 553(d) of the APA authorizes agencies to make rules effective in less than thirty days, upon a finding of good cause.

An unsafe condition exists that requires the immediate adoption of this AD without providing an opportunity for public comments prior to adoption. The FAA has found that the risk to the flying public justifies forgoing notice and comment prior to adoption of this rule because the FAA has previously provided notice and comment on this unsafe condition and has dispositioned those comments herein. The FAA is redefining the applicable airplanes by revising the applicability in paragraph (c) and definition in paragraph (g)(3) of this AD. However, this change does not affect a new population of airplanes, but rather, this AD removes several airplanes from the applicability of this AD. Accordingly, notice and opportunity for prior public comment is unnecessary pursuant to 5 U.S.C. 553(b)(3)(B).

In addition, the FAA finds that good cause exists pursuant to 5 U.S.C. 553(d) for making this amendment effective in less than 30 days, for the same reasons the FAA found good cause to forgo notice and comment.

**Regulatory Flexibility Act**

The requirements of the Regulatory Flexibility Act (RFA) do not apply when an agency finds good cause pursuant to 5 U.S.C. 553 to adopt a rule without prior notice and comment. Because the FAA has determined that it has good cause to adopt this rule without notice and comment, RFA analysis is not required.

**Costs of Compliance**

The FAA estimates that this AD affects 28 airplanes of U.S. registry. The FAA estimates the following costs to comply with this AD:

ESTIMATED COSTS *

| Action | Labor cost | Parts cost | Cost per product | Cost on U.S. operators |
|---|---|---|---|---|
| Inspections of transfer pump motor impeller inlet adapter and transfer pump housing inlet check valves (left and right transfer pumps). | 12 work-hours × $85 per hour = $1,020. | $0 | $1,020 | $28,560 |
| Reporting | 1 work-hour × $85 per hour = $85. | 0 | 85 | 2,380 |

* While this AD removes certain airplanes from the applicability, the cost estimates in the previous AD did not include airplanes delivered with provisions for but inoperable horizontal stabilizer fuel tanks. Therefore, the cost estimate in this AD has not changed in that regard.

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

ON-CONDITION COSTS

| Action | Labor cost | Parts cost | Cost per product |
|---|---|---|---|
| Replace transfer pump motor impeller inlet adapter | 4 work-hours × $85 per hour = $340 | $1,000 | $1,340 |
| Replace transfer pump housing inlet check valve | 17 work-hours × $85 per hour = $1,445 | * 20,000 | 21,445 |

* Boeing has indicated that the transfer pump housing inlet check valve is not currently available as a standalone part; this cost is for the pump housing, which contains the transfer pump housing inlet check valve. Boeing has indicated that it is working with the part supplier to make the transfer pump housing inlet check valve available as a standalone part.

**Paperwork Reduction Act**

A federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a currently valid OMB Control Number. The OMB Control Number for this information collection is 2120–0056. Public reporting for this collection of information is estimated to be approximately 1 hour per response, including the time for reviewing instructions, searching existing data

sources, gathering and maintaining the data needed, completing and reviewing the collection of information. All responses to this collection of information are mandatory. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to: Information Collection Clearance Officer, Federal Aviation Administration, 10101 Hillwood Parkway, Fort Worth, TX 76177–1524.

**Authority for This Rulemaking**

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

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

**Regulatory Findings**

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

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

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

(2) Will not affect intrastate aviation in Alaska.

**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:

■ a. Removing Airworthiness Directive (AD) 2022–27–07, Amendment 39–22292 (87 FR 80028, December 29, 2022); and

■ b. Adding the following new AD:

**2023–07–09 The Boeing Company:** Amendment 39–22411; Docket No. FAA–2023–0925; Project Identifier AD–2023–00255–T.

**(a) Effective Date**

This airworthiness directive (AD) is effective May 1, 2023.

**(b) Affected ADs**

This AD replaces AD 2022–27–07, Amendment 39–22292 (87 FR 80028, December 29, 2022) (AD 2022–27–07).

**(c) Applicability**

This AD applies to The Boeing Company Model 747–400 and 747–8 series airplanes, certificated in any category, equipped with an activated horizontal stabilizer fuel tank with Crane Aerospace Hydro-Aire horizontal stabilizer fuel transfer pump housings and transfer pump motor impellers.

**(d) Subject**

Air Transport Association (ATA) of America Code 28, Fuel.

**(e) Unsafe Condition**

This AD was prompted by reports of wear-through of the transfer pump motor impeller inlet adapter of the horizontal stabilizer fuel tank transfer pump caused by contact between the transfer pump housing inlet check valve and the inlet adapter. The FAA is issuing this AD to address the development of an ignition source within the horizontal stabilizer fuel tank resulting from wear to the transfer pump housing inlet check valves and transfer pump motor impeller inlet adapters of the horizontal stabilizer fuel tank. This condition, in combination with flammable fuel vapors, could result in a fuel tank explosion and consequent loss of the airplane.

**(f) Compliance**

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

**(g) Retained Definitions, With a Revised Definition**

This paragraph restates the definitions specified in paragraphs (g)(1) and (2) of AD 2022–27–07, with a revised definition.

(1) A ''serviceable'' transfer pump motor impeller inlet adapter is an inlet adapter of the motor impeller assembly for which any missing material does not exceed 0.20 inch in the pump axial direction.

(2) A ''serviceable'' transfer pump housing inlet check valve is an inlet check valve for which the hinge pin protrudes past the flapper arm on both sides and there is no metal disk gouging, missing material, corrosion, burrs, or raised material. Minor surface scratches, defects, or appearances of surface wear are acceptable.

(3) A horizontal stabilizer tank is considered to be ''activated'' if it is not deactivated in production or deactivated by an approved alteration.

**(h) Retained Inspection and Corrective Action: Transfer Pump Housing Inlet Check Valve, With No Changes**

This paragraph restates the requirements of paragraph (h) of AD 2022–27–07, with no changes. Within 90 days after January 13, 2023 (the effective date of AD 2022–27–07): Do a detailed visual inspection of the transfer pump housing inlet check valve in the left and right transfer pump housing for hinge pin protrusion, gouging, missing material, corrosion, burrs, and raised material, in accordance with paragraph C., Work Instructions, Attachment A, Boeing Multiple Operator Message MOM–MOM–22–0549–01B(R1), dated November 29, 2022.

(1) *Condition 1:* If the hinge pin does not protrude past the flapper arm on one side, or if any gouging, missing material, corrosion, burrs, or raised material is found on the transfer pump housing inlet check valve, do the actions required by paragraphs (h)(1)(i) and (ii) of this AD.

(i) Report inspection findings in accordance with paragraph (j) of this AD.

(ii) Prior to further flight, replace the transfer pump housing inlet check valve or transfer pump housing with a serviceable transfer pump housing inlet check valve or transfer pump housing containing a serviceable transfer pump housing inlet check valve, in accordance with paragraph C., Work Instructions, Attachment A, Boeing Multiple Operator Message MOM–MOM–22–0549–01B(R1), dated November 29, 2022.

(2) *Condition 2:* If the hinge pin does protrude past the flapper arm on both sides, and no gouging, missing material, corrosion, burrs, or raised material is found, report inspection findings in accordance with paragraph (j) of this AD.

**(i) Retained Inspection and Corrective Action: Transfer Pump Motor Impeller Inlet Adapter, With No Changes**

This paragraph restates the requirements of paragraph (i) of AD 2022–27–07, with no changes. Within 90 days after January 13, 2023 (the effective date of AD 2022–27–07): Do a detailed visual inspection of the transfer pump motor impeller inlet adapter for wear (missing material), in accordance with paragraph D., Work Instructions, Attachment A, Boeing Multiple Operator Message MOM–MOM–22–0549–01B(R1), dated November 29, 2022.

(1) Condition 1: If any wear is found that is 0.20 inch or less, report inspection findings in accordance with paragraph (j) of this AD.

(2) Condition 2: If any wear is found that is greater than 0.20 inch, do the actions required by paragraphs (i)(2)(i) and (ii) of this AD.

(i) Report inspection findings in accordance with paragraph (j) of this AD.

(ii) Before further flight, replace the transfer pump motor impeller with a transfer pump motor impeller having a serviceable inlet adapter, in accordance with paragraph D., Work Instructions, Attachment A, Boeing Multiple Operator Message MOM–MOM–22–0549–01B(R1), dated November 29, 2022.

**(j) Retained Reporting Inspection Results, With No Changes**

This paragraph restates the requirements of paragraph (j) of AD 2022–27–07, with no changes. At the applicable time specified in paragraph (j)(1) or (2) of this AD, submit a report of all findings of the inspections required by paragraphs (h) and (i) of this AD, in accordance with paragraph G. and Appendix A, Attachment A, Boeing Multiple Operator Message MOM–MOM–22–0549–01B(R1), dated November 29, 2022.

(1) If the inspection was done on or after January 13, 2023 (the effective date of AD 2022–27–07): Submit the report within 30 days after the inspection.

(2) If the inspection was done before January 13, 2023 (the effective date of AD 2022–27–07): Submit the report within 30 days after January 13, 2023.

**(k) Retained Parts Installation Limitation, With Revised Affected Parts**

This paragraph restates the requirements of paragraph (k) of AD 2022–27–07, with revised affected parts. As of January 13, 2023 (the effective date of AD 2022–27–07), no person may install, on any airplane, a Crane Aerospace Hydro-Aire horizontal stabilizer fuel transfer pump housing or transfer pump motor impeller, unless the transfer pump motor impeller inlet adaptor and transfer pump housing inlet check valve have been inspected as specified in paragraph (h) or (i) of this AD, as applicable, and been determined to be a serviceable part as defined in paragraph (g)(1) or (2) of this AD.

**(l) Retained Credit for Previous Actions, With No Changes**

This paragraph restates the provisions of paragraph (l) of AD 2022–27–07, with no changes. This paragraph provides credit for actions required by paragraphs (h) and (i) of this AD, if those actions were performed before January 13, 2023 (the effective date of AD 2022–27–07) using Boeing Multiple Operator Message MOM–MOM–22–0549–01B, dated November 21, 2022.

**(m) Special Flight Permit**

Special flight permits may be issued in accordance with 14 CFR 21.197 and 21.199 to operate the airplane to a location where the actions required by this AD can be performed, provided the horizontal stabilizer fuel tank is defueled and both transfer pump circuit breakers are locked in the ''open'' position.

**(n) Alternative Methods of Compliance (AMOCs)**

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

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

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

**(o) Related Information**

(1) For more information about this AD, contact Samuel Dorsey, Aerospace Engineer, Propulsion Section, FAA, Seattle ACO Branch, 2200 South 216th St., Des Moines, WA 98198; phone: 206–231–3415; email: *Samuel.j.dorsey@faa.gov.*

(2) Service information identified in this AD that is not incorporated by reference is available at the addresses specified in paragraphs (p)(4) and (5) of this AD.

**(p) Material Incorporated by Reference**

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

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

(3) The following service information was approved for IBR on January 13, 2023 (87 FR 80028, December 29, 2022).

(i) Boeing Multiple Operator Message MOM–MOM–22–0549–01B(R1), dated November 29, 2022.

(ii) [Reserved]

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

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

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

Issued on April 8, 2023.

**Christina Underwood,**

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

[FR Doc. 2023–08027 Filed 4–12–23; 4:15 pm]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

**[Docket No. FAA–2022–1488; Project Identifier MCAI–2022–00788–R; Amendment 39–22391; AD 2023–06–05]**

**RIN 2120–AA64**

## Airworthiness Directives; Bell Textron Canada Limited Helicopters

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final rule.

**SUMMARY:** The FAA is adopting a new airworthiness directive (AD) for all Bell Textron Canada Limited Model 206A, 206A–1 (OH–58A), 206B, 206B–1, 206L, 206L–1, 206L–3, and 206L–4 helicopters. This AD was prompted by a loss of tail rotor (TR) drive due to a failure of an adhesively bonded joint between an adapter and a tube on one of the segmented TR drive shaft (TRDS) assemblies. This AD requires determining if an affected TRDS is installed; repetitively inspecting the bond line for damage; repetitively performing a proof load test of the TRDS assembly; and depending on the results of the inspections or the proof load tests, removing an affected TRDS from service and replacing it with a serviceable TRDS. This AD also prohibits installing a TRDS unless it meets certain requirements, as specified in a Transport Canada AD, which is incorporated by reference. The FAA is issuing this AD to address the unsafe condition on these products.

**DATES:** This AD is effective May 19, 2023.

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

**ADDRESSES:**

*AD Docket:* You may examine the AD docket at regulations.gov under Docket No. FAA–2022–1488; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, any comments received, and other information. The address for Docket Operations is U.S. Department of Transportation, Docket

Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

*Material Incorporated by Reference:*

• For Transport Canada material that is incorporated by reference in this final rule, contact Transport Canada, Transport Canada National Aircraft Certification, 159 Cleopatra Drive, Nepean, Ontario, K1A 0N5, CANADA; telephone 888–663–3639; email *TC.AirworthinessDirectives-Consignesdenavigabilite.TC@tc.gc.ca;* internet *tc.canada.ca/en/aviation.*

• You may view this material at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Room 6N–321, Fort Worth, TX 76177. 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–2022–1488.

*Other Related Service Information:* For Bell service information identified in this final rule, contact Bell Textron Canada Limited, 12,800 Rue de l'Avenir, Mirabel, Quebec J7J 1R4, Canada; telephone 1–450–437–2862 or 1–800–363–8023; fax 1–450–433–0272; email *productsupport@bellflight.com;* or at *bellflight.com/support/contact-support.* This service information is also available at the FAA contact information under *Material Incorporated by Reference* above.

**FOR FURTHER INFORMATION CONTACT:** Kristi Bradley, Program Manager, COS Program Management Section, Operational Safety Branch, Compliance & Airworthiness Division, FAA, 10101 Hillwood Pkwy., Fort Worth, TX 76177; telephone (817) 222–5110; email *kristin.bradley@faa.gov.*

**SUPPLEMENTARY INFORMATION:**

## Background

Transport Canada, which is the aviation authority for Canada, has issued Transport Canada AD CF–2022–33, dated June 15, 2022 (Transport Canada AD CF–2022–33), to correct an unsafe condition for Bell Textron Canada Limited Model 206A, 206A–1, 206B, 206B–1, 206L, 206L–1, 206L–3 and 206L–4 helicopters, all serial numbers.

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to Bell Textron Canada Limited Model 206A, 206A–1 (OH–58A), 206B, 206B–1, 206L, 206L–1, 206L–3, and 206L–4 helicopters, all serial numbers.

The NPRM published in the **Federal Register** on November 28, 2022 (87 FR 72899). The NPRM was prompted by a report in which a Bell Textron Canada Limited Model 206L–1 helicopter experienced loss of TR drive during a maintenance test flight, which was due to a failure of an adhesively bonded joint between an adapter and a tube on one of the segmented TRDS assemblies. The NPRM proposed to require determining if an affected TRDS is installed; repetitively inspecting the bond line for damage; repetitively performing a proof load test of the TRDS assembly; and depending on the results of the inspections or the proof load tests, removing an affected TRDS from service and replacing it with a serviceable TRDS. The NPRM also proposed to prohibit installing a TRDS unless it meets certain requirements, as specified in Transport Canada AD CF–2022–33.

## Discussion of Final Airworthiness Directive

### Comments

The FAA received comments from one individual commenter. The following presents the comments received on the NPRM and the FAA's response to each comment.

### Request To Not Incorporate the Transport Canada AD by Reference

One individual requested that the FAA not reference Transport Canada AD CF–2022–33 in the FAA AD. The commenter stated Transport Canada AD CF–2022–33 either repeats the instructions found in the alert service bulletin (ASB) or directs the reader to the ASB. Additionally, the commenter stated referencing Transport Canada ADs is a new practice and the Transport Canada ADs should only be referenced if they make a substantial addition to the ASB requirements.

The FAA disagrees with both the request to not require compliance with Transport Canada AD CF–2022–33 in the FAA AD and the request to discontinue the method of requiring compliance with some foreign ADs issued by the foreign state of design authority. In the FAA's ongoing efforts to improve the efficiency of the AD process, the FAA developed a process to use some civil aviation authority ADs as the primary source of information for compliance with requirements for corresponding FAA ADs. FAA ADs that require compliance with foreign ADs have been utilized since 2018 for some products and since 2022 for Bell Textron Canada Limited helicopters. Referring to Transport Canada AD CF–2022–33 minimizes the need for Alternative Methods of Compliance.

### Conclusion

These helicopters have been approved by the aviation authority of Canada and are approved for operation in the United States. Pursuant to the FAA's bilateral agreement with Canada, Transport Canada, its technical representative, has notified the FAA of the unsafe condition described in its AD. The FAA reviewed the relevant data, considered the comments received, and determined that air safety requires adopting this AD as proposed. Accordingly, the FAA is issuing this AD to address the unsafe condition on these helicopters. This AD is adopted as proposed in the NPRM.

### Related Service Information Under 1 CFR Part 51

Transport Canada AD CF–2022–33 requires determining if a helicopter has an affected TRDS installed. If there is an affected TRDS installed, Transport Canada AD CF–2022–33 requires performing a repetitive detailed inspection of the bond line of the inboard end of the flange and, if there is damage, replacing the affected TRDS with a serviceable TRDS. Transport Canada AD CF–2022–33 also requires performing a repetitive proof load test of the TRDS assembly and replacing any TRDS that fails the proof load test. Transport Canada AD CF–2022–33 also prohibits installing a TRDS unless certain requirements are met.

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

### Other Related Service Information

The FAA also reviewed Bell ASB 206–20–139, Revision A, dated August 21, 2020 for Model 206A, 206B, and TH–67 helicopters, and Bell ASB 206L–20–184, Revision C, dated January 14, 2021 for Model 206L, 206L–1, 206L–3, and 206L–4 helicopters. This service information specifies procedures for repetitive detailed visual inspections and proof load tests of installed bonded TRDSs, and replacement of an affected bonded TRDS that fails a visual inspection or proof load test with a serviceable segmented bonded TRDS or a riveted TRDS. This service information also specifies that replacing all the bonded TRDS assemblies with riveted TRDS assemblies is a terminating action for the repetitive visual inspections and proof load tests.

The FAA reviewed Bell Helicopter Technical Bulletin (TB) No. 206–06–186, Revision B, dated September 7, 2007, and Bell Helicopter Textron TB No. 206L–02–207, Revision A, dated

January 22, 2003, which both specify procedures for installing a riveted TRDS and rotor break disc; inspecting the aft short shaft and driveshaft assemblies; and stripping and painting the aft short shaft and driveshaft assemblies.

**Differences Between This AD, the Transport Canada AD, and the Service Information**

Where the service information referenced in Transport Canada AD CF–2022–33 specifies recording certain information in the event of a bond line failure and notifying Bell Product Support Engineering of the findings, this AD does not require recording any information or reporting any information to Bell Product Support Engineering.

**Costs of Compliance**

The FAA estimates that this AD affects 1,395 helicopters of U.S. Registry. Labor rates are estimated at $85 per work-hour. Based on these numbers, the FAA estimates the following costs to comply with this AD.

Determining if an affected TRDS is installed takes about 0.5 work-hour for an estimated cost of $43 per helicopter and $59,985 for the U.S. fleet.

Inspecting the bond line and performing a proof load test takes about 1.5 work-hours for an estimated cost of $128 per helicopter per inspection cycle.

Replacing an affected TRDS assembly takes about 12 work-hours and parts cost up to $32,708 for an estimated cost of up to $33,728 per helicopter.

**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:

**2023–06–05 Bell Textron Canada Limited:** Amendment 39–22391; Docket No. FAA–2022–1488; Project Identifier MCAI–2022–00788–R.

**(a) Effective Date**

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

**(b) Affected ADs**

None.

**(c) Applicability**

This AD applies to Bell Textron Canada Limited Model 206A, 206A–1 (OH–58A), 206B, 206B–1, 206L, 206L–1, 206L–3, and 206L–4 helicopters, all serial numbers, certificated in any category.

**(d) Subject**

Joint Aircraft Service Component (JASC) Code: 6510, Tail Rotor Drive Shaft.

**(e) Unsafe Condition**

This AD was prompted by a loss of tail rotor (TR) drive due to a failure of an adhesively bonded joint between an adapter and a tube on one of the segmented TR drive shaft (TRDS) assemblies. The FAA is issuing this AD to detect degradation of the adhesive bond of the TRDS assembly. The unsafe condition, if not addressed, could result in loss of TR drive and subsequent loss of control of the helicopter.

**(f) Compliance**

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

**(g) Requirements**

Except as specified in paragraphs (h) and (i) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, Transport Canada AD CF–2022–33, dated June 15, 2022 (Transport Canada AD CF–2022–33).

**(h) Exceptions To Transport Canada AD CF–2022–33**

(1) Where Transport Canada AD CF–2022–33 requires compliance in terms of air time, this AD requires using hours time-in-service (TIS).

(2) Where Transport Canada AD CF–2022–33 refers to its effective date, this AD requires using the effective date of this AD.

(3) Where Transport Canada AD CF–2022–33 defines ''Affected TRDS,'' for this AD replace each instance of the text ''affected TRDS,'' with ''a TRDS with a part number (P/N) that is not one of the riveted TRDS P/Ns listed in the accomplishment instructions of Bell Alert Service Bulletin (ASB) 206–20–139, Revision A, dated August 21, 2020 (ASB 206–20–139 Rev A) or Bell ASB 206L–20–184, Revision C, dated January 14, 2021 (ASB 206L–20–184 Rev C) as applicable to your model helicopter.''

(4) Where Transport Canada AD CF–2022–33 defines ''Serviceable part,'' for this AD replace each instance of the text ''serviceable part,'' with ''a riveted TRDS with a P/N that is listed in the accomplishment instructions of ASB 206–20–139 Rev A or ASB 206L–20–184 Rev C as applicable to your model helicopter; or an affected TRDS that has been inspected and proof load tested in accordance with the requirements of this AD within the past 300 hours TIS or within the last 12 months, whichever occurs first.''

(5) Where the service information referenced in Transport Canada AD CF–2022–33 specifies scrapping or discarding a part, this AD requires removing that part from service.

(6) Where the service information referenced in Transport Canada AD CF–2022–33 specifies in the event of a bond line failure, recording the torque value at which it failed, the affected shaft position, part number, serial number, and which end failed, and notifying Bell Product Support Engineering of the findings, this AD does not require recording any discrepancies or reporting any information to Bell Product Support Engineering.

**(i) No Reporting Requirement**

Although the service information referenced in Transport Canada AD CF–2022–33 specifies to submit certain information to the manufacturer, this AD does not include that requirement.

**(j) Special Flight Permit**

Special flight permits are prohibited.

**(k) Alternative Methods of Compliance (AMOCs)**

(1) The Manager, International Validation Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the International Validation Branch, send it to the attention of the person identified in paragraph (l) of this AD. Information may be emailed to: *9-AVS-AIR-730-AMOC@faa.gov.*

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

**(l) Related Information**

For more information about this AD, contact Kristi Bradley, Program Manager, COS Program Management Section, Operational Safety Branch, Compliance & Airworthiness Division, FAA, 10101 Hillwood Pkwy., Fort Worth, TX 76177; telephone (817) 222–5110; email *kristin.bradley@faa.gov.*

**(m) Material Incorporated by Reference**

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

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

(i) Transport Canada AD CF–2022–33, dated June 15, 2022.

(ii) [Reserved]

(3) For Transport Canada service information identified in this AD, contact Transport Canada, Transport Canada National Aircraft Certification, 159 Cleopatra Drive, Nepean, Ontario, K1A 0N5, CANADA; telephone 888–663–3639; email *TC.AirworthinessDirectives-Consignesdenavigabilite.TC@tc.gc.ca;* internet *tc.canada.ca/en/aviation.*

(4) You may view this service information at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Room 6N–321, Fort Worth, TX 76177. For information on the availability of this material at the FAA, call (817) 222–5110.

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

Issued on March 16, 2023.

**Christina Underwood,**

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

[FR Doc. 2023–07779 Filed 4–13–23; 8:45 am]

BILLING CODE 4910–13–P

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

**[Docket No. FAA–2022–1404; Project Identifier MCAI–2022–01044–A; Amendment 39–22410; AD 2023–07–08]**

**RIN 2120–AA64**

## Airworthiness Directives; Pilatus Aircraft Ltd. Airplanes

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final rule.

**SUMMARY:** The FAA is adopting a new airworthiness directive (AD) for certain Pilatus Aircraft Ltd. (Pilatus) Model PC–12/47E airplanes. This AD was prompted by mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI identifies the unsafe condition as corrosion of the actuator attachment lug areas underneath the anti-rotation pads of the main landing gear (MLG) and nose landing gear (NLG). This AD requires replacing certain MLG and NLG electro-mechanical actuators. The FAA is issuing this AD to address the unsafe condition on these products.

**DATES:** This AD is effective May 19, 2023.

**ADDRESSES:**

*AD Docket:* You may examine the AD docket at *regulations.gov* under Docket No.FAA–2022–1404; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, the MCAI, any comments received, and other information. The address for Docket Operations is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

**FOR FURTHER INFORMATION CONTACT:** Doug Rudolph, Aviation Safety Engineer, FAA, General Aviation & Rotorcraft Section, International Validation Branch, 901 Locust, Room 301, Kansas City, MO 64106; phone: (816) 329–4059; email: *doug.rudolph@faa.gov.*

**SUPPLEMENTARY INFORMATION:**

### Background

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to certain serial-numbered Pilatus Model PC–12/47E airplanes. The NPRM published in the **Federal Register** on November 7, 2022 (87 FR 66971). The NPRM was prompted by EASA AD 2022–0158, dated August 4, 2022 (EASA AD 2022–0158) (referred to after this as ''the MCAI''), issued by the European Union Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Union.

The MCAI was prompted by occurrences of corrosion on the MLG and NLG actuator attachment lugs, underneath the anti-rotation pads of Pilatus Model PC–12/47E airplanes. The MCAI states that investigations revealed that extending or retracting the affected landing gear results in fretting between the anti-rotation pads and the actuator attachment lugs. This decreases the effectivity of surface protection, allows corrosion to develop on the attachment lug areas underneath the anti-rotation pads, and leads to cracking and failure of the attachment lugs.

This condition, if not addressed, could result in loss of functionality of the MLG and NLG, which could result in damage to the airplane and injury to the occupants. The MCAI requires inspecting, and if required, replacing affected MLG and NLG electro-mechanical actuators with serviceable actuators and prohibits the installation of an affected actuator unless it has been reworked to become a serviceable actuator.

Since issuance of the NPRM, EASA superseded EASA AD 2022–0158 with EASA AD 2022–0245, dated December 12, 2022 (EASA AD 2022–0245). EASA AD 2022–0245 retains the requirements of EASA AD 2022–0158 and references revised service information.

In the NPRM, the FAA proposed to require replacing affected MLG and NLG actuators with serviceable actuators and prohibit the installation of an affected actuator unless it has been reworked (inspection and modification) to become a serviceable actuator. 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–2022–1404.

### Discussion of Final Airworthiness Directive

### Comments

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

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

**Request To Reference Revised Service Information**

Pilatus stated that since the NPRM was published, revised service information was issued and requested that the FAA change paragraph (f)(2)(i) in the proposed AD to reference Pilatus PC–12 Service Bulletin 32–030, Rev. 2, dated October 7, 2022; and Tamagawa Seiki Co., Ltd., Service Bulletin SB21–0001, Issue 3, dated August 25, 2022, instead of Pilatus PC–12 Service Bulletin 32–030, dated June 27, 2022; and Tamagawa Seiki Co., Ltd., Service Bulletin SB21–0001, dated March 31, 2022. The commenter also noted that after the NPRM was published, EASA released Proposed Airworthiness Directive (PAD) 22–149, dated November 9, 2022, which indicated that EASA AD 2022–0158 would be superseded.

The FAA agrees with the commenter's request. The FAA reviewed Pilatus PC–12 Service Bulletin 32–030, Rev. 2, dated October 7, 2022, which references Tamagawa Seiki Co., Ltd., SB SB21–0001, Issue 3, dated August 25, 2022, and determined that no additional work is specified. The FAA revised paragraph (f)(2)(i) of this AD to reference this revised service information. The FAA added paragraph (i) to this AD (and redesignated the subsequent paragraphs of this AD accordingly) to provide credit for actions done before the effective date of this AD using Pilatus PC–12 Service Bulletin 32–030, dated June 27, 2022; and Tamagawa Seiki Co., Ltd., Service Bulletin SB21–0001, dated March 31, 2022.

As discussed in the Background section of this final rule, EASA superseded EASA AD 2022–0158 with EASA AD 2022–0245. The FAA did not update the reference to the MCAI in this AD to refer to EASA AD 2022–0245 because in the NPRM, the FAA already proposed to require the actions in EASA AD 2022–0245. The FAA discussed this in the ''Differences Between this Proposed AD and the MCAI'' section of the NPRM.

**Request To Extend the Compliance for Certain Airplanes**

Pilatus requested that the FAA revise the 3-month compliance time in paragraph (h)(1) of the proposed AD and explained this compliance time should only be applicable to older airplanes on which the affected actuators were installed and the initial failures were identified.

The FAA agrees. The FAA is keeping the compliance time for replacement of each affected part for the older airplanes with serial numbers (S/Ns) 1300 and 1451 to 1663 inclusive, which is within 3 months after the effective date of the AD. The FAA is extending the compliance time for replacement of each affected part from what was called out in the NPRM for the rest of airplanes as follows:

- For airplanes with S/Ns 1664 through 1719 inclusive, and S/Ns 1721 through 1942 inclusive, within 300 hours time-in-service (TIS) after the effective date of this AD or within 12 months after the effective date of this AD, whichever occurs first.
- For airplanes with S/Ns 1720, 2001 through 2202 inclusive, 2204, and 2206, within 600 hours TIS after the effective date of this AD or within 12 months after the effective date of this AD, whichever occurs first.

**Conclusion**

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

**Differences Between This AD and the MCAI**

The MCAI bases the compliance time for the replacement of affected MLG and NLG electro-mechanical actuators on the corrosion environment of the airplane. FAA regulations do not require operators to track operations in different environmental conditions and thus there is no way to determine whether an airplane is in the category of moderate to severe or mild corrosion environment.

**Costs of Compliance**

The FAA estimates that this AD affects 440 airplanes of U.S. registry.

The FAA estimates that the costs of one of the two actions below will be required to comply with this AD:

ESTIMATED COSTS

| Action | Labor cost | Parts cost | Cost per product | Cost on U.S. operators |
|---|---|---|---|---|
| * Rework (inspection and modification). | 5 work-hours × $85 per hour = $425. | Up to $1,245 | $1,670 (for rework of all three actuators). | $734,800 |
| * Replacement | 3 work-hours × $85 per hour = $255. | $4,750 (Actuator Part Number (P/N) 959.56.01.852, nose landing gear) and $11,100 (for 2 actuators—Actuator P/N 659.56.01.853, main landing gear). | $16,105 (for replacement of all three actuators). | 7,086,200 |

* Only the rework (inspection and modification) or the replacement will be required by this AD. Both actions will not be required.

**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:

**2023–07–08 Pilatus Aircraft Ltd.:** Amendment 39–22410; Docket No. FAA–2022–1404; Project Identifier MCAI–2022–01044–A.

**(a) Effective Date**

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

**(b) Affected ADs**

None.

**(c) Applicability**

This AD applies to Pilatus Aircraft Ltd. Model PC–12/47E airplanes, serial number (S/N) 1300 and S/Ns 1451 and higher, certificated in any category.

**(d) Subject**

Joint Aircraft System Component (JASC) Code 3211, Main Landing Gear Attach Section; and JASC Code 3221, Nose/Tail Landing Gear Attach Section.

**(e) Unsafe Condition**

This AD was prompted by mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI identifies the unsafe condition as corrosion leading to cracks on the actuator attachment lug areas underneath the anti-rotation pads of the main landing gear (MLG) and nose landing gear (NLG). The FAA is issuing this AD to address this condition. The unsafe condition, if not addressed, could result in loss of functionality of the MLG and NLG, which could result in damage to the airplane and injury to the occupants.

**(f) Definitions**

For the purposes of this AD, the following definitions apply:

(1) Affected parts are defined as MLG electro-mechanical actuators having part number (P/N) 959.56.01.823 or P/N 959.56.01.845 and NLG electro-mechanical actuators having P/N 959.56.01.824 or P/N 959.56.01.844.

(2) Serviceable parts are defined as one of the following:

(i) MLG electro-mechanical actuators having P/N 959.56.01.823 or P/N 959.56.01.845 and NLG electro-mechanical actuators having P/N 959.56.01.824 or P/N 959.56.01.844 that have been reworked (inspection and modification) in accordance with the instructions in Pilatus PC–12 Service Bulletin 32–030, Rev. 2, dated October 7, 2022; and Tamagawa Seiki Co., Ltd., Service Bulletin SB21–0001, Issue 3, dated August 25, 2022; or

(ii) MLG electro-mechanical actuators having P/N 959.56.01.853 and NLG electro-mechanical actuators having P/N 959.56.01.852.

**(g) Compliance**

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

**(h) Required Actions**

(1) Replace each affected part as defined in paragraph (f)(1) of this AD with a serviceable part as defined in either paragraph (f)(2)(i) or (ii) of this AD, as follows:

(i) For airplanes with S/Ns 1300 and 1451 through 1663 inclusive, within 3 months after the effective date of the AD.

(ii) For airplanes with S/Ns 1664 through 1719 inclusive, and S/Ns 1721 through 1942 inclusive, within 300 hours time-in-service (TIS) after the effective date of this AD or within 12 months after the effective date of this AD, whichever occurs first.

(iii) For airplanes with S/Ns 1720, 2001 through 2202 inclusive, 2204, and 2206, within 600 hours TIS after the effective date of this AD or within 12 months after the effective date of this AD, whichever occurs first.

(2) As of the effective date of this AD, do not install an affected part as defined in paragraph (f)(1) of this AD on any airplane unless it has been reworked (inspection and modification) and made a serviceable part as defined in paragraph (f)(2)(i) of this AD.

**(i) Credit for Previous Actions**

This paragraph provides credit for the actions required by paragraph (h)(1) of this AD if those actions were done before the effective date of this AD using Pilatus PC–12 Service Bulletin 32–030, dated June 27, 2022; and Tamagawa Seiki Co., Ltd., Service Bulletin SB21–0001, dated March 31, 2022.

**(j) Alternative Methods of Compliance (AMOCs)**

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

**(k) Additional Information**

(1) Refer to European Union Aviation Safety Agency (EASA) AD 2022–0158, dated August 4, 2022, for related information. This EASA AD may be found in the AD docket at *regulations.gov* under Docket No. FAA–2022–1404.

(2) For more information about this AD, contact Doug Rudolph, Aviation Safety Engineer, FAA, General Aviation & Rotorcraft Section, International Validation Branch, 901 Locust, Room 301, Kansas City, MO 64106; phone: (816) 329–4059; email: *doug.rudolph@faa.gov.*

(3) For Pilatus and Tamagawa Seiki Co., Ltd. service information that is not incorporated by reference in this AD, contact Pilatus Aircraft Limited, Customer Support General Aviation, CH–6371 Stans, Switzerland; phone: +41 848 24 7 365; email: *techsupport.ch@pilatus-aircraft.com;* website: *pilatus-aircraft.com.* You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 901 Locust, Kansas City, MO 64106. For information on the availability of this material at the FAA, call (817) 222–5110.

**(l) Material Incorporated by Reference**

None.

Issued on April 8, 2023.

**Christina Underwood,**

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

[FR Doc. 2023–07773 Filed 4–13–23; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 71

**[Docket No. FAA–2022–0546; Airspace Docket No. 22–ASW–10]**

**RIN 2120–AA66**

## Amendment of Class D and Class E Airspace; Rogers, Springdale, and Bentonville, AR

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final rule.

**SUMMARY:** This action amends Class D airspace and Class E surface airspace for the following Arkansas airports: Rogers Executive Airport-Carter Field (new name), Springdale Municipal Airport, and Bentonville Municipal Airport/Louise M Thaden Field (new name), as well as updating the airport's names and geographic coordinates.

**DATES:** Effective 0901 UTC, June 15, 2023. The Director of the Federal Register approves this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order JO 7400.11 and publication of conforming amendments.

**ADDRESSES:** A copy of the 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 helps, and guidelines are available on the website. It is available 24 hours each day, 365 days each year.

FAA Order JO 7400.11G, Airspace Designations and 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 amends airspace in Rogers, Springdale, and Bentonville, AR, to support IFR operations in the area.

**History**

The FAA published a notice of proposed rulemaking for Docket No. FAA–2022–0546 in the **Federal Register** (87 FR 68116, November 14, 2022), to amend Class D airspace for Rogers Executive Airport-Carter Field (formerly Rogers Municipal/Carter Field), and Springdale Municipal Airport by updating each airport's geographic coordinates to coincide with the FAA's database. Also, Class E surface airspace for the above airports and Bentonville Municipal Airport/Louise M Thaden Field (formerly Bentonville Municipal/Louise M. Thaden Field) was proposed to be amended, and the airport's names and the dividing line of the Class D airspace between Rogers Executive Airport-Carter Field with the Class E surface airspace of Bentonville Municipal Airport/Louise M Thaden Field required updating.

Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received support.

Class D and Class E airspace designations are published in Paragraphs 5000 and 6002, respectively, of FAA Order JO 7400.11G, dated August 19, 2022, and effective September 15, 2022, which is incorporated by reference in 14 CFR 71.1. The Class D and Class E airspace designations listed in this document will subsequently be published in FAA Order JO 7400.11.

**Incorporation by Reference**

Class D and Class E airspace designations are published in Paragraphs 5000, 6002, and 6005 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 7400.11G, dated August 19, 2022, and effective September 15, 2022. These updates will subsequently be published in the next update to FAA Order JO 7400.11. FAA Order JO 7400.11G is publicly available as listed in the **ADDRESSES** section of this document. These amendments will be published in the next update to FAA Order JO 7400.11.

FAA Order JO 7400.11G lists Class A, B, C, D, and E airspace areas, air traffic routes, and reporting points.

**The Rule**

This action amends 14 CFR part 71 by amending Class D airspace for Rogers Executive Airport-Carter Field (formerly Rogers Municipal/Carter Field), and Springdale Municipal Airport by updating each airport's geographic coordinates to coincide with the FAA's database. Also, Class E surface airspace is amended for the above airports and Bentonville Municipal Airport/Louise M Thaden Field (formerly Bentonville Municipal/Louise M. Thadden Field). This action also updates the airport's names and the dividing line of the Class D airspace between Rogers Executive Airport-Carter Field with the Class E surface airspace of Bentonville Municipal Airport/Louise M Thaden Field. In addition, this action replaces the outdated terms Airport/Facility Directory with the term Chart Supplement and Notice to Airmen with the term Notice to Air Missions in the airspace descriptions.

**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 Department of Transportation (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,'' paragraphs 5–6.5a. This airspace action is not expected to cause any potentially significant environmental impacts, and no extraordinary circumstances exist that 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 14 CFR part 71 continues to read as follows:

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

**§ 71.1 [Amended]**

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order JO 7400.11G, Airspace Designations and Reporting

Points, dated August 19, 2022, and effective September 15, 2022, is amended as follows:

*Paragraph 5000 Class D Airspace.*

* * * * *

**ASW AR D Rogers, AR [Amended]**

Rogers Executive Airport-Carter Field, AR
(Lat. 36°22′21″ N, long. 94°06′25″ W)
Razorback VOR
(Lat. 36°14′47″ N, long. 94°07′17″ W)

That airspace extending upward from the surface up to but not including 3,900 feet MSL within a 4-mile radius of Rogers Executive Airport-Carter Field and within 2.2 miles each side of the 005° radial of the Razorback VOR extending from the 4-mile radius to 6.0 miles south of the airport excluding that airspace west of a line (lat. 36°24′09″ N, long. 94°10′51″ W and lat. 36°18′53″ N, long. 94°08′55″ W), and excluding the Class C airspace associated with the Northwest Arkansas Regional airport. This Class D airspace area is effective during the specific dates and times established in advance by a Notice to Air Missions. The effective date and time will thereafter be continuously published in the Chart Supplement.

**ASW AR D Springdale, AR [Amended]**

Springdale Municipal Airport, AR
(Lat. 36°10′35″ N, long. 94°07′09″ W)
Razorback VOR
(Lat. 36°14′47″ N, long. 94°07′17″ W)

That airspace extending upward from the surface to and including 3,900 feet MSL within a 4.1-mile radius of Springdale Municipal Airport and within 1.3 miles each side of the 358° and 178° radials of the Razorback VORTAC extending from the 4.1-mile radius to 4.6 miles north of the airport. This Class D airspace area is effective during the specific dates and times established in advance by a Notice to Air Missions. The effective date and time will thereafter be continuously published in the Chart Supplement.

*Paragraph 6002 Class E Surface Airspace.*

* * * * *

**ASW AR E2 Rogers, AR [Amended]**

Rogers Executive Airport—Carter Field, AR
(Lat. 36°22′21″ N, long. 94°06′25″ W)
Razorback VOR
(Lat. 36°14′47″ N, long. 94°07′17″ W)

That airspace extending upwards from the surface within a 4-mile radius of Rogers Executive Airport—Carter Field and within 2.2 miles on each side of the 005° radial of the Razorback VOR extending from the 4-mile radius to 6.0 miles south of the airport, excluding that airspace west of a line (lat. 36°24′09″ N, long. 94°10′51″ W and lat. 36°18′53″ N, long. 94°08′55″ W). This Class E airspace area is effective during the specific dates and times established in advance by a Notice to Air Missions. The effective date and time will thereafter be continuously published in the Chart Supplement.

**ASW AR E2 Springdale, AR [Amended]**

Springdale Municipal Airport, AR
(Lat. 36°10′35″ N, long. 94°07′09″ W)
Razorback VORTAC
(Lat. 36°14′47″ N, long. 94°07′17″ W)

That airspace extending upwards from the surface within a 4.1-mile radius of Springdale Municipal Airport and within 1.3 miles on each side of the 358° and 178° radials of the Razorback VORTAC extending from the 4.1-mile radius to 4.6 miles north of the airport. This Class E airspace area is effective during the specific dates and times established in advance by a Notice to Air Missions. The effective date and time will thereafter be continuously published in the Chart Supplement.

**ASW AR E2 Bentonville, AR [Amended]**

Bentonville Municipal Airport/Louise M. Thaden Field, AR
(Lat. 36°20′43″ N, long. 94°13′10″ W)
Razorback VOR
(Lat. 36°14′47″ N, long. 94°07′17″ W)

That airspace extending upwards from the surface within a 3.9-mile radius of Bentonville Municipal Airport/Louise M. Thaden Field and within 2.2 miles each side of the 322° radial of the Razorback VOR extending from the 3.9-mile radius to 6 miles southeast of the airport excluding that airspace east of a line (lat. 36°24′09″ N, long. 94°10′51″ W and lat. 36°18′53″ N, long. 94°08′55″ W). This Class E airspace area is effective during the specific dates and times established in advance by a Notice to Air Missions. The effective date and time will thereafter be continuously published in the Chart Supplement.

Issued in College Park, Georgia, on April 10, 2023.

**Andreese C. Davis,**

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

[FR Doc. 2023–07831 Filed 4–13–23; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### 14 CFR Part 71

**[Docket No. FAA–2022–1117; Airspace Docket No. 20–AGL–31]**

**RIN 2120–AA66**

## Establishment of Class E Airspace; Delphi, IN

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final rule; correction.

**SUMMARY:** This action corrects a typographic error in the final rule published in the **Federal Register** on April 4, 2023, establishing Class E airspace at Delphi, IN.

**DATES:** Effective date 0901 UTC, June 15, 2023. The Director of the Federal Register approves this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order JO 7400.11 and publication of conforming amendments.

**FOR FURTHER INFORMATION CONTACT:** Jeffrey Claypool, Federal Aviation Administration, Operations Support Group, Central Service Center, 10101 Hillwood Parkway, Fort Worth, TX 76177; telephone (817) 222–5711.

**SUPPLEMENTARY INFORMATION:**

### History

The FAA published a final rule in the **Federal Register** (88 FR 19823; April 4, 2023), establishing Class E airspace at Delphi, IN. Subsequent to publication, the FAA identified that the final rule was published with the incorrect Airspace Docket number. This action corrects this error by replacing the incorrect docket number, 22–AGL–31, with the correct one, 20–AGL–31.

### Correction to Final Rule

Accordingly, pursuant to the authority delegated to me, Establishment of Class E Airspace: Delphi, IN, published in the **Federal Register** on April 4, 2023 (88 FR 19823), is corrected as follows:

**§ 71.1 [Amended]**

On page 19823, column 2, line 50, amend to read, ''Docket No. 20–AGL–31]''.

Issued in Fort Worth, Texas, on April 10, 2023.

**Martin A. Skinner,**

*Acting Manager, Operations Support Group, ATO Central Service Center.*

[FR Doc. 2023–07836 Filed 4–13–23; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

### 21 CFR Part 131

**[Docket No. FDA–2000–P–0126 (Formerly Docket No. 2000P–0658)]**

## International Dairy Foods Association: Response to the Objections and Requests for a Public Hearing on the Final Rule To Revoke the Standards for Lowfat Yogurt and Nonfat Yogurt and Amend the Standard for Yogurt

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Final order; response to objections and denial of public hearing requests; removal of administrative stay; final amendment.

**SUMMARY:** The Food and Drug Administration (FDA or we) published

a final rule entitled ''Milk and Cream Products and Yogurt Products; Final Rule To Revoke the Standards for Lowfat Yogurt and Nonfat Yogurt and To Amend the Standard for Yogurt,'' on June 11, 2021 (the 2021 final rule). The International Dairy Foods Association (IDFA) objected to the final rule's provision that yogurt have either a titratable acidity of not less than 0.7 percent, expressed as lactic acid, or a pH of 4.6 or lower before the addition of bulky flavoring ingredients. We are denying IDFA's request for a public hearing with respect to this objection and are issuing a final order to modify the final rule's provision with respect to both pH and titratable acidity.

**DATES:** This order is effective April 14, 2023. The administrative stay is lifted April 14, 2023. The compliance date is May 15, 2023.

**ADDRESSES:** You may submit objections and requests for a hearing on new provisions added by this response to objections as follows. Please note that late, untimely filed objections 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 May 15, 2023. Objections 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 objections in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Objections submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your objection will be made public, you are solely responsible for ensuring that your objection 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 objection, that information will be posted on *https://www.regulations.gov.*
- If you want to submit an objection with confidential information that you do not wish to be made available to the public, submit the objection 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 objections submitted to the Dockets Management Staff, FDA will post your objection, 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–2000–P–0126 for ''International Dairy Foods Association: Response to the Objections and Denial of the Requests for a Public Hearing on the Final Rule To Revoke the Standards for Lowfat Yogurt and Nonfat Yogurt and To Amend the Standard for Yogurt.'' Received objections, 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 an objection with confidential information that you do not wish to be made publicly available, submit your objections only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' We will review this copy, including the claimed confidential information, in our consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

*Docket:* For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

**FOR FURTHER INFORMATION CONTACT:** Andrea Krause, Center for Food Safety and Applied Nutrition (HFS–820), Food and Drug Administration, 5001 Campus Dr., College Park, MD 20740, 240–402–2371, or Holli Kubicki, Center for Food Safety and Applied Nutrition, Office of Regulations and Policy (HFS–024), Food and Drug Administration, 5001 Campus Dr., College Park, MD 20740, 240–402–2378.

**SUPPLEMENTARY INFORMATION:**

## I. Background

Section 401 of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 341) directs the Secretary of Health and Human Services (Secretary) to issue regulations fixing and establishing for any food a reasonable definition and standard of identity whenever, in the judgment of the Secretary, such action will promote honesty and fair dealing in the interest of consumers. Under section 701(e)(1) of the FD&C Act (21 U.S.C. 371(e)(1)), any action for the amendment or repeal of any definition and standard of identity under section 401 of the FD&C Act for any dairy product (*e.g.,* yogurt) must begin with a proposal made either by FDA under our own initiative or by petition of any interested persons.

In the **Federal Register** of June 11, 2021 (86 FR 31117), we issued a final rule (the 2021 final rule) amending the definition and standard of identity for yogurt ((§ 131.200) (21 CFR 131.200)) and revoking the definitions and standards of identity for lowfat yogurt (21 CFR 131.203) and nonfat yogurt (21 CFR 131.206). This action was in response, in part, to a citizen petition submitted by the National Yogurt Association. The final rule modernized the yogurt standard to allow for technological advances while promoting honesty and fair dealing in the interest of consumers.

The preamble to the final rule stated that the effective date of the final rule would be July 12, 2021, except as to any provisions that may be stayed by the filing of proper objections (86 FR 31117 at 31136). Pursuant to section 701(e) of

the FD&C Act, the final rule notified persons who would be adversely affected by the final rule that they could file objections, specifying with particularity the provisions of the final rule deemed objectionable, stating the grounds therefor, and requesting a public hearing upon such objections. We gave interested persons until July 12, 2021, to file objections and request a hearing on the final rule.

The IDFA timely filed objections and requested a hearing with respect to several provisions in the final rule (see Objections and Request for Hearings submitted by Michael Dykes, DVM (IDFA objection), President and Chief Executive Officer, IDFA, dated July 12, 2021, to the Dockets Management Staff, Food and Drug Administration (Comment ID FDA–2000–P–0126–0109). Section 701(e)(2) of the FD&C Act provides that, until final action is taken by the Secretary, the filing of objections operates to stay the effectiveness of those provisions to which the objections are made.

In the **Federal Register** of March 23, 2022 (87 FR 16394) we issued a final rule providing clarification on which provisions of the 2021 final rule were stayed and which requirements of the previous final rule that we issued in 1981 (46 FR 9924) (1981 final rule) are in effect pending final action under section 701(e) of the FD&C Act. In the **Federal Register** of December 15, 2022 (87 FR 76559), we published a final rule (2022 final rule) denying IDFA's requests for a hearing with respect to all but one of their objections. The 2022 final rule provided modifications to certain provisions in the final rule and announced that the stay of effectiveness of provisions for which hearings were denied was lifted. We did not address IDFA's objection and request for a hearing on the provision in § 131.200(a) that yogurt have either a titratable acidity of not less than 0.7 percent, expressed as lactic acid, or a pH of 4.6 or lower before the addition of bulky flavoring ingredients (hereinafter referred to as ''the acidity requirement''). We addressed this objection and request for a hearing in a proposed order, which we sent to IDFA under § 12.24(d) (21 CFR 12.24(d)) and posted to the docket for public review (Document ID FDA–2000–P–0126–0129). FDA regulations provide that after the Commissioner serves a proposed order denying a hearing, a person has 30 days after receipt of the proposed order to demonstrate that the submission justifies a hearing (§ 12.24(d)). FDA did not receive any response to the proposed order, and we are now issuing a final order denying IDFA's request for a hearing on the acidity requirement and amending the 2021 final rule with respect to this requirement.

## II. Objection and Request for a Hearing on the Acidity Requirement

The acidity requirement in § 131.200(a) of the 2021 final rule is comprised of two options: yogurt must either have a minimum titratable acidity of 0.7 percent or a maximum pH of 4.6 before bulky flavoring ingredients are added. IDFA objected to both of these options, asserting that they are not practical and do not reflect consumer taste preferences or current industry practice for yogurt manufacturing. IDFA stated that the requirement will not promote honesty and fair dealing in the interest of consumers. IDFA asserted that the requirement should be a titratable acidity of not less than 0.6 percent, expressed as lactic acid, measured in the white mass of the yogurt, or a pH of 4.6 or lower measured in the finished product within 24 hours after filling. IDFA requested a hearing on the following issues: (1) whether a requirement that titratable acidity or pH be reached prior to the addition of bulky flavors in the manufacturing process is consistent with the basic nature and essential characteristics of yogurt; (2) whether a requirement that prohibits yogurt from being filled at a pH of 4.8 or less and reaching a pH of 4.6 or below within 24 hours after filling is consistent with the basic nature and essential characteristics of yogurt; and (3) whether a minimum titratable acidity requirement of 0.7 percent is in the interest of consumers and necessary to maintaining the basic nature and essential characteristics of yogurt.

We are denying IDFA's request for a hearing with respect to both the titratable acidity minimum and pH maximum under § 12.24(b)(1). We are modifying the 2021 final rule with respect to the pH maximum in accordance with IDFA's request, and we are modifying the 2021 final rule to eliminate the option of complying with a minimum titratable acidity.

### *A. Denial of Request for a Hearing on Maximum pH Option*

With respect to the maximum pH option, IDFA objected to requiring the pH to be reached prior to the addition of bulky flavoring ingredients and requiring the pH of 4.6 in the white mass of the yogurt prior to filling. IDFA explained that modifications made to the Grade ''A'' Pasteurized Milk Ordinance (PMO) in 2007 exempted yogurt from certain cooling requirements based on an initial pH of 4.8 or below at filling and with the product reaching a pH of 4.6 or below within 24 hours of filling. (The PMO is a model regulation intended to help States and municipalities initiate and maintain effective programs for the prevention of milk-borne disease. State and local milk control agencies can adopt the PMO.) IDFA stated that bulky flavoring ingredients such as fruits and fruit preparations are added before achieving the target pH (pH 4.6) and prior to filling. Before accepting this change in the PMO, FDA and the National Conference on Interstate Milk Shipments reviewed pathogen challenge study data regarding this manufacturing practice and concluded that exempting yogurt from the cooling requirements of the PMO is safe when this specific practice is followed. In its objection, IDFA also asserted that such products (manufactured with an initial pH of 4.8 or below at filling and with the product reaching a pH of 4.6 or below within 24 hours of filling) have been on the market for many years and accepted by consumers without deviating from the basic nature and essential characteristics of yogurt and maintaining honesty and fair dealing in the interest of consumer.

We agree that the key safety control measure for finished yogurt is pH and, secondarily, temperature control (*i.e.,* refrigeration). Also, the pH process described in the PMO for yogurt contains other factors that contribute to preventing growth of different kinds of microorganisms. For example, the relatively rapid pH drop during fermentation (and the final pH achieved) is the primary control measure for pathogenic sporeformers in yogurt. Microbiological safety by acids relies on the pH value of the food, and pH is a parameter that is easily measurable. The pH values that inhibit growth of microbial pathogens are generally well-known by food safety professionals and easily found in the scientific literature.

Based on all available information, including the information presented in the objections from IDFA, FDA is amending the yogurt standard regarding the acidity requirement in § 131.200(a). We are revising § 131.200(a) as requested by IDFA, and consistent with the PMO, to require a pH of 4.6 or lower measured on the finished product within 24 hours after filling. The finished product refers to the yogurt white mass after the addition of bulky flavors. If a bulky flavor (*e.g.,* fruit pieces) added to yogurt increases the pH, the pH must be 4.6 or lower after the product has had time to equilibrate. This requirement will ensure the safety

of yogurt, while maintaining its basic nature and essential characteristics.

This amendment is consistent with IDFA's proposed modification to the maximum pH option. Therefore, we are denying IDFA's request for a hearing with respect to the maximum pH option under § 12.24(b)(1) because there is not a genuine and substantial issue of fact for resolution at a hearing.

*B. Denial of Request for a Hearing on the Minimum Titratable Acidity Option*

IDFA objected to the minimum titratable acidity of 0.7 percent and requested that we modify the 2021 final rule to provide for a minimum titratable acidity of 0.6 percent. IDFA explained that a minimum titratable acidity of 0.6 percent is necessary to produce certain low calorie yogurt products that meet consumer expectations of a delicate and less tart yogurt taste that is not too acidic or sour. IDFA stated that if a titratable acidity requirement of 0.7 percent is imposed, some manufacturers may need to adjust formulations and add sugars to counteract the acidity and deliver a product that meets consumer expectations and preferences. IDFA emphasized that a minimum titratable acidity of 0.6 percent would provide manufacturers with needed flexibility.

Because we are modifying the maximum pH option consistent with the pH specifications in the PMO, which States have adopted, manufacturers are already required to comply with the maximum pH option. Therefore, the minimum titratable acidity option in the 2021 final rule, whether set at 0.7 percent or 0.6 percent, is superfluous and would not provide flexibility to manufacturers. So long as manufacturers comply with the maximum pH option, they may manufacture yogurt with a titratable acidity of 0.6 percent and can accommodate consumer expectations and preferences without reformulating their products. We note that the maximum pH option we are finalizing has been in effect in States for several years and, by itself, appears sufficient to ensure the safety of yogurt products. With the elimination of the titratable acidity option, we are also removing § 131.200(e)(1)(iii) *Methods of analysis, Titratable acidity* and the corresponding method incorporated by reference in § 131.200(i)(1)(i).

We are denying IDFA's request for a hearing on whether a minimum titratable acidity requirement of 0.7 percent is in the interest of consumers and necessary to maintaining the basic nature and essential characteristics of yogurt. Given our modification to the maximum pH option, a minimum titratable acidity option is unnecessary, and we do not believe there is a genuine and substantial issue of fact for resolution at a hearing (§ 12.24(b)(1)).

## III. Conclusions

For the reasons explained above, we are denying IDFA's request for a hearing with respect to both the maximum pH option and the minimum titratable acidity option under § 12.24(b)(1). We are modifying the acidity requirement in § 131.200(a) in the 2021 final rule to eliminate the minimum titratable acidity option and require that yogurt have a pH of 4.6 or lower measured on the finished product within 24 hours after filling.

This final order is being issued after following the process provided under § 12.24(d). Objections to or requests for hearing on the modification and revocation may be submitted under 21 CFR 12.20 through 12.22 in accordance with 21 CFR 12.26. The stay of effectiveness with respect to the acidity requirement is lifted upon publication of this final order in the **Federal Register**.

## IV. Reference

The following reference is on display at the Dockets Management Staff (see **ADDRESSES**) and is available for viewing by interested persons between 9 a.m. and 4 p.m., Monday through Friday; it is also available electronically at *https://www.regulations.gov.* FDA has verified the website addresses, as of the date this document publishes in the **Federal Register**, but websites are subject to change over time.

1. U.S. Department of Health and Human Services, Public Health Service, Food and Drug Administration. Grade ''A'' Pasteurized Milk Ordinance. 2019. Available at: *https://ncims.org/wp-content/uploads/2020/07/2019-PMO.pdf* (last accessed February 6, 2023).

## List of Subjects in 21 CFR Part 131

Cream, Food grades and standards, Milk, Yogurt.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, 21 CFR part 131 is amended as follows:

## PART 131—MILK AND CREAM

■ 1. The authority citation for part 131 continues to read as follows:

**Authority:** 21 U.S.C. 321, 341, 343, 348, 371, 379e.

■ 2. In § 131.200:

■ a. Revise the fourth sentence of paragraph (a);

■ b. Remove paragraphs (e)(1)(iii) and (i)(1)(i); and

■ c. Redesignate paragraphs (i)(1)(ii) and (iii) as paragraphs (i)(1)(i) and (ii).

The revision reads as follows:

**§ 131.200 Yogurt.**

(a) * * * Yogurt contains not less than 3.25 percent milkfat, except as provided for in paragraph (g) of this section, and not less than 8.25 percent milk solids not fat and has a pH of 4.6 or lower measured on the finished product within 24 hours after filling. * * *

* * * * *

Dated: April 6, 2023.

**Robert M. Califf,**

*Commissioner of Food and Drugs.*

[FR Doc. 2023–07723 Filed 4–13–23; 8:45 am]

**BILLING CODE 4164–01–P**

## DEPARTMENT OF THE INTERIOR

## Bureau of Ocean Energy Management

## 30 CFR Part 553

**[Docket ID: BOEM–2023–0002]**

**RIN 1010–AE18**

## Oil Spill Financial Responsibility Adjustment of the Limit of Liability for Offshore Facilities

**AGENCY:** Bureau of Ocean Energy Management, Interior.

**ACTION:** Final rule.

**SUMMARY:** The Bureau of Ocean Energy Management issues this final rule to adjust the offshore facility limit of liability for damages under the Oil Pollution Act of 1990 (OPA) to reflect the increase in the Consumer Price Index (CPI) since 2016. This rule increases the OPA offshore facility limit of liability for damages from $137,659,500 to $167,806,900. In addition to damages, responsible parties continue to be liable for all removal costs associated with any oil spill or discharge.

**DATES:** This rule is effective on May 15, 2023.

**FOR FURTHER INFORMATION CONTACT:** Questions regarding the inflation adjustment methodology or amount should be directed to Martin Heinze, Economics Division, BOEM, at *martin.heinze@boem.gov* or at 703–787–1010. Questions regarding the timing of this adjustment or the applicability of the regulations should be directed to Anna Atkinson, Office of Regulations, BOEM, at *anna.atkinson@boem.gov* or at (703) 787–1025.

**SUPPLEMENTARY INFORMATION:**

I. Background and Purpose
II. Calculation of the 2022 Adjustment
III. Effective Date
IV. Statutory and Executive Order Reviews
A. Statutes
1. National Environmental Policy Act
2. Regulatory Flexibility Act
3. Paperwork Reduction Act
4. Unfunded Mandates Reform Act
5. Small Business Regulatory Enforcement Fairness Act
6. Congressional Review Act
B. Executive Orders (E.O.).
1. Governmental Actions and Interference With Constitutionally Protected Property Rights (E.O. 12630)
2. Regulatory Planning and Review (E.O. 12866); Improving Regulation and Regulatory Review (E.O. 13563)
3. Civil Justice Reform (E.O. 12988)
4. Federalism (E.O. 13132)
5. Consultation and Coordination With Indian Tribal Governments (E.O. 13175)
6. Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use (E.O. 13211)

## I. Background and Purpose

The OPA established a comprehensive regime for addressing the consequences of oil spills, ranging from spill response to compensation for damages to injured parties. Under title I of the OPA, the responsible parties are liable for the removal costs and damages that result from the discharge or substantial threat of discharge of oil into navigable waters, shorelines, or the exclusive economic zone by any vessel or onshore or offshore facility. See 33 U.S.C. 2702(a) and (b). Under 33 U.S.C. 2704(a), however, the total liability of each responsible party is limited, subject to certain exceptions specified in 33 U.S.C. 2704(c). In 1990, the total liability of responsible parties for an offshore facility incident was limited to ''the total of all removal costs plus $75,000,000.'' 33 U.S.C. 2704(a)(3).

To prevent the real value of the OPA liability limits from declining over time due to inflation and shifting the financial risk to the Oil Spill Liability Trust Fund (OSLTF), the President must adjust the limits ''not less than every three years,'' by regulation, to reflect significant CPI increases. 33 U.S.C. 2704(d)(4). This mandate preserves the deterrent effect and ''polluter pays'' principle embodied in the OPA.

BOEM issues this rule under title I of the OPA, E.O. 12777, as amended, and BOEM regulations at 30 CFR part 553, subpart G—Limit of Liability for Offshore Facilities. BOEM has good cause under 5 U.S.C. 553(b) for issuing this as a final rule; a proposed rule is unnecessary. The adjustment in the limit of liability is mandated by statute, the methodology for determining the amount of the adjustment is defined in BOEM's regulations, and BOEM's regulations provide that inflation adjustments to the offshore facilities limit of liability will be implemented through final rulemaking. §§ 553.703(b)(4) and 553.704.

## II. Calculation of the 2022 Adjustment

The inflation adjustment methodology is provided in § 553.703. BOEM last adjusted the OPA offshore facility liability limit for inflation on January 18, 2018 (83 FR 2540). BOEM evaluates whether the liability limit should be adjusted for inflation not later than every 3 years since the previous adjustment. § 553.703(b)(2). BOEM calculates inflation by comparing the cumulative percent change in the Annual Consumer Price Index for All Urban Consumers (CPI–U) since the last adjustment. BOEM adjusts the liability limits when inflation reaches a significance threshold of 3 percent or greater. The January 2018 adjustment used the 2016 annual CPI–U.

BOEM used the Bureau of Labor Statistics (BLS) annual average CPI–U published in 2022 to calculate the inflation adjustment for the period between 2016 and 2022. The cumulative percent change in the annual CPI–U since 2016 exceeded 3 percent in 2022, the year that the annual CPI–U was published most recently. Therefore, BOEM must increase the offshore liability limit in § 553.702 by an amount equal to the cumulative percent change in the annual CPI–U since 2016.

Under § 553.703(a), the formula for calculating a cumulative percent change in the annual CPI–U is as follows: the percent change in the annual CPI–U = [(annual CPI–U for current period − annual CPI–U for previous period) ÷ annual CPI–U for previous period] × 100 and round to one decimal place. Using the BLS annual CPI–U index numbers for 2016 (previous period) and 2022 (current period), the calculation is: (292.655 − 240.007) ÷ 240.007 = 0.21936. Multiplying × 100 yields a cumulative percent change of 21.936 percent. Rounding to one decimal place, the resulting change is 21.9 percent.

Under paragraph (c) of § 553.703, BOEM calculates the inflation adjustment to the offshore facilities liability limit using the following formula: New limit of liability = previous limit of liability + (previous limit of liability × the decimal equivalent of the percent change in the annual CPI–U), rounded to the closest $100. The calculation is: $137.6595 million + ($137.6595 million × 0.219) = $167.8069 million.

Therefore, under § 553.702, BOEM is revising the responsible party's liability limit under OPA to cover all removal costs plus $167.8069 million for damages caused by each oil spill from an offshore facility, included any offshore pipeline.

Further information regarding the CPI and BLS's methodology for developing it is available at *https://www.bls.gov/opub/hom/cpi/home.htm.*

## III. Effective Date

Under BOEM's regulations, the effective date of an inflation-adjusted liability limit is the 90th day after publication in the **Federal Register**. § 553.704. BOEM may select a different effective date as part of the rule establishing a new liability limit. *Id.* Given that this adjustment is mandated by statute and that the methodology for determining the amount of the update is defined in BOEM's regulations, BOEM determined that an effective date 30 days after this rule's publication is appropriate, instead of the 90 days stated in § 553.704.

## IV. Statutory and Executive Order Reviews

### *A. Statutes*

#### 1. National Environmental Policy Act

This rule does not constitute a major Federal action significantly affecting the quality of the human environment because it is non-discretionary and consistent with BOEM's statutory authority. See 40 CFR 1508.1(q)(1)(ii). The OPA requires that, ''not less than every three years,'' BOEM adjust its liability limits by regulation to reflect significant CPI increases, 33 U.S.C. 2704(d)(4), and the formula for doing so is set by regulation. Accordingly, BOEM has no discretion in adjusting its OPA liability limits as reflected in this rule. Because this rule is not a major Federal action, it is therefore not subject to the requirements of the National Environmental Policy Act (NEPA, 42 U.S.C. 4321 *et seq.*). Even if this were a discretionary action subject to NEPA, which it is not, a detailed statement under NEPA is not required because this rule is administrative in nature and covered by a categorical exclusion. See 43 CFR 46.210(i). BOEM also has determined that the rule does not implicate any of the extraordinary circumstances listed in 43 CFR 46.215 that would require further analysis under NEPA. Therefore, a detailed statement under NEPA is not required.

#### 2. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) requires an agency to prepare a

regulatory flexibility analysis for all rules unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. The RFA applies only to rules for which an agency is required to first publish a proposed rule. See 5 U.S.C. 603(a) and 604(a). Thus, the RFA does not apply to this rulemaking.

3. Paperwork Reduction Act

This rule does not contain information collection requirements, and, therefore, a submission to Office of Management and Budget (OMB) under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*) is not required.

4. Unfunded Mandates Reform Act

This rule does not impose an unfunded mandate on State, local, or Tribal governments, or on the private sector, of more than $100 million per year. The rule does not have a significant or unique effect on State, local, or Tribal governments, or on the private sector. Therefore, a statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*) is not required.

5. Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2). This rule:

(a) Will not have an annual effect on the economy of $100 million or more;

(b) Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; and

(c) Will not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

6. Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*) this rule is not a major rule, as defined by 5 U.S.C. 804.

*B. Executive Orders (E.O.)*

1. Governmental Actions and Interference With Constitutionally Protected Property Rights (E.O. 12630)

This rule does not effect a taking of private property or otherwise have takings implications under E.O. 12630. Therefore, a takings implication assessment is not required.

2. Regulatory Planning and Review (E.O. 12866); Improving Regulation and Regulatory Review (E.O. 13563)

E.O. 12866 provides that the Office of Information and Regulatory Affairs (OIRA) in OMB will review all significant rules. OIRA has determined that this rule is not significant.

This rule updates the offshore facility liability limit under OPA. It is neither a new regulation, nor does it increase the regulatory burden on regulated entities. This rule simply updates the liability limit for inflation that accrued over a 6-year period, pursuant to OPA. 33 U.S.C. 2704(d)(4).

E.O. 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the Nation's regulatory system to reduce uncertainty and to promote predictability and the use of the best, most innovative, and least burdensome tools for achieving regulatory ends. E.O. 13563 directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. We have developed this rule in a manner consistent with these requirements.

3. Civil Justice Reform (E.O. 12988)

This rule complies with the requirements of E.O. 12988. Specifically, this rule:

(a) Meets the criteria of section 3(a) requiring that all regulations be reviewed to eliminate errors and ambiguity and be written to minimize litigation; and

(b) Meets the criteria of section 3(b)(2) requiring that all regulations be written in clear language and contain clear legal standards.

4. Federalism (E.O. 13132)

Under the criteria in section 1 of E.O. 13132, this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement. Therefore, a federalism summary impact statement is not required.

5. Consultation and Coordination With Indian Tribal Governments (E.O. 13175)

E.O. 13175 provides that Tribal consultation is not necessary for regulations required by statute. Because this rule simply implements a statutory mandate, Tribal consultation is not required by this Executive Order.

The Department of the Interior (DOI) continually strives to strengthen its government-to-government relationship with Indian Tribes through a commitment to consultation with Indian Tribes and a recognition of their right to self-governance and Tribal sovereignty. BOEM is also respectful of its responsibilities for consultation with corporations established pursuant to the Alaska Native Claims Settlement Act, 43 U.S.C. 1601 *et seq.* (ANCSA).

BOEM has evaluated this rule under DOI's consultation policy in chapters 4 and 5 of series 512 of the Departmental Manual. BOEM determined that this rule has no substantial direct effects on any Tribe or ANCSA Corporation, as defined in 512 DM 4.3 to include, among others, federally recognized Alaska Native tribes. Based on this evaluation, BOEM determined that consultation is not necessary to comply with any DOI policy.

6. Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use (E.O. 13211)

This rule is not a significant energy action under the definition in E.O. 13211. Therefore, a statement of energy effects is not required.

The action taken herein is pursuant to an existing delegation of authority.

**List of Subjects in 30 CFR Part 553**

Administrative practice and procedure, Continental shelf, Environmental protection, Intergovernmental relations, Oil and gas exploration, Oil pollution, Penalties, Pipelines, Rights-of-way, Reporting and recordkeeping requirements, Surety bonds, Securities.

**Laura Daniel-Davis,**

*Principal Deputy Assistant Secretary, Land and Minerals Management.*

For the reasons stated in the preamble, BOEM amends 30 CFR part 553 as follows:

## PART 553—OIL SPILL FINANCIAL RESPONSIBILITY FOR OFFSHORE FACILITIES

■ 1. The authority citation for part 553 is revised to read as follows:

**Authority:** 33 U.S.C. 2704, 2716, as amended; E.O. 12777.

### Subpart G—Limit of Liability for Offshore Facilities

■ 2. Revise § 553.702 to read as follows:

**§ 553.702 What limit of liability applies to my offshore facility?**

Except as provided in 33 U.S.C. 2704(c), the limit of liability under OPA for a responsible party for any offshore facility, including any offshore pipeline, is the total of all removal costs plus $167.8069 million for damages with respect to each incident.

[FR Doc. 2023–07931 Filed 4–13–23; 8:45 am]

BILLING CODE 4340–98–P

**DEPARTMENT OF HOMELAND SECURITY**

**Coast Guard**

**33 CFR Part 147**

**[Docket Number USCG–2021–0473]**

**RIN 1625–AA00**

## Safety Zone; Constitution Spar Outer Continental Shelf Facility, Green Canyon Block 680, Gulf of Mexico

**AGENCY:** Coast Guard, DHS.

**ACTION:** Final rule.

**SUMMARY:** The Coast Guard is is establishing a safety zone on the navigable waters around the Constitution Spar, located in Green Canyon Block 680 on the Outer Continental Shelf (OCS) in the Gulf of Mexico. The purpose of this rule is to protect the facility from all vessel traffic operating outside the normal shipping channels and fairways that are not providing service to or working with the facility. Establishing a safety zone around the facility will significantly reduce the threat of allisions, collisions, security breaches, oil spills, releases of natural gas, and thereby protect the safety of life, property, and the environment.

**DATES:** This rule is effective May 15, 2023.

**ADDRESSES:** To view documents mentioned in this preamble as being available in the docket, go to *https://www.regulations.gov,* type USCG–2021–0473 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 on this rule, call or email LCDR David Newcomb, District Eight OCS, U.S. Coast Guard; telephone 504–671–2106, *David.T.Newcomb@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
OCS Outer Continental Shelf
§ Section
U.S.C. United States Code

### II. Background Information and Regulatory History

Anadarko Petroleum Corporation requested that the Coast Guard establish a safety zone around its facility. There are safety concerns for both the personnel aboard the facility and the environment that arise when a safety zone is not established. In response, on October 23, 2022, the Coast Guard published a notice of proposed rulemaking (NPRM) titled Safety Zone; Constitution Spar Outer Continental Shelf Facility, Green Canyon Block 680, Gulf of Mexico. There we stated why we issued the NPRM, and invited comments on our proposed regulatory action related to this safety zone. During this comment period that ended on November 23, 2022, we received 1 comment.

### III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 14 U.S.C. 85, 43 U.S.C. 1333, Department of Homeland Security Delegation No. 0170.1, and 33 CFR 1.05–1, 33 CFR 147.1 and 147.10, which collectively permit the establishment of safety zones for facilities located on the OCS for the purpose of protecting life and property on the facilities, and the marine environment in the safety zones. The Coast Guard has determined that a safety zone is necessary to protect the facility from all vessels operating outside the normal shipping channels and fairways that are not providing services to or working with the facility. Navigation in the vicinity of the safety zone consists of large commercial shipping vessels, fishing vessels, cruise ships, tugs with tows and the occasional recreational vessel. The deepwater area also includes an extensive system of fairways. The purpose of the rule is to significantly reduce the threat of allisions, oil spills, and releases of natural gas, and thereby protect the safety of life, property, and the environment.

### IV. Discussion of Comments, Changes and the Rule

As noted above, we received 1 comment on our NPRM published on November 23, 2022. The commenter asked to specify the horizontal datum (NAD 27, NAD 83, etc.) for the latitude and longitude position in the rule. We have done so. In this rule, as in all OCS Safety Zone rules, we use the NAD 83 horizontal datum.

This rule established a safety zone on the Outer Continental Shelf (OCS) in the deepwater area of the Gulf of Mexico at Green Canyon 680. The area or the safety zone is 500 meters (1640.4 feet) from each point on the facility, which is located at 27°17′31.92″ N, 90°58′4.8″ W, (NAD 83). The deepwater area is waters of 304.8 meters (1,000 feet) or greater depth extending to the limits of the Exclusive Economic Zone (EEZ) contiguous to the territorial sea of the United States and extending to a distance up to 200 nautical miles from the baseline from which the breadth of the sea is measured. No vessel, except those attending the facility, or those less than 100 feet in length and not engaged in towing will be permitted to enter the safety zone without obtaining permission from Commander, Eighth Coast Guard District or a designated representative.

### V. Regulatory Analyses

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

#### *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. Executive Order 13771 directs agencies to control regulatory costs through a budgeting process. This rule has not been designated a ''significant regulatory action,'' under Executive Order 12866. Accordingly, this rule has not been reviewed by the Office of Management and Budget (OMB), and pursuant to OMB guidance it is exempt from the requirements of Executive Order 13771.

This regulatory action determination is based on the location of the Constitution Spar, on the OCS, and its distance from both land and safety fairways. Vessels traversing waters near the safety zone will be able to safely travel around the zone using alternate routes. Exceptions to this rule include vessels measuring less than 100 feet in length overall and not engaged in towing. The Eighth Coast Guard District Commander, or a designated representative, will consider requests to transit through the safety zone on a case-by-case basis.

#### *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 affects your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

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

*C. Collection of Information*

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

*D. Federalism and Indian Tribal Governments*

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

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

*E. Unfunded Mandates Reform Act*

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

*F. Environment*

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have made a preliminary determination that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves establishing a safety zone around an offshore deepwater facility. Normally such actions are categorically excluded from further review under paragraph 34(g) of Figure 2–1 of Commandant Instruction M16475.lD. A preliminary environmental analysis checklist and Categorical Exclusion Determination, prepared and signed before October 31, 2022, are available in the docket where indicated under **ADDRESSES**.

*G. Protest Activities*

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to contact 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 147**

Continental shelf, Marine safety, Navigation (water).

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 147 as follows:

## PART 147—SAFETY ZONES

■ 1. The authority citation for part 147 continues to read as follows:

**Authority:** 14 U.S.C. 554; 43 U.S.C. 1333; 33 CFR 1.05–1; Department of Homeland Security Delegation No. 0170.1.

■ 2. Add § 147.871 to read as follows:

**§ 147.871 Safety Zone, Constitution Spar, Outer Continental Shelf Facility, Green Canyon 680, Gulf of Mexico**

(a) *Description.* The Constitution Spar is in the deepwater area of the Gulf of Mexico at Green Canyon Block 680. The facility is located at 27°17′31.92″ N, 90°58′4.8″ W, (NAD 83) and the area within 500 meters (1640.4 feet) from each point on the facility structure's outer edge is a safety zone.

(b) *Regulation.* No vessel may enter or remain in the safety zone described in paragraph (a) of this section except for the following:

(1) An attending vessel, as defined in 147.20

(2) A vessel under 100 feet in length overall not engaged in towing; or

(3) A vessel authorized by the Commander, Eighth Coast Guard District or a designated representative.

(c) *Requests for Permission.* Persons or vessels requiring authorization to enter the safety zone described in paragraph (a) of this section must request permission from the Commander, Eighth Coast Guard District or a designated representative. If permission is granted, all persons and vessels shall comply with the instructions of the Commander or designated representative.

Dated: April 4, 2023.

**Richard Timme,**

*RADM, U.S. Coast Guard, Commander, Coast Guard District Eight.*

[FR Doc. 2023–07853 Filed 4–13–23; 8:45 am]

**BILLING CODE 9110–04–P**

## DEPARTMENT OF VETERANS AFFAIRS

### 38 CFR Part 4

**RIN 2900–AR51**

## Exceptions to Applying the Bilateral Factor in VA Disability Calculations

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Interim final rule.

**SUMMARY:** The Department of Veterans Affairs (VA) is issuing this interim final

rule to amend the regulation governing the bilateral factor for diseases and injuries of both arms, both legs, or paired skeletal muscles. More specifically, this interim final rule will allow VA adjudicators to exclude certain disabilities that would be calculated using the bilateral factor to determine the combined evaluation if, by their exclusion, a higher combined evaluation can be achieved.

**DATES:**

*Effective date:* This interim final rule is effective April 16, 2023.

*Comment date:* Comments must be received on or before June 13, 2023.

**ADDRESSES:** Comments must be submitted through *www.regulations.gov*. Except as provided below, comments received before the close of the comment period will be available at *www.regulations.gov* for public viewing, inspection, or copying, including any personally identifiable or confidential business information that is included in a comment. We post the comments received before the close of the comment period on the following website as soon as possible after they have been received: *https://www.regulations.gov*. VA will not post on *Regulations.gov* public comments that make threats to individuals or institutions or suggest that the commenter will take actions to harm the individual. VA encourages individuals not to submit duplicative comments. We will post acceptable comments from multiple unique commenters even if the content is identical or nearly identical to other comments. Any public comment received after the comment period's closing date is considered late and will not be considered in the final rulemaking.

**FOR FURTHER INFORMATION CONTACT:** Olumayowa Famakinwa, Chief, VA Schedule for Rating Disabilities (VASRD) Implementation Staff (218B), Compensation Service (21C), Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420, (202) 461–9700. (This is not a toll-free telephone number.)

**SUPPLEMENTARY INFORMATION:**

## I. The Need for Updating Bilateral Factor Policy

VA conducted claims data analysis and determined that, in very limited circumstances, an unintended negative impact can result based on VA's ''bilateral factor'' calculation, which is applied when disabilities involving paired extremities are service connected. Specifically, adding an extremity to a veteran's total combined (100 percent) evaluation in some cases can result in a less favorable 90 percent evaluation. To remedy this unintended negative impact, VA is amending its regulation regarding the bilateral factor to ensure affected veterans receive the appropriate level of compensation that their disabilities warrant.

### *A. How Combined Evaluations Are Calculated*

By statute, VA assigns a combined evaluation for all service-connected disabilities using a schedule of 10 grades—10 percent, 20 percent, 30 percent, 40 percent, 50 percent, 60 percent, 70 percent, 80 percent, 90 percent and 100 percent (sometimes referred to as ''total''). See 38 U.S.C. 1155. This combined evaluation serves as the basis for a veteran's monthly compensation. Id. Instructions for combining evaluations for multiple service-connected disabilities are found in 38 CFR 4.25. Specifically, § 4.25 states that combinations must be done by order of severity (larger numbers first, smaller numbers last) and that, for example, ''a person having a 60 percent disability is considered 40 percent efficient. Proceeding from this 40 percent efficiency, the effect of a further 30 percent disability is to leave only 70 percent of the efficiency remaining after consideration of the first disability, or 28 percent efficiency altogether. The individual is thus 72 percent disabled[.]''

Paragraph (a) of 38 CFR 4.25 further states that ''[t]his combined value will then be converted to the nearest number divisible by 10, and combined values ending in 5 will be adjusted upward.'' Therefore, the individual who is 72 percent disabled in the example would receive a 70 percent combined evaluation. This paragraph also provides instructions for combining more than two disabilities. Using the example of combining disabilities evaluated at 60 percent, 40 percent and 20 percent, the result is 80.8 percent; however, because the combination result is a decimal, it is converted to a whole number, and decimals of .5 or higher are adjusted upward. The result is an 81 percent evaluation that is converted to the nearest degree divisible by 10, or 80 percent.

### *B. How the Bilateral Factor Is Applied*

Section 4.26 of title 38, CFR, provides that when a partial disability results from disease or injury of both arms, or of both legs, or of paired skeletal muscles, the ratings for the disabilities of the right and left sides will be combined as usual, and 10 percent of this value will be added (*i.e.,* not combined) before proceeding with further combinations, or converting to degree of disability. The bilateral factor will be applied to such bilateral disabilities before other combinations are carried out and the rating for such disabilities including the bilateral factor in § 4.26 will be treated as 1 disability for the purpose of arranging in order of severity and for all further combinations.

### *C. How the Bilateral Factor Lowers Evaluations in Isolated Cases*

The bilateral factor calculation does two things: (1) it combines bilateral disability evaluations together and (2) adds 10 percent of that total value to those combined bilateral disabilities, with a potential to increase the overall combined evaluation. However, the closer the combined evaluation approaches 100 percent, the smaller the effect of the additional disability on the combined rating, and, in limited cases, the bilateral factor yields a lower evaluation than if it were not applied to some or all of a particular veteran's bilateral disability evaluations.

An example of this is when there are multiple disabilities that combine to 93 percent, plus two other 10-percent evaluations. Applying the bilateral factor, 10 and 10 first combine to 19, and 1.9 (representing 10 percent of 19) is added (not combined) to the 19, resulting in 20.9. This is rounded to 21 (the nearest whole number) and combined with 93 percent. 93 percent and 21 percent combine to 94.47, which is rounded to 94 and then adjusted downward to a final combined rating of 90 percent. However, if the bilateral factor is not applied, 93 and 10 combine to 93.7, which is rounded to 94, then 94 and 10 combine to 94.6, which is rounded to 95. This is then adjusted upward to a final combined rating of 100 percent. Thus, in this example, not applying the bilateral factor results in a greater benefit to the veteran.

This effect can also be observed when combining 92 percent and 31 percent, where 31 percent is the result of two bilateral disabilities at 20 percent and 10 percent, compared to combining 92 percent with 20 percent and 10 percent separately. Applying the bilateral factor, 92 percent and 31 percent combine to 94.48, which is rounded to 94 and then adjusted downward to a final combined rating of 90 percent. If the bilateral factor is not applied, 92 percent and 20 percent combine to 93.6, which is rounded to 94, and 94 percent and 10 percent combine to 94.6, which is rounded to 95. This is then adjusted upward to a final combined rating of 100 percent.

**II. The Solution**

VA considered several solutions to arrive at one that resolves this issue without creating new ones. First, it is important to note that the bilateral factor increases combined evaluations in many cases or at least results in the same evaluation that could be obtained without it in almost every case. It is only at the low 90-percent level where it may reduce a combined evaluation; therefore, VA determined that simply eliminating the bilateral factor regulation would not be beneficial to veterans. VA also rejected other potential solutions that would have revised combination results less than 90 percent, as those would have overcorrected for the problem.

Instead, VA determined that the most appropriate solution is simply to allow disabilities that affect extremities but also cause the bilateral factor calculation to lower the combined evaluation to be excluded from the bilateral factor calculation. VA will make the necessary system changes so that when a combined evaluation equals 90 percent and the bilateral factor has been applied, VA's claims processing system will perform calculations to determine if a 100 percent rating can be achieved if a bilateral disability or multiple bilateral disabilities are excluded. If so, the system will assign a 100 percent combined evaluation.

To implement this change, VA is adding an exception to the requirement in 38 CFR 4.26 that all bilateral disabilities must be combined as usual and 10 percent of the combined value added before proceeding with further combinations or converting to degree of disability. The exception will allow VA to avoid applying the bilateral factor calculation for a given bilateral disability or disabilities if excluding that disability or disabilities will allow for a higher combined evaluation when combined separately.

**III. Converting Cases Based on VA's Own Initiative**

This rulemaking, to amend § 4.26 to enable a veteran to receive an increased evaluation, is considered a liberalizing VA issue within the meaning of 38 U.S.C. 5110(g) and 38 CFR 3.114 because it would result in higher ratings for impacted veterans than would currently result under § 4.26. Section 3.114 also provides authority for VA to review claims on its own initiative after a liberalizing VA issue has become effective. In this well-defined, limited situation, VA can identify all veterans who would benefit from the application of this bilateral factor exception. Therefore, VA will adjust all the affected combined evaluations running on the effective date of this rulemaking without requiring a claim from affected veterans or their authorized representatives. VA will also provide notice of this adjustment to affected veterans and their representatives in accordance with 38 U.S.C. 5104. Advance notice is not required because it would have no adverse impact on the affected veterans. Finally, the provisions of 38 U.S.C. 5110(g) and 38 CFR 3.114 will apply if a veteran requests a review based on this liberalizing issue. Under those provisions, the effective date of an increased evaluation based on this liberalizing VA issue may be authorized from the effective date of this issue if the claim is received within one year of that date. If the claim is received more than one year from the effective date of this liberalizing VA issue, then the effective date of the increased evaluation may be authorized for a period of one year prior to the date the claim is received.

**IV. Regulatory Amendments**

For the reasons discussed above, VA is amending 38 CFR 4.26 as follows:

VA is amending the introductory paragraph by adding ''Except as provided in paragraph (d) of this section,'' to the first sentence and replacing ''10's'' with ''10 percent evaluations'' in the penultimate sentence.

VA is adding new paragraph (d) to provide the exception to the application of the bilateral factor.

**Administrative Procedure Act**

The Secretary of Veterans Affairs finds that there is good cause, under the provisions of 5 U.S.C. 553(b)(B), that advance notice and opportunity for public comment is contrary to the public interest, particularly to veterans with bilateral disability evaluations. This interim final rule enables VA to provide higher evaluations for a number of veterans that will entitle them to additional benefits from VA and other Federal and state government agencies.

It would have been contrary to the public interest to provide opportunity for prior notice and comment for this rulemaking because a delay in implementation would have required VA rating officials to continue to apply the bilateral factor even where it results in a lower rating for impacted veterans. Moreover, this rule will not negatively impact any veterans but rather will only serve to provide higher ratings where feasible. Lastly, a delay in implementation would have denied veterans timely access to benefits based on the appropriate combined rating warranted by their disabilities.

For the same reasons, VA finds that there is good cause under 5 U.S.C. 553(d)(3) to make this rule effective upon the date of publication.

For the above reasons, VA is issuing this rule as an interim final rule with immediate effect. However, VA will consider and address comments that are received within 60 days of the date this interim final rule is published in the **Federal Register**.

**Executive Orders 12866 and 13563**

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. The Office of Information and Regulatory Affairs has determined that this rule is not a significant regulatory action under Executive Order 12866. The Regulatory Impact Analysis associated with this rulemaking can be found as a supporting document at *www.regulations.gov.*

**Regulatory Flexibility Act**

The Regulatory Flexibility Act, 5 U.S.C. 601–612, is not applicable to this rulemaking because notice of proposed rulemaking is not required. 5 U.S.C. 601(2), 603(a), 604(a).

**Unfunded Mandates**

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) in any one year. This interim final rule will have no such effect on State, local, and tribal governments, or on the private sector.

**Paperwork Reduction Act**

This interim final rule contains no provisions constituting a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521).

**Congressional Review Act**

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

**List of Subjects in 38 CFR Part 4**

Disability benefits.

**Signing Authority**

Denis McDonough, Secretary of Veterans Affairs, approved this document on June 6, 2022, and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs.

**Jeffrey M. Martin,**

*Assistant Director, Office of Regulation Policy & Management, Office of General Counsel, Department of Veterans Affairs.*

For the reasons stated in the preamble, VA amends 38 CFR part 4 as set forth below:

## PART 4—SCHEDULE FOR RATING DISABILITIES

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

**Authority:** 38 U.S.C. 1155, unless otherwise noted.

■ 2. Amend § 4.26 by:
■ a. Revising the introductory text;
■ b. Adding headings to paragraphs (a) through (c); and
■ c. Adding paragraph (d).

The revision and additions read as follows:

**§ 4.26 Bilateral factor.**

Except as provided in paragraph (d) of this section, when a partial disability results from disease or injury of both arms, or of both legs, or of paired skeletal muscles, the ratings for the disabilities of the right and left sides will be combined as usual, and 10 percent of this value will be added (*i.e.,* not combined) before proceeding with further combinations, or converting to degree of disability. The bilateral factor will be applied to such bilateral disabilities before other combinations are carried out and the rating for such disabilities including the bilateral factor in this section will be treated as one disability for the purpose of arranging in order of severity and for all further combinations. For example, with disabilities evaluated at 60 percent, 20 percent, 10 percent and 10 percent (with the two 10 percent evaluations being bilateral disabilities), the order of severity would be 60, 21 and 20. The 60 and 21 combine to 68 percent and the 68 and 20 combine to 74 percent, converted to 70 percent as the final degree of disability.

(a) *Definitions.* * * *

(b) *Procedure for four affected extremities.* * * *

(c) *Applicability.* * * *

(d) *Exception.* In cases where the combined evaluation is lower than what could be achieved by not including one or more bilateral disabilities in the bilateral factor calculation, those bilateral disabilities will be removed from the bilateral factor calculation and combined separately, to achieve the combined evaluation most favorable to the veteran.

[FR Doc. 2023–07426 Filed 4–13–23; 8:45 am]

**BILLING CODE 8320–01–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

### 50 CFR Part 679

**[Docket No. 230306–0065]**

**RTID 0648–XC924**

## Fisheries of the Exclusive Economic Zone Off Alaska; Pacific Cod in the Bering Sea and Aleutian Islands Management Area

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

**ACTION:** Temporary rule; modification of a closure; request for comments.

**SUMMARY:** NMFS is opening directed fishing for Pacific cod by catcher vessels using trawl gear in the Bering Sea and Aleutian Islands Management Area (BSAI). This action is necessary to fully use the 2023 total allowable catch of Pacific cod allocated to catcher vessels using trawl gear in the BSAI.

**DATES:** Effective 1200 hours, Alaska local time (A.l.t.), April 13, 2023, through 1200 hours, A.l.t., June 10, 2023. Comments must be received at the following address no later than 4:30 p.m., A.l.t., May 1, 2023.

**ADDRESSES:** You may submit comments on this document, identified by docket number NOAA–NMFS–2022–0094, by any of the following methods:

*Electronic Submission:* Submit all electronic public comments via the Federal e- Rulemaking Portal. Go to *https://www.regulations.gov* and enter NOAA–NMFS–2022–0094 in the Search box. Click on the ''Comment'' icon, complete the required fields, and enter or attach your comments.

*Mail:* Submit written comments to Gretchen Harrington, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region NMFS. Mail comments to P.O. Box 21668, Juneau, AK 99802–1668.

*Instructions:* Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are a part of the public record and will generally be posted for public viewing on *www.regulations.gov* without change. All personal identifying information (*e.g.,* name, address, *etc.*), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous).

**FOR FURTHER INFORMATION CONTACT:** Krista Milani, 907–581–2062.

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

The B season apportionment of the 2023 Pacific cod TAC allocated to catcher vessels using trawl gear in the BSAI is 2,949 metric tons (mt) as established by the final 2023 and 2024 harvest specifications for groundfish in the BSAI (88 FR 14926, March 10, 2023). NMFS closed directed fishing for Pacific cod by catcher vessels using trawl gear in the BSAI under § 679.20(d)(1)(iii) on April 2, 2023 (88 FR 20080, April 5, 2023).

NMFS has determined that as of April 10, 2023, approximately 2,000 metric tons of Pacific cod remain in the B season apportionment of the 2023 Pacific cod allocated to catcher vessels using trawl gear in the BSAI. Therefore, in accordance with § 679.25(a)(1)(i), (a)(2)(i)(C), and (a)(2)(iii)(D), and to fully use the 2023 total allowable catch (TAC) of Pacific cod in the BSAI, NMFS is terminating the previous closure and is opening directed fishing for Pacific cod by catcher vessels using trawl gear in the BSAI. The Administrator, Alaska Region, NMFS, (Regional Administrator) considered the following factors in

reaching this decision: (1) the current catch of Pacific cod by catcher vessels using trawl gear in the BSAI; and (2) the harvest capacity and stated intent on future harvesting patterns of vessels in participating in this fishery.

While this closure is effective, the maximum retainable amounts at § 679.20(e) and (f) apply at any time during a trip.

**Classification**

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

Pursuant to 5 U.S.C. 553(b)(B), there is good cause to waive prior notice and an opportunity for public comment on this action, as notice and comment would be impracticable and contrary to the public interest, as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion, and would delay the opening of Pacific cod by catcher vessels using trawl gear in the BSAI. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of April 10, 2023.

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

Without this inseason adjustment, NMFS could not allow the fishery for Pacific cod by catcher vessels by trawl gear in the BSAI to be harvested in an expedient manner and in accordance with the regulatory schedule. Under § 679.25(c)(2), interested persons are invited to submit written comments on this action to the above address until May 1, 2023.

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

Dated: April 11, 2023.

**Jennifer M. Wallace,**

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

[FR Doc. 2023–07920 Filed 4–11–23; 4:15 pm]

**BILLING CODE 3510–22–P**

# Proposed Rules

Federal Register
Vol. 88, No. 72
Friday, April 14, 2023

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

## FEDERAL HOUSING FINANCE AGENCY

### 12 CFR Chapter XII

**[No. 2023–N–5]**

### Notice of Regulatory Review

**AGENCY:** Federal Housing Finance Agency.

**ACTION:** Regulatory review; request for comment.

**SUMMARY:** The Federal Housing Finance Agency (FHFA) is issuing a notice of a regulatory review to be conducted in accordance with the process set forth in its Regulatory Review Plan published in February 2012, and is requesting comments on how its regulations may be made more effective and less burdensome.

**DATES:** Comments on this notice of regulatory review must be received no later than June 13, 2023.

**ADDRESSES:** You may submit your comments, identified by ''Regulatory Review [No. 2023–N–5]'', by any of the following methods:

- *Agency website: www.fhfa.gov/open-for-comment-or-input.*
- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. If you submit your comment to the Federal eRulemaking Portal, please also send it by email to FHFA at *RegComments@fhfa.gov* to ensure timely receipt by FHFA. Please include ''Regulatory Review [No. 2023–N–5]'' in the subject line of the message.
- *Hand Delivered/Courier:* The hand delivery address is: Clinton Jones, General Counsel, Attention: Comments/''Regulatory Review [No. 2023–N–5],'' Federal Housing Finance Agency, 400 Seventh Street SW, Washington, DC 20219. Deliver the package at the Seventh Street entrance Guard Desk, First Floor, on business days between 9 a.m. and 5 p.m.
- *U.S. Mail, United Parcel Service, Federal Express, or Other Mail Service:* The mailing address for comments is: Clinton Jones, General Counsel, Attention: Comments/Regulatory Review [No. 2023–N–5], Federal Housing Finance Agency, 400 Seventh Street SW, Washington, DC 20219. Please note that all mail sent to FHFA via U.S. Mail is routed through a national irradiation facility, a process that may delay delivery by approximately two weeks. For any time-sensitive correspondence, please plan accordingly.

**FOR FURTHER INFORMATION CONTACT:** Ellen S. Bailey, Managing Associate General Counsel, *ellen.bailey@fhfa.gov,* (202) 649–3056; or Chris Bederka, Counsel, *christopher.bederka@fhfa.gov,* (202) 649–3796, Federal Housing Finance Agency, Constitution Center, (OGC) Fourth Floor, 400 Seventh Street SW, Washington, DC 20219. For TTY/TRS users with hearing and speech disabilities, dial 711 and ask to be connected to any of the contact numbers above.

**SUPPLEMENTARY INFORMATION:**

#### Comments

All comments received will be posted without change and will include any personal information provided, such as your name, address, email address, and telephone numbers, on the FHFA website at *https://www.fhfa.gov.* In addition, copies of all comments received will be available for examination by the public through the electronic docket for this Notice also located on the FHFA website.

#### I. Background; FHFA's Regulatory Review Plan

FHFA was established by the Housing and Economic Recovery Act of 2008, Public Law 110–289, to supervise and regulate the Federal National Mortgage Association (Fannie Mae), the Federal Home Loan Mortgage Corporation (Freddie Mac) (together, the Enterprises), any affiliate of either Enterprise, the Federal Home Loan Banks (the Banks), and the Office of Finance of the Federal Home Loan Bank System (OF). In 2012, FHFA developed its Regulatory Review Plan (Review Plan) after considering principles set forth in Executive Order 13579, ''Regulation and Independent Regulatory Agencies'' (July 11, 2011).[1] Executive Order 13579 requested—but did not require—independent regulatory agencies, such as FHFA, to develop, release to the public, and implement a plan for the periodic review of their existing significant regulations to determine whether any regulation should be modified, streamlined, expanded, or repealed to make the agency's regulatory program more effective or less burdensome in achieving its objectives.

Under its Review Plan, FHFA reviews its regulations at least every five years, except for those regulations that were adopted or substantially amended within the two years prior to issuance of a Notice of Regulatory Review and rules of agency organization, procedure, or practice. The Review Plan suggests factors that commenters should consider in order to assist FHFA with its regulatory review, including factors related to legal, regulatory, or market developments, regulatory overlap, less burdensome alternatives, and clarity of regulatory requirements.

#### II. Results of the 2018 Regulatory Review

FHFA's most recent regulatory review was initiated in April 2018, by a Notice of Regulatory Review and request for comments and considered 52 regulations. FHFA received 11 total comment letters from trade associations, a research center associated with a major university, an insured depository institution, a credit union, and the Federal Home Loan Banks. FHFA also conducted an internal review of its regulations that were subject to the five-year Review Plan, seeking staff input on the same questions on which the Review Notice sought public comment.

FHFA evaluated all comments received and determined that some amendments were warranted. In response to amendments to the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Pub. L. 111–203, 124 Stat. 1376), and as requested by commenters, FHFA amended 12 CFR part 1238 to remove the stress testing requirements for the Banks.[2] Additionally, FHFA undertook a comprehensive amendment of its regulation on prior approval of Enterprise products, 12 CFR part 1253. In some cases, FHFA determined that a

[1] 77 FR 10351 (Feb. 22, 2012) (FHFA Regulatory Review Plan); *see also* 76 FR 41585 (July 14, 2011) (E.O. 13579).

[2] 85 FR 16528 (Mar. 24, 2020) (Stress Testing of Regulated Entities).

suggestion should be considered when the underlying regulation was otherwise being amended by FHFA. In other cases, FHFA determined that an amendment was not necessary because, for example, the comment requested a clarification that could effectively be provided through another means (such as an interpretation or guidance).

**III. FHFA's 2023 Regulatory Review; Request for Comment**

Consistent with its Review Plan, FHFA's next regulatory review must begin not later than five years after its prior review, or in April 2023. All current regulations—except, as noted, rules of agency organization, procedure, or practice, or regulations adopted or substantially amended since April 2021 (meaning, within the past two years)—are subject to review. If members of the public comment on recently adopted or amended regulations, FHFA may consider those comments, as it deems appropriate. FHFA does not anticipate responding to individual comments.

Regulations administered by FHFA are published in chapter XII of title 12 of the Code of Federal Regulations, except for two regulations of predecessor agencies which FHFA has not yet moved.[3] FHFA's regulations are also posted on the FHFA website at *https://www.fhfa.gov.*

FHFA hereby requests comment on its regulations for purposes of improving their effectiveness and reducing their burden. Factors that FHFA's Review Plan identifies as relevant to the review, and which FHFA suggests should guide commenters, are:

(1) Legal or regulatory developments—including new laws, executive orders, or judicial decisions that have been adopted since the promulgation of a regulation—that make a regulation inefficient, obsolete, contrary to controlling legal precedent, or unduly burdensome;

(2) Marketplace developments, technological evolution, and related changes that may have rendered a regulation, in whole or in part, inefficient, outmoded, or outdated;

(3) The extent to which provisions of the regulation are written in plain language or need clarification;

(4) Compelling evidence that a consolidation of two or more regulations, elimination of a duplicative regulation, or other revision to regulatory requirements would facilitate compliance by Fannie Mae, Freddie Mac, any affiliate of either Enterprise, the Banks, or OF with the regulation, or would improve supervision by FHFA of Fannie Mae, Freddie Mac, any affiliate of either Enterprise, the Banks, or OF; and

(5) Demonstration of a better alternative method to effect a regulatory purpose or requirement, supported by compelling evidence of significantly less intrusive means or of a substantially more efficient method of accomplishing the same supervisory purpose.

In accordance with FHFA's Review Plan, the 2023 regulatory review process will be conducted by the FHFA Office of General Counsel, which will review all comments received and consult with other FHFA offices and divisions. After that review, a report of findings and recommendations will be provided to the FHFA Director. The report of findings and recommendations will be privileged and confidential. After receiving the report of findings and recommendations, the Director will determine what steps may be necessary to relieve any unnecessary burden, including amendment to or repeal of existing regulations or issuance of less formal guidance.

The 2023 FHFA regulatory review is not a formal or informal rulemaking proceeding under the Administrative Procedure Act and creates no right of action against FHFA. FHFA's determination whether to conduct or not to conduct a review of a regulation and any determination, finding, or recommendation resulting from any review is not a final agency action and therefore is not subject to judicial review.

**Sandra L. Thompson,**

*Director, Federal Housing Finance Agency.*

[FR Doc. 2023–07928 Filed 4–13–23; 8:45 am]

**BILLING CODE 8070–01–P**

[3] These are a regulation of the former Office of Federal Housing Enterprise Oversight on Prompt Corrective Action related to the Enterprises, at 12 CFR part 1777, which FHFA has suspended due to the Enterprise conservatorships; and a regulation of the Department of Housing and Urban Development on public-use databases and public information provided by the Enterprises, at 24 CFR part 81, subpart F.

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

**[Docket No. FAA–2023–0929; Project Identifier MCAI–2022–01401–T]**

**RIN 2120–AA64**

## Airworthiness Directives; BAE Systems (Operations) Limited Airplanes

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** The FAA proposes to adopt a new airworthiness directive (AD) for all BAE Systems (Operations) Limited Model 4101 airplanes. This proposed AD was prompted by in-service cracking of the passenger door edge member, seal carrier, and inner skin, adjacent to the roller guide bracket. This proposed AD would require a one-time inspection of the external visible surface of the inner skin, door edge member, and seal carrier adjacent to the roller bracket attachment brackets; and the inner skin, door edge member, and seal carrier at the roller bracket attachment bore, and repair if necessary. The FAA is proposing this AD to address the unsafe condition on these products.

**DATES:** The FAA must receive comments on this proposed AD by May 30, 2023.

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

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

*AD Docket:* You may examine the AD docket at *regulations.gov* under Docket No. FAA–2023–0929; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this NPRM, the mandatory continuing airworthiness information (MCAI), any comments received, and other information. The street address for Docket Operations is listed above.

**Material Incorporated by Reference**

- For service information identified in this NPRM, contact BAE Systems (Operations) Limited, Customer Information Department, Prestwick International Airport, Ayrshire, KA9 2RW, Scotland, United Kingdom; telephone +44 1292 675207; fax +44 1292 675704; email *RApublications@baesystems.com;* website *regional-services.com.*
- You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the

availability of this material at the FAA, call 206–231–3195.

**FOR FURTHER INFORMATION CONTACT:** Todd Thompson, Aerospace Engineer, Large Aircraft Section, FAA, International Validation Branch, 2200 South 216th St., Des Moines, WA 98198; telephone 206–231–3228; email *todd.thompson@faa.gov.*

**SUPPLEMENTARY INFORMATION:**

**Comments Invited**

The FAA invites you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under **ADDRESSES**. Include ''Docket No. FAA–2023–0929; Project Identifier MCAI–2022–01401–T'' at the beginning of your comments. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend the proposal because of those comments.

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

**Confidential Business Information**

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this NPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this NPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this NPRM. Submissions containing CBI should be sent to Todd Thompson, Aerospace Engineer, Large Aircraft Section, FAA, International Validation Branch, 2200 South 216th St., Des Moines, WA 98198; telephone 206–231–3228; email *todd.thompson@faa.gov.* Any commentary that the FAA receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

**Background**

The Civil Aviation Authority (CAA), which is the aviation authority for the United Kingdom (U.K.), has issued U.K. CAA AD G–2022–0019, dated October 31, 2022 (U.K. CAA AD G–2022–0019) (also referred to after this as the MCAI), to correct an unsafe condition on all BAE Systems (Operations) Limited Model 4101 airplanes. The MCAI states that in-service cracking occurred on the Jetstream 41 passenger door edge member, seal carrier, and inner skin, adjacent to the roller guide bracket. BAE Systems (Operations) Limited reviewed the fatigue test data and existing inspection requirements, and concluded a new inspection is needed to address this potential unsafe condition.

The FAA is proposing this AD to address undetected cracking of the passenger door. The unsafe condition, if not addressed, could result in a partial failure of the door, hindering passenger evacuation during an emergency or possibly causing cabin pressurization problems during flight, requiring passengers and crew to don oxygen masks.

You may examine the MCAI in the AD docket at *regulations.gov* under Docket No. FAA–2023–0929.

**Related Service Information Under 1 CFR Part 51**

The FAA reviewed BAe JETSTREAM Series 4100 Service Bulletin, Revision 1, dated June 8, 2022. This service information specifies procedures for a one-time eddy current inspection of the external visible surface of the inner skin, door edge member, and seal carrier adjacent to the roller bracket attachment brackets for cracking; a one-time eddy current inspection of the inner skin, door edge member, and seal carrier at the roller bracket attachment bores for cracking; and repair.

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

**FAA's Determination**

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to the FAA's bilateral agreement with this State of Design Authority, it has notified the FAA of the unsafe condition described in the MCAI and service information described above. The FAA is issuing this NPRM after determining that the unsafe condition described previously is likely to exist or develop on other products of the same type design.

**Proposed AD Requirements in This NPRM**

This proposed AD would require accomplishing the actions specified in the service information already described.

**Costs of Compliance**

The FAA estimates that this AD, if adopted as proposed, would affect 12 airplanes of U.S. registry. The FAA estimates the following costs to comply with this proposed AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS

| Labor cost | Parts cost | Cost per product | Cost on U.S. operators |
|---|---|---|---|
| 2 work-hours × $85 per hour = Up to $170 | $0 | $170 | $2,040 |

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

**Authority for This Rulemaking**

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

The FAA is issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701: General requirements. Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce.

This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

**Regulatory Findings**

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

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

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

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

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

**List of Subjects in 14 CFR Part 39**

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

**The Proposed Amendment**

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

## PART 39—AIRWORTHINESS DIRECTIVES

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

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

**§ 39.13 [Amended]**

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

**BAE Systems (Operations) Limited:** Docket No. FAA–2023–0929; Project Identifier MCAI–2022–01401–T.

**(a) Comments Due Date**

The FAA must receive comments on this airworthiness directive (AD) by May 30, 2023.

**(b) Affected ADs**

None.

**(c) Applicability**

This AD applies to all BAE Systems (Operations) Limited Model 4101 airplanes, certificated in any category.

**(d) Subject**

Air Transport Association (ATA) of America Code 52, Doors.

**(e) Unsafe Condition**

This AD was prompted by in-service cracking of the passenger door edge member, seal carrier, and inner skin, adjacent to the roller guide bracket. The FAA is issuing this AD to address undetected cracking of the passenger door. The unsafe condition, if not addressed, could result in a partial failure of the passenger door, and consequent reduced structural integrity of the passenger door.

**(f) Compliance**

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

**(g) Inspections**

At the applicable time specified in paragraph (g)(1) or (2) of this AD, accomplish an eddy current inspection of the external visible surface of the inner skin, door edge member, and seal carrier adjacent to the roller bracket attachment brackets for cracking; and an eddy current inspection of the inner skin, door edge member, and seal carrier at the roller bracket attachment bores for cracking, in accordance with paragraph 2.B. of the Accomplishment Instructions of BAe JETSTREAM Series 4100 Service Bulletin J41–52–065, Revision 1, dated June 8, 2022.

(1) For airplanes that have accumulated 18,000 total flight cycles or fewer as of the effective date of this AD: Accomplish the inspections prior to the accumulation of 20,000 total flight cycles.

(2) For airplanes that have accumulated more than 18,000 total flight cycles as of the effective date of this AD: Accomplish the inspections within 2,000 flight cycles after the effective date of this AD.

**(h) Corrective Actions**

If, during any inspection required by paragraph (g) of this AD, any crack is detected: Before further flight, repair using a method approved by the Manager, International Validation Branch, FAA; or the United Kingdom Civil Aviation Authority (U.K. CAA); or BAE Systems (Operations) Limited's U.K. CAA's (DOA). If approved by the DOA, the approval must include the DOA-authorized signature

**(i) No Reporting Requirement**

Although BAe JETSTREAM Series 4100 Service Bulletin J41–52–065, Revision 1, dated June 8, 2022, specifies to submit certain information to the manufacturer, this AD does not include that requirement.

**(j) Additional AD Provisions**

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Validation Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or responsible Flight Standards Office, as appropriate. If sending information directly to the manager, International Validation Branch, mail it to the address identified in paragraph (k)(2) of this AD or email to: *9-AVS-AIR-730-AMOC@faa.gov.* If mailing information, also submit information by email. Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the responsible Flight Standards Office.

(2) *Contacting the Manufacturer:* For any requirement in this AD to obtain instructions from a manufacturer, the instructions must be accomplished using a method approved by the Manager, International Validation Branch, FAA; or the U.K. CAA; or BAE Systems (Operations) Limited's U.K. CAA's Design Organization Approval (DOA). If approved by the DOA, the approval must include the DOA-authorized signature.

**(k) Additional Information**

(1) Refer to U.K. CAA G–2022–0019, dated October 31, 2022, for related information. This U.K. CAA AD may be found in the AD docket at *regulations.gov* under Docket No. FAA–2023–0929.

(2) For more information about this AD, contact Todd Thompson, Aerospace Engineer, Large Aircraft Section, FAA, International Validation Branch, 2200 South 216th St., Des Moines, WA 98198; telephone 206–231–3228; email *todd.thompson@faa.gov.*

**(l) Material Incorporated by Reference**

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

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

(i) BAe JETSTREAM Series 4100 Service Bulletin J41–52–065, Revision 1, dated June 8, 2022.

(ii) [Reserved]

(3) For service information identified in this AD, contact BAE Systems (Operations) Limited, Customer Information Department, Prestwick International Airport, Ayrshire, KA9 2RW, Scotland, United Kingdom; telephone +44 1292 675207; fax +44 1292 675704; email *RApublications@baesystems.com;* website *regional-services.com.*

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

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

Issued on April 8, 2023.

**Christina Underwood,**

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

[FR Doc. 2023–07826 Filed 4–13–23; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### 14 CFR Part 39

**[Docket No. FAA–2023–0927; Project Identifier MCAI–2023–00013–T]**

**RIN 2120–AA64**

## Airworthiness Directives; Airbus SAS Airplanes

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** The FAA proposes to adopt a new airworthiness directive (AD) for all Airbus SAS Model A350–941 and –1041 airplanes. This proposed AD was prompted by a determination that new or more restrictive airworthiness limitations are necessary. This proposed AD would require revising the existing maintenance or inspection program, as applicable, to incorporate new or more restrictive airworthiness limitations, as specified in a European Union Aviation Safety Agency (EASA) AD, which is proposed for incorporation by reference (IBR). The FAA is proposing this AD to address the unsafe condition on these products.

**DATES:** The FAA must receive comments on this proposed AD by May 30, 2023.

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

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

*AD Docket:* You may examine the AD docket at *regulations.gov* under Docket No. FAA–2023–0927; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this NPRM, the mandatory continuing airworthiness information (MCAI), any comments received, and other information. The street address for Docket Operations is listed above.

### Material Incorporated by Reference

- For material that is proposed for IBR in this NPRM, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* website *easa.europa.eu.* You may find this material on the EASA website at *ad.easa.europa.eu.* It is also available at *regulations.gov* under Docket No. FAA–2023–0927.
- You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th Street, Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195.

**FOR FURTHER INFORMATION CONTACT:** Dat Le, Aerospace Engineer, Large Aircraft Section, FAA, International Validation Branch, 2200 South 216th Street, Des Moines, WA 98198; telephone 516–228–7317; email *dat.v.le@faa.gov.*

**SUPPLEMENTARY INFORMATION:**

### Comments Invited

The FAA invites you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under **ADDRESSES**. Include ''Docket No. FAA–2023–0927; Project Identifier MCAI–2023–00013–T'' at the beginning of your comments. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend this proposal because of those comments.

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

### Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this NPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this NPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this NPRM. Submissions containing CBI should be sent to Dat Le, Aerospace Engineer, Large Aircraft Section, FAA, International Validation Branch, 2200 South 216th Street, Des Moines, WA 98198; telephone 516–228–7317; email *dat.v.le@faa.gov.* Any commentary that the FAA receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

### Background

EASA, which is the Technical Agent for the Member States of the European Union, has issued EASA AD 2023–0004, dated January 6, 2023 (EASA AD 2023–0004) (also referred to as the MCAI), to correct an unsafe condition for all Airbus SAS Model A350–941 and A350–1041 airplanes. Airplanes with an original airworthiness certificate or original export certificate of airworthiness issued after November 1, 2022 must comply with the airworthiness limitations specified as part of the approved type design and referenced on the type certificate data sheet; this AD therefore does not include those airplanes in the applicability. The MCAI states that new or more restrictive airworthiness limitations are necessary.

EASA AD 2023–0004 specifies that it requires tasks (limitations) already in Airbus A350 Airworthiness Limitations Section (ALS), Part 2, Revision 08, dated May 2, 2022, that is required by EASA AD 2022–0125, dated June 28, 2022 (which corresponds to FAA AD 2023–04–05, Amendment 39–22352 (88 FR 13668, March 6, 2023) (AD 2023–04–05)), and that incorporation of EASA AD 2023–0004 invalidates (terminates) prior instructions for those tasks. This proposed AD would therefore terminate the limitations for the tasks identified in the service information referenced in EASA AD 2023–0004 only, as required by paragraph (j) of AD 2023–04–05.

The FAA is proposing this AD to address reduced structural integrity of the airplane. See the MCAI for additional background information. You may examine the MCAI in the AD docket at *regulations.gov* under Docket No. FAA–2023–0927.

### Related Service Information Under 1 CFR Part 51

EASA AD 2023–0004 describes new or more restrictive airworthiness limitations for airplane structures and safe life limits. This material is reasonably available because the interested parties have access to it

through their normal course of business or by the means identified in **ADDRESSES** section.

**FAA's Determination**

This product has been approved by the aviation authority of another country and is approved for operation in the United States. Pursuant to the FAA's bilateral agreement with this State of Design Authority, it has notified the FAA of the unsafe condition described in the MCAI described above. The FAA is issuing this NPRM after determining that the unsafe condition described previously is likely to exist or develop in other products of the same type design.

**Proposed AD Requirements in This NPRM**

This proposed AD would require revising the existing maintenance or inspection program, as applicable, to incorporate new or more restrictive airworthiness limitations, which are specified in EASA AD 2023–0004 described previously, as incorporated by reference. Any differences with EASA AD 2023–0004 are identified as exceptions in the regulatory text of this proposed AD.

This proposed AD would require revisions to certain operator maintenance documents to include new actions (*e.g.,* inspections). Compliance with these actions and intervals is required by 14 CFR 91.403(c). For airplanes that have been previously modified, altered, or repaired in the areas addressed by this proposed AD, the operator may not be able to accomplish the actions described in the revisions. In this situation, to comply with 14 CFR 91.403(c), the operator must request approval for an alternative method of compliance (AMOC) according to paragraph (k)(1) of this proposed AD.

**Explanation of Required Compliance Information**

In the FAA's ongoing efforts to improve the efficiency of the AD process, the FAA developed a process to use some civil aviation authority (CAA) ADs as the primary source of information for compliance with requirements for corresponding FAA ADs. The FAA has been coordinating this process with manufacturers and CAAs. As a result, the FAA proposes to incorporate EASA AD 2023–0004 by reference in the FAA final rule. This proposed AD would, therefore, require compliance with EASA AD 2023–0004 through that incorporation, except for any differences identified as exceptions in the regulatory text of this proposed AD. Using common terms that are the same as the heading of a particular section in EASA AD 2023–0004 does not mean that operators need comply only with that section. For example, where the AD requirement refers to ''all required actions and compliance times,'' compliance with this AD requirement is not limited to the section titled ''Required Action(s) and Compliance Time(s)'' in EASA AD 2023–0004. Service information required by EASA AD 2023–0004 for compliance will be available at *regulations.gov* under Docket No. FAA–2023–0927 after the FAA final rule is published.

**Airworthiness Limitation ADs Using the New Process**

The FAA's process of incorporating by reference MCAI ADs as the primary source of information for compliance with corresponding FAA ADs has been limited to certain MCAI ADs (primarily those with service bulletins as the primary source of information for accomplishing the actions required by the FAA AD). However, the FAA is now expanding the process to include MCAI ADs that require a change to airworthiness limitation documents, such as airworthiness limitation sections.

For these ADs that incorporate by reference an MCAI AD that changes airworthiness limitations, the FAA requirements are unchanged. Operators must revise the existing maintenance or inspection program, as applicable, to incorporate the information specified in the new airworthiness limitation document. The airworthiness limitations must be followed according to 14 CFR 91.403(c) and 91.409(e).

The previous format of the airworthiness limitation ADs included a paragraph that specified that no alternative actions (*e.g.,* inspections) or intervals may be used unless the actions and intervals are approved as an AMOC in accordance with the procedures specified in the AMOC paragraph under ''Additional AD Provisions.'' This new format includes a ''New Provisions for Alternative Actions'' paragraph that does not specifically refer to AMOCs, but operators may still request an AMOC to use an alternative action, or interval.

**Costs of Compliance**

The FAA estimates that this AD, if adopted as proposed, would affect 31 airplanes of U.S. registry. The FAA estimates the following costs to comply with this proposed AD.

The FAA has determined that revising the existing maintenance or inspection program takes an average of 90 work-hours per operator, although the agency recognizes that this number may vary from operator to operator. Since operators incorporate maintenance or inspection program changes for their affected fleet(s), the FAA has determined that a per-operator estimate is more accurate than a per-airplane estimate. Therefore, the agency estimates the average total cost per operator to be $7,650 (90 work-hours × $85 per work-hour).

**Authority for This Rulemaking**

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

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

**Regulatory Findings**

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

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

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

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

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

**List of Subjects in 14 CFR Part 39**

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

**The Proposed Amendment**

Accordingly, under the authority delegated to me by the Administrator,

the FAA proposes to amend 14 CFR part 39 as follows:

## PART 39—AIRWORTHINESS DIRECTIVES

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

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

**§ 39.13 [Amended]**

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

**Airbus SAS:** Docket No. FAA–2023–0927; Project Identifier MCAI–2023–00013–T.

**(a) Comments Due Date**

The FAA must receive comments on this airworthiness directive (AD) by May 30, 2023.

**(b) Affected ADs**

This AD affects AD 2023–04–05, Amendment 39–22352 (88 FR 13668, March 6, 2023) (AD 2023–04–05).

**(c) Applicability**

This AD applies to Airbus SAS Model A350–941 and –1041 airplanes, certificated in any category, with an original airworthiness certificate or original export certificate of airworthiness issued on or before November 1, 2022.

**(d) Subject**

Air Transport Association (ATA) of America Code: 05, Time Limits/Maintenance Checks.

**(e) Unsafe Condition**

This AD was prompted by a determination that new or more restrictive airworthiness limitations are necessary. The FAA is issuing this AD to address reduced structural integrity of the airplane.

**(f) Compliance**

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

**(g) Requirements**

Except as specified in paragraph (h) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, European Union Aviation Safety Agency (EASA) AD 2023–0004, dated January 6, 2023 (EASA AD 2023–0004).

**(h) Exceptions to EASA AD 2023–0004**

(1) This AD does not adopt the requirements specified in paragraphs (1) and (2) of EASA AD 2023–0004.

(2) Paragraph (3) of EASA AD 2023–0004 specifies revising ''the approved AMP'' within 12 months after its effective date, but this AD requires revising the existing maintenance or inspection program, as applicable, within 90 days after the effective date of this AD.

(3) The initial compliance time for doing the tasks specified in paragraph (3) of EASA 2023–0004 is on or before the applicable ''associated thresholds'' as incorporated by the requirements of paragraph (3) of EASA AD 2023–0004, or within 90 days after the effective date of this AD, whichever occurs later.

(4) This AD does not adopt the provisions specified in paragraphs (4) of EASA AD 2023–0004.

(5) This AD does not adopt the ''Remarks'' section of EASA AD 2023–0004.

**(i) Provisions for Alternative Actions and Intervals**

After the existing maintenance or inspection program has been revised as required by paragraph (g) of this AD, no alternative actions (*e.g.,* inspections) and intervals are allowed unless they are approved as specified in the provisions of the ''Ref. Publications'' section of EASA AD 2023–0017.

**(j) Terminating Action for AD 2023–04–05**

Accomplishing the actions required by this AD terminates the corresponding requirements of AD 2023–04–05, for the tasks identified in the service information referenced in EASA AD 2023–0004 only.

**(k) Additional AD Provisions**

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Validation Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or responsible Flight Standards Office, as appropriate. If sending information directly to the International Validation Branch, send it to the attention of the person identified in paragraph (l) of this AD. Information may be emailed to: *9-AVS-AIR-730-AMOC@faa.gov.* Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the responsible Flight Standards Office.

(2) *Contacting the Manufacturer:* For any requirement in this AD to obtain instructions from a manufacturer, the instructions must be accomplished using a method approved by the Manager, International Validation Branch, FAA; or EASA; or Airbus SAS's EASA Design Organization Approval (DOA). If approved by the DOA, the approval must include the DOA-authorized signature.

**(l) Additional Information**

For more information about this AD, contact Dat Le, Aerospace Engineer, Large Aircraft Section, FAA, International Validation Branch, 2200 South 216th Street, Des Moines, WA 98198; telephone 516–228–7317; email *dat.v.le@faa.gov.*

**(m) Material Incorporated by Reference**

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

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

(i) European Union Aviation Safety Agency (EASA) AD 2023–0004, dated January 6, 2023.

(ii) [Reserved]

(3) For EASA AD 2023–0004, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email: *ADs@easa.europa.eu;* website: *easa.europa.eu.* You may find this EASA AD on the EASA website: *ad.easa.europa.eu.*

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

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

Issued on April 8, 2023.

**Christina Underwood,**

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

[FR Doc. 2023–07829 Filed 4–13–23; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

**[Docket No. FAA–2023–0928; Project Identifier MCAI–2023–00134–T]**

**RIN 2120–AA64**

## Airworthiness Directives; Airbus SAS Airplanes

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** The FAA proposes to adopt a new airworthiness directive (AD) for all Airbus SAS A300 B4–600, B4–600R, and F4–600R series airplanes, and Model A300 C4–605R Variant F airplanes (collectively called Model A300–600 series airplanes). This proposed AD was prompted by a determination that new or more restrictive airworthiness limitations are necessary. This proposed AD would require revising the existing maintenance or inspection program, as applicable, to incorporate new or more restrictive airworthiness limitations, as specified in a European Union Aviation Safety Agency (EASA) AD, which is proposed for incorporation by reference (IBR). The FAA is proposing this AD to address the unsafe condition on these products.

**DATES:** The FAA must receive comments on this proposed AD by May 30, 2023.

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

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

*AD Docket:* You may examine the AD docket at *regulations.gov* under Docket No. FAA–2023–0928; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this NPRM, the mandatory continuing airworthiness information (MCAI), any comments received, and other information. The street address for Docket Operations is listed above.

**Material Incorporated by Reference**

- For material that is proposed for IBR in this NPRM, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email: *ADs@easa.europa.eu;* website: *easa.europa.eu.* You may find this material on the EASA website: *ad.easa.europa.eu.* It is also available at *regulations.gov* under Docket No. FAA–2023–0928.
- You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th Street, Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195.

**FOR FURTHER INFORMATION CONTACT:** Dan Rodina, Aerospace Engineer, Large Aircraft Section, International Validation Branch, FAA, 2200 South 216th Street, Des Moines, WA 98198; telephone 206–231–3225; email *dan.rodina@faa.gov.*

**SUPPLEMENTARY INFORMATION:**

**Comments Invited**

The FAA invites you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under **ADDRESSES**. Include ''Docket No. FAA–2023–0928; Project Identifier MCAI–2023–00134–T'' at the beginning of your comments. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend this proposal because of those comments.

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

**Confidential Business Information**

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this NPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this NPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this NPRM. Submissions containing CBI should be sent to Dan Rodina, Aerospace Engineer, Large Aircraft Section, International Validation Branch, FAA, 2200 South 216th Street, Des Moines, WA 98198; telephone 206–231–3225; email *dan.rodina@faa.gov.* Any commentary that the FAA receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

**Background**

EASA, which is the Technical Agent for the Member States of the European Union, has issued EASA AD 2023–0017, dated January 23, 2023 (EASA AD 2023–0017) (also referred to as the MCAI), to correct an unsafe condition for all Airbus SAS Model A300B4–601, A300B4–603, A300B4–620, A300B4–622, A300B4–605R, A300B4–622R, A300C4–605R Variant F, A300C4–620, A300F4–605R and A300F4–622R airplanes. Model A300C4–620 airplanes are not certificated by the FAA and are not included on the U.S. type certificate data sheet; this proposed AD therefore does not include those airplanes in the applicability. The MCAI states that new or more restrictive airworthiness limitations have been developed.

EASA AD 2023–0017 specifies that it requires a task (limitation) already in Airbus A300–600 Airworthiness Limitations Section (ALS) Part 4, System Equipment Maintenance Requirements (SEMR), Revision 03 that is required by EASA AD 2017–0202, dated October 12, 2017 (which corresponds to FAA AD 2018–18–21, Amendment 39–19400 (83 FR 47054, September 18, 2018) (AD 2018–18–21)), and that incorporation of EASA AD 2023–0017 invalidates (terminates) prior instructions for that task. This proposed AD, therefore would, for the tasks identified in the service information referenced in EASA AD 2023–0017, terminate the limitations required by paragraph (g) of AD 2018–18–21, for Model A300B4–601, A300B4–603, A300B4–620, A300B4–622, A300B4–605R, A300B4–622R, A300C4–605R Variant F, A300F4–605R and A300F4–622R airplanes only.

The FAA is proposing this AD to address the risks associated with the effects of aging on airplane systems. The unsafe condition, if not addressed, could change system characteristics, leading to an increased potential for failure of certain life-limited parts, and reduced structural integrity or controllability of the airplane. You may examine the MCAI in the AD docket at *regulations.gov* under Docket No. FAA–2023–0928.

**Related Service Information Under 1 CFR Part 51**

EASA AD 2023–0017 specifies new or more restrictive airworthiness limitations for airplane structures and safe life limits. This material is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in **ADDRESSES** section.

**FAA's Determination**

This product has been approved by the aviation authority of another country and is approved for operation in the United States. Pursuant to the FAA's bilateral agreement with the State of Design Authority, it has notified the FAA of the unsafe condition described in the MCAI referenced above. The FAA is issuing this NPRM after determining that the unsafe condition described previously is likely to exist or develop in other products of the same type design.

**Proposed AD Requirements in This NPRM**

This proposed AD would require revising the existing maintenance or inspection program, as applicable, to incorporate new or more restrictive airworthiness limitations, which are specified in EASA AD 2023–0017 described previously, except for any differences identified as exceptions in the regulatory text of this proposed AD.

This proposed AD would require revisions to certain operator maintenance documents to include new actions (*e.g.,* inspections). Compliance with these actions and intervals is required by 14 CFR 91.403(c). For airplanes that have been previously modified, altered, or repaired in the areas addressed by this proposed AD, the operator may not be able to accomplish the actions described in the revisions. In this situation, to comply with 14 CFR 91.403(c), the operator must request approval for an alternative method of compliance (AMOC) according to paragraph (k)(1) of this proposed AD.

**Explanation of Required Compliance Information**

In the FAA's ongoing efforts to improve the efficiency of the AD process, the FAA developed a process to use some civil aviation authority (CAA) ADs as the primary source of information for compliance with requirements for corresponding FAA ADs. The FAA has been coordinating this process with manufacturers and CAAs. As a result, the FAA proposes to incorporate EASA AD 2023–0017 by reference in the FAA final rule. This proposed AD would, therefore, require compliance with EASA AD 2023–0017 through that incorporation, except for any differences identified as exceptions in the regulatory text of this proposed AD. Using common terms that are the same as the heading of a particular section in EASA AD 2023–0017 does not mean that operators need comply only with that section. For example, where the AD requirement refers to ''all required actions and compliance times,'' compliance with this AD requirement is not limited to the section titled ''Required Action(s) and Compliance Time(s)'' in EASA AD 2023–0017. Service information required by EASA AD 2023–0017 for compliance will be available at *regulations.gov* by searching for and locating Docket No. FAA–2023–0928 after the FAA final rule is published.

**Airworthiness Limitation ADs Using the New Process**

The FAA's process of incorporating by reference MCAI ADs as the primary source of information for compliance with corresponding FAA ADs has been limited to certain MCAI ADs (primarily those with service bulletins as the primary source of information for accomplishing the actions required by the FAA AD). However, the FAA is now expanding the process to include MCAI ADs that require a change to airworthiness limitation documents, such as airworthiness limitation sections.

For these ADs that incorporate by reference an MCAI AD that changes airworthiness limitations, the FAA requirements are unchanged. Operators must revise the existing maintenance or inspection program, as applicable, to incorporate the information specified in the new airworthiness limitation document. The airworthiness limitations must be followed according to 14 CFR 91.403(c) and 91.409(e).

The previous format of the airworthiness limitation ADs included a paragraph that specified that no alternative actions (*e.g.,* inspections) or intervals may be used unless the actions and intervals are approved as an AMOC in accordance with the procedures specified in the AMOC paragraph under ''Additional AD Provisions.'' This new format includes a ''New Provisions for Alternative Actions'' paragraph that does not specifically refer to AMOCs, but operators may still request an AMOC to use an alternative action, or interval.

**Costs of Compliance**

The FAA estimates that this AD, if adopted as proposed, would affect 120 airplanes of U.S. registry. The FAA estimates the following costs to comply with this proposed AD:

The FAA has determined that revising the existing maintenance or inspection program takes an average of 90 work-hours per operator, although the agency recognizes that this number may vary from operator to operator. Since operators incorporate maintenance or inspection program changes for their affected fleet(s), the FAA has determined that a per-operator estimate is more accurate than a per-airplane estimate. Therefore, the agency estimates the average total cost per operator to be $7,650 (90 work-hours × $85 per work-hour).

**Authority for This Rulemaking**

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

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

**Regulatory Findings**

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

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

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

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

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

**List of Subjects in 14 CFR Part 39**

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

**The Proposed Amendment**

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

## PART 39—AIRWORTHINESS DIRECTIVES

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

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

**§ 39.13 [Amended]**

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

**Airbus SAS:** Docket No. FAA–2023–0928; Project Identifier MCAI–2023–00134–T.

**(a) Comments Due Date**

The FAA must receive comments on this airworthiness directive (AD) by May 30, 2023.

**(b) Affected ADs**

This AD affects AD 2018–18–21, Amendment 39–19400 (83 FR 47054, September 18, 2018) (AD 2018–18–21).

**(c) Applicability**

This AD applies to all Airbus SAS Model A300B4–601, A300B4–603, A300B4–620, A300B4–622, A300B4–605R, A300B4–622R, A300C4–605R Variant F, A300F4–605R and A300F4–622R airplanes, certificated in any category.

**(d) Subject**

Air Transport Association (ATA) of America Code: 05, Time Limits/Maintenance Checks.

**(e) Unsafe Condition**

This AD was prompted by a determination that new or more restrictive airworthiness limitations are necessary. The FAA is issuing this AD to address the risks associated with the effects of aging on airplane systems. The unsafe condition, if not addressed, could change system characteristics, leading to an increased potential for failure of certain life-limited parts, and reduced structural integrity or controllability of the airplane.

**(f) Compliance**

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

**(g) Requirements**

Except as specified in paragraph (h) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, European Union Aviation Safety Agency (EASA) AD 2023–0017, dated January 23, 2023 (EASA AD 2023–0017).

**(h) Exceptions to EASA AD 2023–0017**

(1) This AD does not adopt the requirements specified in paragraphs (1) and (2) of EASA AD 2023–0017.

(2) Paragraph (3) of EASA AD 2023–0017 specifies revising ''the approved AMP'' within 12 months after its effective date, but this AD requires revising the existing maintenance or inspection program, as applicable, within 90 days after the effective date of this AD.

(3) The initial compliance time for doing the tasks specified in paragraph (3) of EASA 2023–0017 is on or before the applicable ''limitations'' as incorporated by the requirements of paragraph (3) of EASA AD 2023–0017, or within 90 days after the effective date of this AD, whichever occurs later.

(4) This AD does not adopt the provisions specified in paragraph (4) of EASA AD 2023–0017.

(5) This AD does not adopt the ''Remarks'' section of EASA AD 2023–0017.

**(i) Provisions for Alternative Actions and Intervals**

After the existing maintenance or inspection program has been revised as required by paragraph (g) of this AD, no alternative actions (*e.g.,* inspections) and intervals are allowed unless they are approved as specified in the provisions of the ''Ref. Publications'' section of EASA AD 2023–0017.

**(j) Terminating Action for AD 2018–18–21**

For Model A300B4–601, A300B4–603, A300B4–620, A300B4–622, A300B4–605R, A300B4–622R, A300C4–605R Variant F, A300F4–605R and A300F4–622R airplanes only: Accomplishing the actions required by this AD terminates the corresponding requirements of AD 2018–18–21, for the tasks identified in the service information referenced in EASA AD 2023–0017 only.

**(k) Additional AD Provisions**

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Validation Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or responsible Flight Standards Office, as appropriate. If sending information directly to the International Validation Branch, send it to the person identified in paragraph (l) of this AD. Information may be emailed to: *9-AVS-AIR-730-AMOC@faa.gov.* Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

(2) *Contacting the Manufacturer:* For any requirement in this AD to obtain instructions from a manufacturer, the instructions must be accomplished using a method approved by the Manager, International Validation Branch, FAA; or EASA; or Airbus SAS's EASA Design Organization Approval (DOA). If approved by the DOA, the approval must include the DOA-authorized signature.

**(l) Additional Information**

For more information about this AD, contact Dan Rodina, Aerospace Engineer, Large Aircraft Section, International Validation Branch, FAA, 2200 South 216th Street, Des Moines, WA 98198; telephone 206–231–3225; email *dan.rodina@faa.gov.*

**(m) Material Incorporated by Reference**

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

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

(i) European Union Aviation Safety Agency (EASA) AD 2023–0017, dated January 23, 2023.

(ii) [Reserved]

(3) For EASA AD 2023–0017, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email: *ADs@easa.europa.eu;* website: *easa.europa.eu.* You may find this EASA AD on the EASA website: *ad.easa.europa.eu.*

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

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

Issued on April 8, 2023.

**Christina Underwood,**

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

[FR Doc. 2023–07828 Filed 4–13–23; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

**[Docket No. FAA–2023–0926; Project Identifier MCAI–2022–01583–A]**

**RIN 2120–AA64**

## Airworthiness Directives; Pilatus Aircraft Ltd. Airplanes

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** The FAA proposes to adopt a new airworthiness directive (AD) for certain Pilatus Aircraft Ltd. (Pilatus) Model PC–24 airplanes. This proposed AD was prompted by a report that an incorrect wiring arrangement was detected around the weather radar system. This proposed AD would require modifying the weather radar redundant wiring, as specified in a European Union Aviation Safety Agency (EASA) AD, which is proposed for incorporation by reference (IBR). The FAA is proposing this AD to address the unsafe condition on these products.

**DATES:** The FAA must receive comments on this NPRM by May 30, 2023.

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

- *Federal eRulemaking Portal:* Go to *regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* (202) 493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

• *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

*AD Docket:* You may examine the AD docket at *regulations.gov* under Docket No. FAA–2023–0926; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this NPRM, the mandatory continuing airworthiness information (MCAI), any comments received, and other information. The street address for Docket Operations is listed above.

**Material Incorporated by Reference**

• For EASA service information that is proposed for IBR in this NPRM, contact EASA Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; phone: +49 221 8999 000; email: *ADs@easa.europa.eu;* website: *easa.europa.eu.* You may find this service information on the EASA website at *ad.easa.europa.eu.*

• 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. The EASA service information is also available at *regulations.gov* under Docket No. FAA–2023–0926.

**FOR FURTHER INFORMATION CONTACT:** Doug Rudolph, Aviation Safety Engineer, General Aviation & Rotorcraft Section, International Validation Branch, FAA, 901 Locust, Room 301, Kansas City, MO 64106; phone: (816) 329–4059; email: *doug.rudolph@faa.gov.*

**SUPPLEMENTARY INFORMATION:**

**Comments Invited**

The FAA invites you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under **ADDRESSES**. Include ''Docket No. FAA–2023–0926; Project Identifier MCAI–2022–01583–A'' at the beginning of your comments. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend this proposal because of those comments.

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

**Confidential Business Information**

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this NPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this NPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this NPRM. Submissions containing CBI should be sent to Doug Rudolph, Aviation Safety Engineer, General Aviation & Rotorcraft Section, International Validation Branch, FAA, 901 Locust, Room 301, Kansas City, MO 64106. Any commentary that the FAA receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

**Background**

EASA, which is the Technical Agent for the Member States of the European Union, has issued EASA AD 2022–0249, dated December 14, 2022 (EASA AD 2022–0249) (referred to after this as the MCAI), to correct an unsafe condition on certain serial-numbered Pilatus Model PC–24 airplanes. The MCAI states an occurrence was reported where an incorrect wiring arrangement was detected around the weather radar system on certain Pilatus Model PC–24 airplanes. In case of a lightning strike, the functionalities related to the Advanced Graphic Module (AGM) 1 and AGM2, the Dual Generic Input/Output (DGI0) 1 card in the Modular Avionics Unit (MAU) 1 module of the Honeywell Advanced Cockpit Environment (ACE) system, and the Attitude Heading Reference System (AHRS) 2 could be affected. The MCAI specifies modification of the weather radar redundant wiring.

The FAA is proposing this AD to address an incorrect wiring arrangement around the weather radar system which, if not corrected, could lead to the partial loss of flight and navigation data displayed to the pilot or pilots, possibly resulting in increased flight crew workload and a consequent reduction of safety margins.

You may examine the MCAI in the AD docket at *regulations.gov* under Docket No. FAA–2023–0926.

**Related Service Information Under 1 CFR Part 51**

EASA AD 2022–0249 requires modification of the weather radar redundant wiring.

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**.

**FAA's Determination**

These products have been approved by the aviation authority of another country and are approved for operation in the United States. Pursuant to the FAA's bilateral agreement with this State of Design Authority, it has notified the FAA of the unsafe condition described in the MCAI described above. The FAA is issuing this NPRM after determining that the unsafe condition described previously is likely to exist or develop on other products of the same type design.

**Proposed AD Requirements in This NPRM**

This proposed AD would require accomplishing the actions specified in the MCAI.

**Explanation of Required Compliance Information**

In the FAA's ongoing efforts to improve the efficiency of the AD process, the FAA developed a process to use some civil aviation authority (CAA) ADs as the primary source of information for compliance with requirements for corresponding FAA ADs. The FAA has been coordinating this process with manufacturers and CAAs. As a result, the FAA proposes to incorporate EASA AD 2022–0249 by reference in the FAA final rule. This proposed AD would, therefore, require compliance with EASA AD 2022–0249 in its entirety through that incorporation, except for any differences identified as exceptions in the regulatory text of this proposed AD. Service information referenced in EASA AD 2022–0249 for compliance will be available at *regulations.gov* under Docket No. FAA–2023–0926 after the FAA final rule is published.

**Costs of Compliance**

The FAA estimates that this AD, if adopted as proposed, would affect 12 airplanes of U.S. registry.

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

ESTIMATED COSTS

| Action | Labor cost | Parts cost | Cost per product | Cost on U.S. operators |
|---|---|---|---|---|
| Modification | 16 work-hours × $85 per hour = $1,360 | $5,000 | $6,360 | $76,320 |

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

**Authority for This Rulemaking**

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

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

**Regulatory Findings**

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

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

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

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

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

**List of Subjects in 14 CFR Part 39**

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

**The Proposed Amendment**

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

## PART 39—AIRWORTHINESS DIRECTIVES

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

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

**§ 39.13 [Amended]**

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

**Pilatus Aircraft Ltd.:** Docket No. FAA–2023–0926; Project Identifier MCAI–2022–01583–A.

**(a) Comments Due Date**

The FAA must receive comments on this airworthiness directive (AD) by May 30, 2023.

**(b) Affected ADs**

None.

**(c) Applicability**

This AD applies to Pilatus Aircraft Ltd. Model PC–24 airplanes, serial numbers 231 through 252 inclusive and serial numbers 254 and 255, certificated in any category.

**(d) Subject**

Joint Aircraft System Component (JASC) Codes 3497, Navigation System Wiring; and 3442, Weather Radar System.

**(e) Unsafe Condition**

This AD was prompted by a report that an incorrect wiring arrangement was detected around the weather radar system. The FAA is issuing this AD to address an incorrect wiring arrangement around the weather radar system. The unsafe condition, if not addressed, could, in the case of a lightning strike, lead to the partial loss of flight and navigation data displayed to the pilot or pilots, possibly resulting in increased flight crew workload and a consequent reduction of safety margins.

**(f) Compliance**

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

**(g) Required Actions**

Except as specified in paragraphs (h) and (i) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, European Union Aviation Safety Agency (EASA) AD 2022–0249, dated December 14, 2022 (EASA AD 2022–0249).

**(h) Exceptions to EASA AD 2022–0249**

(1) Where EASA AD 2022–0249 requires compliance from its effective date, this AD requires using the effective date of this AD.

(2) Where the service information referenced in paragraph (1) of EASA AD 2022–0249 specifies removing and discarding parts, this AD requires removing those parts from service.

(3) This AD does not adopt the ''Remarks'' paragraph of EASA AD 2022–0249.

**(i) No Reporting Requirement**

Although the service information referenced in EASA AD 2022–0249 specifies to submit certain information to the manufacturer, this AD does not include that requirement.

**(j) Alternative Methods of Compliance (AMOCs)**

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

**(k) Additional Information**

For more information about this AD, contact Doug Rudolph, Aviation Safety Engineer, General Aviation & Rotorcraft Section, International Validation Branch, FAA, 901 Locust, Room 301, Kansas City, MO 64106; phone: (816) 329–4059; email: *doug.rudolph@faa.gov.*

**(l) Material Incorporated by Reference**

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

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

(i) European Union Aviation Safety Agency AD 2022–0249, dated December 14, 2022.

(ii) [Reserved]

(3) For EASA AD 2022–0249, contact EASA Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; phone: +49 221 8999 000; email: *ADs@easa.europa.eu;* website: *easa.europa.eu.*

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

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

Issued on April 8, 2023.

**Christina Underwood,**

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

[FR Doc. 2023–07775 Filed 4–13–23; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 71

**[Docket No. FAA–2023–0914; Airspace Docket No. 23–AGL–10]**

**RIN 2120–AA66**

## Amendment of Class E Airspace; Madison Dane County Regional Airport-Truax Field, WI

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** This action proposes to amend the Class E airspace at Madison Dane County Regional Airport-Truax Field, WI, and establish Class E airspace at Madison, WI. The FAA is proposing this action as the result of an airspace review requested by the FAA Airspace Rules and Regulations office. The name and geographic coordinates of various airports would also be updated to coincide with the FAA's aeronautical database.

**DATES:** Comments must be received on or before May 30, 2023.

**ADDRESSES:** Send comments identified by FAA Docket No. FAA–2023–0914 and Airspace Docket No. 23–AGL–10 using any of the following methods:

* *Federal eRulemaking Portal:* Go to *www.regulations.gov* and follow the online instruction for sending your comments electronically.

* *Mail:* Send comments to Docket Operations, M–30; U.S. Department of Transportation, 1200 New Jersey Avenue SE, Room W12–140, West Building Ground Floor, Washington, DC 20590–0001.

* *Hand Delivery or Courier:* Take comments to Docket Operations in Room W12–140 OF THE West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

* *Fax:* Fax comments to Docket Operations at (202) 493–2251.

*Docket:* Background documents or comments received may be read at *www.regulations.gov* at any time. Follow the online instructions for accessing the docket or go to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FAA Order JO 7400.11G, Airspace Designations and 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:** Jeffrey Claypool, Federal Aviation Administration, Operations Support Group, Central Service Center, 10101 Hillwood Parkway, Fort Worth, TX 76177; telephone (817) 222–5711.

**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 would amend the Class E surface airspace, the Class E airspace designated as an extension to a Class C surface area, and the Class E airspace extending upward from 700 feet above the surface, and establish Class E airspace designated as an extension to a Class E surface area at Dane County Regional Airport/Truax Field, Madison, WI, to support instrument flight rule operations at this airport.

### Comments Invited

The FAA invites interested persons to participate in this rulemaking by submitting written comments, data, or views. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. To ensure the docket does not contain duplicate comments, commenters should submit only one time if comments are filed electronically, or commenters should send only one copy of written comments if comments are filed in writing.

The FAA will file in the docket all comments it receives, as well as a report summarizing each substantive public contact with FAA personnel concerning this proposed rulemaking. Before acting on this proposal, the FAA will consider all comments it received on or before the closing date for comments. The FAA will consider comments filed after the comment period has closed if it is possible to do so without incurring expense or dely. The FAA may change this proposal in light of the comments it receives.

*Privacy:* In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT post these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov* as described in the system of records notice (DOT/ALL–14FDMS), which can be reviewed at *www.dot.gov/privacy.*

### Availability of Rulemaking Documents

An electronic copy of this document may be downloaded through the internet at *www.regulations.gov.* Recently published rulemaking documents can also be accessed through the FAA's web page at *www.faa.gov/air_traffic/publications/airspace_amendments/.*

You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office (see the **ADDRESSES** section for the address, phone number, and hours of operations). An informal docket may also be examined during normal

business hours at the Federal Aviation Administration, Air Traffic Organization, Central Service Center, Operations Support Group, 10101 Hillwood Parkway, Fort Worth, TX 76177.

**Incorporation by Reference**

Class E airspace is published in paragraphs 6002, 6003, 6004, and 6005 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 proposes to amend the current version of that order, FAA Order JO 7400.11G, dated August 19, 2022, and effective September 15, 2022. These updates would be published subsequently in the next update to FAA Order JO 7400.11. That order is publicly available as listed in the **ADDRESSES** section of this document.

FAA Order JO 7400.11G lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

**The Proposal**

The FAA is proposing an amendment to 14 CFR part 71 by:

Modifying the Class E surface area at Dane County Regional Airport/Truax Field, Madison, WI, by removing all of the extensions contained within the airspace legal descriptions as they will be incorporated into new Class E airspace designated as an extension to a Class E surface area to comply with FAA Order JO 7400.2N, Procedures for Handling Airspace Matters; replacing the outdated terms ''Notice to Airmen'' with ''Notice to Air Missions'' and ''Airport/Facility Directory'' with ''Chart Supplement''; modifying the header from ''Madison Dane County Regional Airport-Truax Field, WI'' to ''Madison, WI'' to comply with changes to FAA Order JO 7400.2N; and updating the name of Dane County Regional Airport/Truax Field (previously Dane County Regional Airport-Truax Field) and the geographic coordinates of Dane County Regional Airport/Truax Field and Waunakee Airport, Waunakee, WI, to coincide with the FAAs aeronautical database;

Modifying the Class E airspace designated as an extension to a Class C surface area at Dane County Regional Airport/Truax Field by removing the extension north of the airport as it is no longer required; modifying the extension southeast of the airport to within 2.4 miles each side of the Madison VORTAC 130° radial (previously 134° bearing from the Dane County Regional Airport-Truax Field) extending from the 5-mile radius of Dane County Regional Airport/Truax Field to 7 miles southeast of the Madison VORTAC (previously Dane County Regional Airport-Truax Field); modifying the extension northwest of the airport to within 2.4 miles each side of the Madison VORTAC 319° radial (previously 358° bearing from the Dane County Regional Airport-Truax Field) extending from the 5-mile radius of Dane County Regional Airport/Truax Field to 7 miles northwest of the Madison VORTAC (previously Dane County Regional Airport-Truax Field); replacing the outdated terms ''Notice to Airmen'' with ''Notice to Air Missions'' and ''Airport/Facility Directory'' with ''Chart Supplement''; modifying the header from ''Madison Dane County Regional Airport-Truax Field, WI'' to ''Madison, WI'' to comply with changes to FAA Order JO 7400.2N; and updating the name of Dane County Regional Airport/Truax Field (previously Dane County Regional Airport-Truax Field) and the geographic coordinates of Dane County Regional Airport/Truax Field and Waunakee Airport, Waunakee, WI, to coincide with the FAAs aeronautical database;

Establishing Class E airspace designated as an extension to a Class E surface area at Dane County Regional Airport/Truax Field within 2.4 miles each side of the Madison VORTAC 130° radial extending from the 5-mile radius of Madison Dane County Regional Airport/Truax Field to 7 miles southeast of the Madison VORTAC; within a 2.4 miles each side of the Madison VORTAC 319° radial extending from the 5-mile radius of Madison Dane County Regional Airport/Truax Field to 7 miles northwest of the Madison VORTAC excluding that airspace within a 1.5-mile radius of Waunakee Airport;

And modifying the Class E airspace extending upward from 700 feet above the surface to within a 7.5-mile (decreased from an 8.8-mile) radius of Dane County Regional Airport/Truax Field; removing the extension south of the airport as it is no longer required; adding an extension within 2 miles each side of the 029° bearing from the airport extending from the 7.5-mile radius to 13.7 miles north of the airport; adding an extension within 1 mile each side of the 316° bearing from the airport extending from the 7.5-mile radius to 11 miles northwest of the airport; and updating the names and geographic coordinates of Dane County Regional Airport/Truax Field (previously Dane County Regional Airport-Truax Field) and Middleton Municipal Airport/Morey Field (previously Morey Airport), Middleton, WI, to coincide with the FAA's aeronautical database; and removing the cities associated with the airports in the header to comply with changes to FAA Order JO 7400.2N.

This action is the result of an airspace review requested by the FAA Airspace Rules and Regulations office.

**Regulatory Notices and Analyses**

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

**Environmental Review**

This proposal will be subject to an environmental analysis in accordance with FAA Order 1050.1F, ''Environmental Impacts: Policies and Procedures'' prior to any FAA final regulatory action.

**List of Subjects in 14 CFR Part 71**

Airspace, Incorporation by reference, Navigation (air).

**The Proposed Amendment**

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

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

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

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

**§ 71.1 [Amended]**

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order JO 7400.11G, Airspace Designations and Reporting Points, dated August 19, 2022, and effective September 15, 2022, is amended as follows:

*Paragraph 6002 Class E Airspace Areas Designated as a Surface Area.*

* * * * *

**AGL WI E2 Madison, WI [Amended]**

Dane County Regional Airport/Truax Field, WI
(Lat 43°08′24″ N, long 89°20′15″ W)
Waunakee Airport
(Lat 43°10′43″ N, long 89°27′05″ W)

Within a 5-mile radius of the Dane County Regional Airport/Truax Field excluding that airspace within a 1.5-mile radius of the Waunakee Airport. This Class E airspace area is effective during the specific dates and times established in advance by a Notice to Air Missions. The effective dates and times will thereafter be continuously published in the Chart Supplement.

*Paragraph 6003 Class E Airspace Areas Designated as an Extension to a Class C Surface Area.*

* * * * *

**AGL WI E3 Madison, WI [Amended]**

Dane County Regional Airport/Truax Field, WI
(Lat 43°08′24″ N, long 89°20′15″ W)
Madison VORTAC
(Lat 43°08′41″ N, long 89°20′23″ W)
Waunakee Airport
(Lat 43°10′43″ N, long 89°27′05″ W)

That airspace extending upward from the surface within 2.4 miles each side of the Madison VORTAC 130° radial extending from the 5-mile radius of Dane County Regional Airport/Truax Field to 7 miles southeast of the Madison VORTAC; and within 2.4 miles each side of the Madison VORTAC 319° radial extending from the 5-mile radius of Dane County Regional Airport/Truax Field to 7 miles northwest of the Madison VORTAC excluding that airspace within a 1.5-mile radius of the Waunakee Airport. This Class E airspace area is effective during the specific dates and times established in advance by a Notice to Air Missions. The effective dates and times will thereafter be continuously published in the Chart Supplement.

*Paragraph 6004 Class E Airspace Areas Designated as an Extension to a Class D or Class E Surface Area.*

* * * * *

**AGL WI E4 Madison, WI [Establish]**

Dane County Regional Airport/Truax Field, WI
(Lat 43°08′24″ N, long 89°20′15″ W)
Madison VORTAC
(Lat 43°08′41″ N, long 89°20′23″ W)
Waunakee Airport
(Lat 43°10′43″ N, long 89°27′05″ W)

That airspace extending upward from the surface within 2.4 miles each side of the Madison VORTAC 130° radial extending from the 5-mile radius of Dane County Regional Airport/Truax Field to 7 miles southeast of the Madison VORTAC; and within 2.4 miles each side of the Madison VORTAC 319° radial extending from the 5-mile radius of Dane County Regional Airport/Truax Field to 7 miles northwest of the Madison VORTAC excluding that airspace within a 1.5-mile radius of the Waunakee Airport. This Class E airspace area is effective during the specific dates and times established in advance by a Notice to Air Missions. The effective dates and times will thereafter be continuously published in the Chart Supplement.

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

* * * * *

**AGL WI E5 Madison, WI [Amended]**

Dane County Regional Airport/Truax Field, WI
(Lat 43°08′24″ N, long 89°20′15″ W)
Middleton Municipal Airport/Morey Field, WI
(Lat 43°06′52″ N, long 89°31′54″ W)

That airspace extending upward from 700 feet above the surface within an 7.5-mile radius of Dane County Regional Airport/Truax Field; and within 2 miles each side of the 029° bearing from the airport extending from the 7.5-mile radius of the airport to 13.7 miles north of the airport; and within 1 mile each side of the 316° bearing from the airport extending from the 7.5-mile radius of the airport to 11 miles northwest of the airport; and within a 6.3-mile radius of Middleton Municipal Airport/Morey Field.

Issued in Fort Worth, Texas, on April 10, 2023.

**Martin A. Skinner,**

*Acting Manager, Operations Support Group, ATO Central Service Center.*

[FR Doc. 2023–07835 Filed 4–13–23; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 71

**[Docket No. FAA–2023–0947; Airspace Docket No. 23–ASW–12]**

**RIN 2120–AA66**

## Establishment of Class E Airspace; Berclair, TX

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** This action proposes to establish Class E airspace at Berclair, TX. The FAA is proposing this action as the result of a request from the U.S. Navy to establish Class E airspace at Goliad NOLF, Berclair, TX, to support instrument procedures at this airport.

**DATES:** Comments must be received on or before May 30, 2023.

**ADDRESSES:** Send comments identified by FAA Docket No. FAA–2023–0947 and Airspace Docket No. 23–ASW–12 using any of the following methods:

* *Federal eRulemaking Portal:* Go to *www.regulations.gov* and follow the online instruction for sending your comments electronically.

* *Mail:* Send comments to Docket Operations, M–30; U.S. Department of Transportation, 1200 New Jersey Avenue SE, Room W12–140, West Building Ground Floor, Washington, DC 20590–0001.

* *Hand Delivery or Courier:* Take comments to Docket Operations in Room W12–140 OF THE West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

* *Fax:* Fax comments to Docket Operations at (202) 493–2251.

*Docket:* Background documents or comments received may be read at *www.regulations.gov* at any time. Follow the online instructions for accessing the docket or go to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FAA Order JO 7400.11G, Airspace Designations and 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:** Jeffrey Claypool, Federal Aviation Administration, Operations Support Group, Central Service Center, 10101 Hillwood Parkway, Fort Worth, TX 76177; telephone (817) 222–5711.

**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 would establish Class E airspace extending upward from 700 feet above the surface at Goliad NOLF, Berclair, TX, to support instrument flight rule operations at this airport.

**Comments Invited**

The FAA invites interested persons to participate in this rulemaking by submitting written comments, data, or views. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. To ensure the docket does not contain duplicate comments, commenters should submit only one time if comments are filed electronically, or commenters should send only one copy of written comments if comments are filed in writing.

The FAA will file in the docket all comments it receives, as well as a report summarizing each substantive public contact with FAA personnel concerning this proposed rulemaking. Before acting on this proposal, the FAA will consider all comments it received on or before the closing date for comments. The FAA will consider comments filed after the comment period has closed if it is possible to do so without incurring expense or dely. The FAA may change this proposal in light of the comments it receives.

*Privacy:* In accordance with 5USC 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT post these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov* as described in the system of records notice (DOT/ALL–14FDMS), which can be reviewed at *www.dot.gov/privacy.*

**Availability of Rulemaking Documents**

An electronic copy of this document may be downloaded through the internet at *www.regulations.gov*. Recently published rulemaking documents can also be accessed through the FAA's web page at *www.faa.gov/air_traffic/publications/airspace_amendments/.*

You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office (see the **ADDRESSES** section for the address, phone number, and hours of operations). An informal docket may also be examined during normal business hours at the Federal Aviation Administration, Air Traffic Organization, Central Service Center, Operations Support Group, 10101 Hillwood Parkway, Fort Worth, TX 76177.

**Incorporation by Reference**

Class E airspace is published in paragraph 6005 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 proposes to amend the current version of that order, FAA Order JO 7400.11G, dated August 19, 2022, and effective September 15, 2022. These updates would be published subsequently in the next update to FAA Order JO 7400.11. That order is publicly available as listed in the **ADDRESSES** section of this document.

FAA Order JO 7400.11G lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

**The Proposal**

The FAA is proposing an amendment to 14 CFR part 71 by establishing Class E airspace extending upward from 700 feet above the surface within a 7-mile radius of Goliad NOLF, Berclair, TX.

This action is the result of request from the U.S. Navy to establish Class E airspace at Goliad NOLF, Berclair, TX, to support instrument procedures at this airport.

**Regulatory Notices and Analyses**

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

**Environmental Review**

This proposal will be subject to an environmental analysis in accordance with FAA Order 1050.1F, ''Environmental Impacts: Policies and Procedures'' prior to any FAA final regulatory action.

**List of Subjects in 14 CFR Part 71**

Airspace, Incorporation by reference, Navigation (air).

**The Proposed Amendment**

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

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

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

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

**§ 71.1 [Amended]**

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order JO 7400.11G, Airspace Designations and Reporting Points, dated August 19, 2022, and effective September 15, 2022, is amended as follows:

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

* * * * *

**ASW TX E5 Berclair, TX [Establish]**

Goliad NOLF, TX
(Lat 28°36′42″ N, long 97°36′45″ W)

That airspace extending upward from 700 feet above the surface within a 7-mile radius of Goliad NOLF.

Issued in Fort Worth, Texas, on April 10, 2023.

**Martin A. Skinner,**

*Acting Manager, Operations Support Group, ATO Central Service Center.*

[FR Doc. 2023–07837 Filed 4–13–23; 8:45 am]

**BILLING CODE 4910–13–P**

## COMMODITY FUTURES TRADING COMMISSION

### 17 CFR Part 39

**RIN 3038–AF21**

## Derivatives Clearing Organization Risk Management Regulations To Account for the Treatment of Separate Accounts by Futures Commission Merchants

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Commodity Futures Trading Commission (Commission or CFTC) is proposing to amend its derivatives clearing organization (DCO) risk management regulations adopted under the Commodity Exchange Act (CEA) to permit futures commission merchants (FCMs) that are clearing members (clearing FCMs) to treat the

separate accounts of a single customer as accounts of separate entities for purposes of certain Commission regulations. The proposed amendments would establish the conditions under which a DCO may permit such separate account treatment.

**DATES:** Comments must be received on or before June 13, 2023.

**ADDRESSES:** You may submit comments, identified by RIN 3038–AF21, by any of the following methods:

- *CFTC Comments Portal: https://comments.cftc.gov.* Select the ''Submit Comments'' link for this rulemaking and follow the instructions on the Public Comment Form.
- *Mail:* Send to Christopher Kirkpatrick, Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW, Washington, DC 20581.
- *Hand Delivery/Courier:* Follow the same instructions as for Mail, above.

Please submit your comments using only one of these methods. Submissions through the CFTC Comments Portal are encouraged. All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received to *https://comments.cftc.gov.* You should submit only information that you wish to make available publicly. If you wish the Commission to consider information that you believe is exempt from disclosure under the Freedom of Information Act, a petition for confidential treatment of the exempt information may be submitted according to the procedures established in § 145.9 of the Commission's regulations. The Commission reserves the right, but shall have no obligation, to review, pre-screen, filter, redact, refuse or remove any or all of your submission from *https://comments.cftc.gov* that it may deem to be inappropriate for publication, such as obscene language.

**FOR FURTHER INFORMATION CONTACT:** Robert B. Wasserman, Chief Counsel, Division of Clearing and Risk, at 202–418–5092 or *rwasserman@cftc.gov,* or Daniel O'Connell, Special Counsel, Division of Clearing and Risk, at 202–418–5583 or *doconnell@cftc.gov,* at the Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW, Washington, DC 20581.

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## I. Background

### *A. The Commission's Customer Funds Protection Regulations*

Two of the fundamental purposes of the CEA are the avoidance of systemic risk and the protection of market participants from misuses of customer assets.[1] The Commission has promulgated a number of regulations in furtherance of those objectives, including regulations designed to ensure that clearing FCMs appropriately margin customer accounts, and are not induced to cover one customer's margin shortfall with another customer's funds. In addition to protecting customer assets, these regulations serve the purpose of avoidance of systemic risk by mitigating the risk that a customer default in its obligations to a clearing FCM results in the clearing FCM in turn defaulting on its obligations to a DCO, which could adversely affect the stability of the broader financial system.

Section 4d(a)(2) of the CEA and Commission regulation § 1.20(a) require an FCM to separately account for and segregate all money, securities, and property which it has received to margin, guarantee, or secure the trades or contracts of its commodity customers.[2] Additionally, section 4d(a)(2) of the CEA and Commission regulation § 1.22(a) prohibit an FCM from using the money, securities, or property of one customer to margin or settle the trades or contracts of another customer.[3] This requirement is designed to prevent disparate treatment of customers by an FCM and mitigate the risk that there will be insufficient funds in segregation to pay all customer claims if the FCM becomes insolvent.[4] Section 4d(a)(2) of the CEA and Commission regulations §§ 1.20 and 1.22 effectively require an FCM to add its own funds into segregation in an amount equal to the sum of all customer deficits to prevent the FCM from being induced to use one customer's funds to margin or carry another customer's trades or contracts.[5]

Section 5b of the CEA,[6] as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010,[7] sets forth eighteen core principles with which DCOs must comply to register and maintain registration as DCOs with the Commission. In 2011, the Commission adopted regulations for DCOs to implement Core Principle D, which concerns risk management.[8] These regulations include a number of provisions that require a DCO to in turn require that its clearing members take certain steps to support their own risk management in order to mitigate the risk that such clearing members pose to the DCO. Specifically, regulation § 39.13(g)(8)(iii) provides that a DCO shall require its clearing members to ensure that their customers do not withdraw funds from their accounts with such clearing members unless the net liquidating value plus the margin deposits remaining in the customer's account after the withdrawal would be sufficient to meet the customer initial margin requirements with respect to the products or portfolios in the customer's account, which are cleared by the DCO.[9] Regulation § 39.13(g)(8)(iii) was designed to mitigate the risk that a clearing member fails to hold, from a customer, funds sufficient to cover the required initial margin for the customer's cleared positions, and, in light of the use of omnibus margin accounts, mitigate the likelihood that the clearing member will effectively cover one customer's margin shortfall using another customer's funds.

In adopting regulation § 39.13(g)(8)(iii), the Commission

[1] Section 3(b) of the CEA, 7 U.S.C. 5(b).

[2] 7 U.S.C. 6d(a)(2); 17 CFR 1.20(a).

[3] 7 U.S.C. 6d(a)(2); 17 CFR 1.22(a).

[4] Prohibition of Guarantees Against Loss, 46 FR 11668, 11669 (Feb. 10, 1981).

[5] 7 U.S.C. 6d(a)(2); 17 CFR 1.20; 17 CFR 1.22; Prohibition of Guarantees Against Loss, 46 FR at 11669.

[6] 7 U.S.C. 7a–1(b).

[7] Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010).

[8] Section 5b(c)(2)(D) of the CEA, 7 U.S.C. 7a–1(c)(2)(D); Derivatives Clearing Organization General Provisions and Core Principles, 76 FR 69334, 69335 (Nov. 8, 2011).

[9] 17 CFR 39.13(g)(8)(iii).

stated [10] that the regulation was consistent with the definition of ''Margin Funds Available for Disbursement'' in the Margins Handbook [11] prepared by the Joint Audit Committee (JAC), a representative committee of U.S. futures exchanges and the National Futures Association (NFA).[12] The Commission noted that while designated self-regulatory organizations (DSROs) reviewed FCMs to determine whether they appropriately prohibited their customers from withdrawing funds from their futures accounts, it was unclear to what extent that requirement applied to cleared swap accounts when such swaps were executed on a designated contract market that participated in the JAC.[13] The Commission also noted that clearing members that cleared only swaps that were executed on a swap execution facility were not subject to the requirements of the JAC Margins Handbook or review by a DSRO.[14] Thus, regulation § 39.13(g)(8)(iii) was also designed to provide certainty as to the scope of these risk mitigation and customer protection standards as they relate to futures and swap positions carried in customer accounts by clearing members and cleared by a DCO.

*B. The Divisions' No-Action Position*

On July 10, 2019, the Division of Swap Dealer and Intermediary Oversight (DSIO) (now Market Participants Division (MPD)) and the Division of Clearing and Risk (DCR) published CFTC Letter No. 19–17, which, among other things, provides guidance with respect to the processing of margin withdrawals under regulation § 39.13(g)(8)(iii) and announced a conditional and time-limited no-action position for certain such withdrawals.[15] The advisory followed discussions with and written representations from the Asset Management Group of the Securities Industry and Financial Markets Association (SIFMA–AMG), the Chicago Mercantile Exchange (CME), the Futures Industry Association (FIA), the JAC, and several FCMs, regarding practices among FCMs and their customers related to the handling of separate accounts of the same customer.[16] CFTC Letter No. 19–17 used the term ''beneficial owner'' synonymously with the term ''customer,'' as ''beneficial owner'' was, in this context, commonly used to refer to the customer that is financially responsible for an account. Additionally, as discussed further below, in the customer relationship context, FCMs often deal directly with a commodity trading advisor acting as an agent of the customer rather than the customer itself. For the avoidance of confusion (*e.g.,* with regard to the terms ''owner'' or ''ownership,'' as those terms are used in Forms 40 and 102, or parts 17–20, or with regard to the term ''beneficial owner,'' as that term may be used by other agencies), this proposed rulemaking uses only the term ''customer.''

The written representations preceding the issuance of CFTC Letter No. 19–17 included letters filed separately by SIFMA–AMG, CME, and FIA (collectively, the ''Industry Letters'').[17] Citing regulation § 39.13(g)(8)(iii)'s requirements related to the withdrawal of customer initial margin, and JAC Regulatory Alert #19–02 reminding FCMs of those requirements,[18] SIFMA–AMG and FIA explained that provisions in certain FCM customer agreements provide that certain accounts carried by the FCM that have the same customer are treated as accounts for different legal entities (*i.e.,* ''separate accounts'').[19]

As FIA explained, there are a variety of reasons why a customer may want separate treatment for its accounts under such an agreement.[20] For instance, an institutional customer, such as an investment or pension fund, may allocate assets to investment managers under investment management agreements that require each investment manager to invest a specified portion of the customer's assets under management in accordance with an agreed trading strategy, independent of the trading that may be undertaken for the customer by the same or other investment managers acting on behalf of other accounts of the customer.[21] In such a situation, an investment manager may, in order to implement their trading strategy effectively, want assurance that the portion of funds they have been given to manage is entirely available to them, and will not be affected by the activities of other investment managers who manage other portions of the customer's assets. Additionally, a commercial enterprise may establish separate agreements to leverage specific broker expertise on products or to diversify risk management strategies.[22] In such cases, each separate account is subject to a separate customer agreement, which the FCM negotiates directly with, in many cases, the customer's agent, which often will be an investment manager.[23]

SIFMA–AMG and FIA asserted that, subject to appropriate FCM internal controls and procedures, separate accounts should be treated as separate legal entities for purposes of regulation § 39.13(g)(8)(iii); *i.e.,* separate accounts should not be combined when determining an account's margin funds available for disbursement.[24] SIFMA–AMG and FIA maintained that such separate account treatment should not be expected to expose an FCM to any greater regulatory or financial risk, and asserted that an FCM's internal controls and procedures could be designed to assure that the FCM does not undertake any additional risk as to the separate account.[25] The Industry Letters included a number of examples of such controls and procedures.[26]

In its letter, SIFMA–AMG suggested that it would be possible to allow for

[10] Derivatives Clearing Organization General Provisions and Core Principles, 76 FR at 69379.

[11] JAC Margins Handbook, available at *https://www.jacfutures.com/jac/MarginHandBookWord.aspx.*

[12] Joint Audit Committee, JAC Members, available at *https://www.jacfutures.com/jac/Members.aspx.* Self-regulatory organizations, such as commodity exchanges and registered futures associations (*e.g.,* NFA), enforce minimum financial and reporting requirements, among other responsibilities, for their members. *See* Commission regulation § 1.3, 17 CFR 1.3. Pursuant to Commission regulation § 1.52(d), when an FCM is a member of more than one self-regulatory organization, the self-regulatory organizations may decide among themselves which of them will assume primary responsibility for these regulatory duties and, upon approval of such a plan by the Commission, the self-regulatory organization assuming such primary responsibility will be appointed the designated self-regulatory organization for the FCM. 17 CFR 1.52(d).

[13] Derivatives Clearing Organization General Provisions and Core Principles, 76 FR at 69379.

[14] *Id.*

[15] CFTC Letter No. 19–17, July 10, 2019, available at *https://www.cftc.gov/csl/19-17/download* as extended by CFTC Letter No. 20–28, Sept. 15, 2020, available at *https://www.cftc.gov/csl/20-28/download;* CFTC Letter No. 21–29, Dec. 21, 2021, available at *https://www.cftc.gov/csl/21-29/download;* and CFTC Letter No. 22–11, Sept. 15, 2022, available at *https://www.cftc.gov/csl/22-11/download.*

[16] SIFMA–AMG letter dated June 7, 2019 to Brian A. Bussey and Matthew B. Kulkin (SIFMA–AMG Letter); CME letter dated June 14, 2019 to Brian A. Bussey and Matthew B. Kulkin (CME Letter); and FIA letter dated June 26, 2019 to Brian A. Bussey and Matthew B. Kulkin (First FIA Letter).

[17] The Commission notes that while CME disagreed with certain aspects of FIA's letter that fall beyond the scope of this rulemaking, CME's letter noted that CME was ''amenable to the Commission amending Rule 39.13(g)(8)(iii) to allow a DCO to permit a[n] FCM to release excess funds from a customer's separate account notwithstanding an outstanding margin call in another account of the same customer provided that certain specified risk-mitigating conditions . . . are satisfied.'' CME Letter.

[18] JAC, Regulatory Alert #19–02, May 14, 2019, available at *https://www.jacfutures.com/jac/jacupdates/2019/jac1902.pdf.*

[19] SIFMA–AMG Letter; First FIA Letter.

[20] First FIA Letter.

[21] *See id.*

[22] *Id.*

[23] *Cf. id.*

[24] SIFMA–AMG Letter; First FIA Letter.

[25] SIFMA–AMG Letter; First FIA Letter.

[26] SIFMA–AMG Letter; First FIA Letter; CME Letter.

separate account treatment without undermining the risk mitigation and customer protection goals of regulation § 39.13(g)(8)(iii).[27] SIFMA–AMG recognized that there may be some instances, such as a customer default, in which separate account treatment would no longer be appropriate.[28] SIFMA–AMG stated that an FCM could agree to first satisfy any amounts owed from agreed assets related to a separate account, and continue to release funds until the FCM provided the separate account with a notice of an event of default under the applicable clearing account agreement, and determined that it is no longer prudent to continue to separately margin the separate accounts, provided that such actions are consistent with the FCM's written internal controls and procedures.[29] SIFMA–AMG further stated that, in such instance, the FCM would retain the ability to ultimately look to funds in other accounts of the customer, including accounts under different control, and the right to call the customer for funds.[30] CME similarly asserted that disbursements on a separate account basis should not be permitted in certain circumstances, such as financial distress, that fall outside the ''ordinary course of business.'' [31] While CME asserted that the plain language of regulation § 39.13(g)(8)(iii) unambiguously forbids disbursements on a separate account basis, CME noted that it would be amenable to the Commission amending the regulation to permit such disbursements, subject to certain such risk-mitigating conditions.[32]

SIFMA–AMG and FIA requested that DCR confirm that it would not recommend that the Commission initiate an enforcement action against a DCO that permits its clearing FCMs to treat certain separate accounts as accounts of separate entities for purposes of regulation § 39.13(g)(8)(iii),[33] and confirm that a clearing FCM may release excess funds from a separate customer account notwithstanding an outstanding margin call in another account of the same customer.[34]

In CFTC Letter No. 19–17, DCR stated that, in the context of separate accounts, the risk management goals of regulation § 39.13(g)(8)(iii) may effectively be addressed if a clearing FCM carrying a customer with separate accounts meets certain conditions, which were derived from the Industry Letters and specified in CFTC Letter No. 19–17.[35] DCR stated that it would not recommend that the Commission take enforcement action against a DCO if the DCO permits its clearing FCMs to treat certain separate accounts as accounts of separate entities for purposes of regulation § 39.13(g)(8)(iii) subject to these conditions.[36] The no-action position extended until June 30, 2021, in order to provide DCR with time to recommend, and the Commission with time to determine whether to conduct and, if so, conduct, a rulemaking to implement a permanent solution.[37] CFTC Letter No. 20–28, published on September 15, 2020, extended the no-action position until December 31, 2021 due to challenges presented by the COVID–19 pandemic.[38] CFTC Letter No. 20–28 stated that if the process to consider codifying the no-action position provided for by CFTC Letter No. 19–17 was not completed by that date, DSIO and DCR would consider further extending the no-action position.[39] MPD and DCR published CFTC Letter No. 21–29, further extending the no-action position until September 30, 2022.[40] On September 15, 2022, MPD and DCR published CFTC Letter No. 22–11, which further extended the no-action position until the earlier of September 30, 2023 or the effective date of any final Commission action relating to regulation § 39.13(g).[41] As with CFTC Letter No. 21–29, this latest extension was issued in order to provide additional time for the Commission to consider a rulemaking.

## II. Proposed Amendments to Regulation § 39.13

The Commission preliminarily believes that proposed regulation § 39.13(j) relating to separate account treatment in connection with the withdrawal of customer initial margin is consistent with the customer protection and risk management goals of regulation § 39.13(g)(8)(iii). As further described below, the Commission preliminarily believes that preventing the under-margining of customer accounts and mitigating the risk of a clearing member default (and the potential for systemic risk), is effectively addressed by the standards set forth in the proposed regulation where the clearing FCM treats the separate accounts of a customer as accounts of separate entities consistent with the conditions outlined in proposed regulation § 39.13(j).

### *A. Overview of Proposed Regulation § 39.13(j)*

The Commission proposes to amend regulation § 39.13 to add new paragraph (j) allowing a DCO to permit a clearing FCM to treat the separate accounts of customers as accounts of separate entities for purposes of regulation § 39.13(g)(8)(iii), if such clearing member's written internal controls and procedures permit it to do so, and the DCO requires its clearing members to comply with conditions specified in proposed regulation § 39.13(j)(1) through (14), which are substantially similar to the conditions specified in CFTC Letter No. 19–17.[42] Those conditions are in turn designed to ensure that clearing FCMs (i) carry out such separate account treatment in a consistent and documented manner; (ii) monitor customer accounts on a separate and combined basis; (iii) identify and act upon instances of financial or operational distress that necessitate a cessation of separate account treatment; (iv) provide appropriate disclosures to customers regarding separate account treatment; and (v) apprise their DSROs when they apply separate account treatment or an event has occurred that would necessitate cessation of separate account treatment. The Commission believes that separate account treatment, subject to these conditions, is consistent with Core Principle D. In addition, the Commission notes that nothing in this proposed rulemaking, or in proposed regulation § 39.13(j), would preclude a DCO from establishing or enforcing requirements for clearing FCMs that are additional to or more stringent than those set forth in the proposed regulation. Rather, proposed regulation § 39.13(j) is intended to establish a minimum set of risk-mitigating

[27] SIFMA–AMG Letter.

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] CME Letter.

[32] *Id.*

[33] FIA specifically noted that such a no-action position could be conditioned on the FCM maintaining certain internal controls and procedures.

[34] SIFMA–AMG Letter; First FIA Letter; *see also* CME Letter.

[35] CFTC Letter No. 19–17.

[36] *Id.*

[37] *Id.*

[38] CFTC Letter No. 20–28.

[39] *Id.*

[40] CFTC Letter No. 21–29.

[41] CFTC Letter No. 22–11.

[42] CFTC Letter No. 19–17 conditioned the no-action position with regard to the treatment of separate accounts on 16 enumerated conditions. Proposed regulation § 39.13(j) incorporates conditions 15 and 16 in CFTC Letter No. 19–17, regarding, respectively, (i) the clearing member's notification to its DSRO and DCOs of which it is a clearing member of the application of separate account treatment; and (ii) the clearing member's maintenance of a list of all separate accounts, as proposed regulation § 39.13(j)(14)(ii) and (iii), respectively.

conditions that DCOs that wish to permit separate account treatment must require of their clearing FCMs that choose to engage in such treatment.

Proposed regulation § 39.13(j) is intended to provide an alternative means of achieving the risk management goals served by regulation § 39.13(g)(8)(iii). As a result, proposed regulation § 39.13(j) would not prohibit the application of portfolio margining or cross-margining treatment within a particular separate account. The Commission notes that because a number of clearing FCMs already comply with the conditions set forth in CFTC Letter No. 19–17, such clearing FCMs already comply in significant part with the requirements of proposed regulation § 39.13(j), which, if adopted, DCOs choosing to permit separate account treatment would be required to apply to such clearing FCMs.

Regulation § 39.13(g)(8)(iii) applies to margin in a customer's account with respect to all products and swap portfolios held in such customer's account *which are cleared by the derivatives clearing organization* (emphasis added). Accordingly, the requirements of regulation § 39.13(g)(8)(iii) apply to a DCO [43] with respect to the clearing of (a) futures, (b) swaps, or (c) foreign futures or foreign options subject to Commission regulation § 30.7, to the extent the DCO clears those specific products in a customer's account. Additionally, because the requirements of proposed regulation § 39.13(j) are an alternative means to achieve the risk management goals of regulation § 39.13(g)(8)(iii), the requirements of proposed regulation § 39.13(j) would apply to a DCO with respect to the clearing of futures, swaps, or foreign futures or foreign options subject to regulation § 30.7, to the extent the DCO permits separate account treatment and clears those specific types of products in a customer account subject to separate account treatment.

For example, if a DCO that permits separate account treatment clears only futures contracts (or only futures and swaps), regulation § 39.13(g)(8)(iii) (and the alternative path in proposed regulation § 39.13(j)) would apply to the DCO only with respect to the clearing by its members of such futures contracts (or, respectively, such futures and swaps). Similarly, if a DCO clears foreign futures or foreign options subject to regulation § 30.7, regulation § 39.13(g)(8)(iii) (and the alternative path in proposed regulation § 39.13(j)) would apply to that DCO with respect to the clearing by its member of such 30.7 contracts.

As a practical matter, an FCM's futures account for a customer includes all futures products that the FCM clears for that customer, and the initial margin *requirement* for that account would be the sum of the initial margin the FCM charges the customer for each of those contracts (including, *e.g.,* effects of portfolio margining), regardless of the DCO at which such contracts are cleared. The margin value available—''net liquidating value plus the margin deposits remaining''—is calculated across the account. Thus, by way of example, a customer whose account contains products cleared by an FCM as a clearing member at two DCOs could generally not be under-margined with respect to products cleared at only one of the two DCOs. Rather, since the margin value available collateralizes the products cleared at both DCOs, the customer would necessarily be under-margined with respect to products cleared at both DCOs, or at neither DCO.[44]

The same applies, *mutatis mutandis,* to a customer's swap portfolios cleared through the FCM at multiple DCOs. It would also apply, *mutatis mutandis,* to a customer's foreign futures or foreign options subject to regulation § 30.7 cleared through the FCM at multiple clearinghouses, with a slight modification: If all of those foreign futures or foreign options are cleared at a clearinghouse that is not registered with the Commission as a DCO (or is so registered, but only subject to subpart D of part 39), then there would be no DCO subject to § 39.13(g)(8)(iii) that would be required to apply that regulation to the FCM. However, if any of those foreign futures or foreign options are cleared by the FCM as a clearing member of a DCO registered with the Commission (other than one registered subject to subpart D), then that DCO would be required to apply § 39.13(g)(8)(iii), or, if adopted, the alternative in proposed § 39.13(j), and (because margin requirements apply across the customer's account, here, a § 30.7 account) the margin requirement that would need to be met would take into account all such foreign futures and foreign options, regardless of the clearinghouse at which they ultimately are cleared.

Clearing FCMs are additionally bound by the rules of DCOs and/or self-regulatory organizations (SROs), and such entities have taken the position that such rules apply to a broader set of circumstances than § 39.13(g)(8)(iii). For example, the JAC Margins Handbook, the provisions of which SROs may apply directly to FCMs, contains provisions that regulation § 39.13(g)(8)(iii) was based on.[45] The JAC Margins Handbook provides that ''[a]ll identically owned accounts must be combined for purposes of determining the amount of funds available for disbursement within the account classifications of customer segregated, customer secured, or nonsegregated.'' [46] The JAC Margins Handbook further provides that an FCM may not make a disbursement to a customer if the value of such customer's combined accounts, less required margin on open positions in such accounts, is zero or negative.[47] Therefore the JAC Margins Handbook effectively calls for each FCM to ensure that its customers, including customers holding accounts subject to regulation § 30.7 (30.7 customers), do not withdraw funds from their accounts with such FCM unless the net liquidating value plus the margin deposits remaining in the applicable customer's account after the withdrawal is sufficient to meet the customer's margin requirements with respect to the products or portfolios in the customer's account.

The JAC issued Regulatory Alert 19–06 to effectively incorporate the no-action position provided by CFTC Letter 19–17 to the provisions of the JAC Margins Handbook as it relates to 30.7 customer accounts.[48] Specifically, Regulatory Alert 19–06 provides that, notwithstanding the restrictions contained in the JAC Margins Handbook, FCMs may apply CFTC Letter No. 19–17, including the appropriate conditions, to the separate accounts of 30.7 customers in determining margin funds available for disbursement.[49]

[43] This discussion does not apply to a DCO regulated pursuant to subpart D of part 39.

[44] There may be slight complications if, *e.g.,* for certain of the collateral posted by the customer, one DCO requires the FCM to apply higher haircuts than the other DCO.

[45] *See supra* n. 11 and accompanying text.

[46] JAC Margins Handbook at 10–2, available at *https://www.jacfutures.com/jac/MarginHandBookWord.aspx.*

[47] *Id.*

[48] JAC, Regulatory Alert #19–06, Aug. 28, 2019, available at *https://www.jacfutures.com/jac/jacupdates/2019/jac1906.pdf.*

[49] *Id.* at 2. The JAC subsequently issued Regulatory Alert 20–02 extending the relief for withdrawals from separate 30.7 customer accounts under the JAC Margins Handbook to the earlier of the termination of the no-action position provided by CFTC Staff Letters or to the adoption of a final regulation addressing the withdrawal of funds from separate 30.7 customer accounts. JAC, Regulatory Alert #20–02, Sept. 23, 2020, available at *https://www.jacfutures.com/jacupdates/2020/jac2002.pdf.*

Similarly, CME, in Financial and Regulatory Bulletin 19–02,[50] noted that the foregoing provisions of the JAC Margins Handbook apply to CME, CBOT, NYMEX, and COMEX Rule 930.F. and CME Rule 8G930.F. (Release of Excess Performance Bond), and that ''CME Clearing is permitting its FCM clearing members to treat separate accounts of the same beneficial owner as separate accounts under Rule 930.F. for purposes of determining performance bond funds available for disbursement under the conditions of the CFTC Letter.''

Request for Comment

Question 1: The Commission requests comment regarding whether it should consider any conditions additional to those contained in proposed regulation § 39.13(j) below, or modify or remove any of the conditions proposed herein.

Question 2: The Commission requests comment regarding whether any further action is necessary and appropriate to apply the requirements DCOs are required to apply to their clearing members regarding customer withdrawal of initial margin under regulation § 39.13(g)(8)(iii) and proposed regulation § 39.13(j), directly to non-clearing FCMs or to FCMs that carry regulation § 30.7 customer accounts that are not cleared at a DCO that is registered with the Commission (or are so registered, but only subject to subpart D of part 39) . If so, who (*e.g.,* SROs or the Commission) should take such action, and what should that action be? Would such actions risk causing actual or potential conflicts with the rules or practices of foreign clearing organizations or foreign contract markets? If so, please provide references.

*B. Proposed Regulation § 39.13(j)(1)*

Proposed regulation § 39.13(j)(1)(i) defines ''separate account'' as referring to any one of multiple accounts of the same customer that are carried by the same FCM that is a clearing member of a DCO. Proposed regulation § 39.13(j)(1) also sets forth the first condition: the clearing member may only permit disbursements on a separate account basis during the ''ordinary course of business,'' as that term is defined therein. Proposed regulation § 39.13(j)(1)(ii) provides that, for purposes of proposed regulation § 39.13(j), the term ''ordinary course of business'' refers to the standard day-to-day operation of the clearing member's business relationship with its customer, a condition where there are no unusual circumstances that might indicate either an increased level of risk that the customer may fail promptly to perform its financial obligations to the clearing FCM, or decreased financial resilience on the part of the clearing FCM.

Consistent with the conditions set forth in CFTC Letter No. 19–17, proposed regulation § 39.13(j)(1)(ii)(A) through (I) specifies events that are inconsistent with the ordinary course of business. The occurrence of such an event would require the clearing member to cease permitting disbursements on a separate account basis as to one or more specific customers (in the case of (A) through (F) below), or as to all customer accounts receiving separate account treatment (in the case of (G) through (I) below).[51] Such events are as follows:

- (A) The customer, including any separate account of the customer, fails to deposit or maintain initial or maintenance margin or make payment of variation margin or option premium as specified in proposed regulation § 39.13(j)(4).
- (B) The occurrence and declaration by the clearing member of an event of default as defined in the account documentation executed between the clearing member and the customer.
- (C) A good faith determination by the clearing member's chief compliance officer, senior risk managers, or other senior management, following the clearing member's own internal escalation procedures, that the customer is in financial distress, or there is significant and bona fide risk that the customer will be unable promptly to perform its financial obligations to the clearing member, whether due to operational reasons or otherwise.
- (D) The insolvency or bankruptcy of the customer or a parent company of the customer.
- (E) The clearing member receives notification that a board of trade, a DCO, an SRO (as defined in Commission regulation § 1.3 or section 3(a)(26) of the Securities Exchange Act of 1934), the Commission, or another regulator with jurisdiction over the customer, has initiated an action with respect to the customer based on an allegation that the customer is in financial distress.
- (F) The clearing member is directed to cease permitting disbursements on a separate account basis, with respect to one or more customers, by a board of trade, a DCO, an SRO, the Commission, or another regulator with jurisdiction over the clearing member, pursuant to, as applicable, board of trade or DCO rules, government regulations, or law.
- (G) The clearing member is notified by a board of trade, a DCO, an SRO, the Commission, or another regulator with jurisdiction over the clearing member,[52] that the board of trade, the DCO, the SRO, the Commission, or other regulator, as applicable, believes the clearing member is in financial or other distress.
- (H) The clearing member is under financial or other distress, as determined in good faith by its chief compliance officer, one of its senior risk managers, or other senior manager.
- (I) The bankruptcy of the clearing member or a parent company of the clearing member.

Proposed regulation § 39.13(j)(1)(iii) provides that the clearing member must communicate to its DSRO and any DCO of which it is a clearing member the occurrence of any one of the events enumerated in proposed regulation § 39.13(j)(1)(ii)(A) through (I). The clearing member would need to make such communication promptly in writing, and in any case no later than the next business day following the date on which the clearing member identifies or is informed that such event has occurred.

Additionally, proposed regulation § 39.13(j)(1)(iv) provides that a clearing member that has ceased permitting disbursements on a separate account basis as a result of the occurrence of a non-ordinary course of business event may resume permitting such disbursements if it reasonably believes, based on new information, that the circumstances leading it to cease separate account treatment have been cured.[53] The clearing member would be required to provide in writing to its DSRO and any DCO of which it is a clearing member a notification that it will resume separate account treatment, and the factual basis and rationale for its conclusion that the circumstances leading it to originally cease separate account treatment have been cured.

In requesting a no-action position, SIFMA–AMG stated that separate account treatment should not be

[50] Available at *https://www.cmegroup.com/notices/clearing/2019/07/FRB-19-02.html.*

[51] Whether the clearing member would be required to cease permitting disbursements on a separate account basis as to one or more specific customers or as to all customer accounts receiving separate account treatment depends on whether the relevant non-ordinary course of business event occurs with respect to one or more specific customers or with respect to the clearing member itself.

[52] *E.g.,* the Securities and Exchange Commission, or a foreign regulator.

[53] If the circumstances in question were an action or direction by one of the entities described in paragraphs (E) through (G), then the cure of those circumstances would require the withdrawal or other appropriate termination of such action or direction.

expected to expose an FCM to any greater regulatory or financial risk, and that, subject to appropriate controls and procedures, an FCM could agree to release funds from separate accounts until the FCM provides the separate account with a notice of default and determines it is no longer prudent to continue separate account treatment.[54] That separate account treatment should be discontinued under certain circumstances is further reflected in CME's recommendation that separate account treatment be permitted only during the ordinary course of business. As CME explained, FCMs should maintain the flexibility to determine that either the customer or the FCM itself is in distress and pause disbursements until the customer's other account can demonstrably meet the call to deposit funds.[55] Similarly, as CME noted, an FCM should not be purposely releasing funds to a customer when the customer's overall account is in deficit, as doing so may create a shortfall in segregated, secured or cleared swaps accounts in the event the FCM becomes insolvent.[56] However, the Commission acknowledges that in some instances, an FCM or customer may exit a state of financial, operational, or other distress, such that resumption of separate account treatment would be appropriate. By explicitly providing clearing members with an avenue to resume separate account treatment consistent with the resumption of the ordinary course of business, while requiring disclosure of the basis for doing so, the Commission seeks to incentivize transparency between clearing members and their DSROs and DCOs with respect to (a) conditions at clearing members or customers that could indicate operational or financial distress, and (b) more generally, the risk management program at the clearing member.

Proposed regulation § 39.13(j)(1) is designed to ensure that disbursements are permitted on a separate account basis only during the sound and routine operation of the clearing member's business relationship with its customer. Certain events signaling financial distress of the clearing member or customer are inconsistent with the normal operation of the business relationship between the clearing member and its customer. The Commission believes that, when such events occur—and during the duration of their occurrence—continuing to allow DCOs to permit separate account treatment would be contrary to the goals of protecting customer funds and mitigating systemic risk.

Request for Comment

*Question 3:* The Commission requests comment regarding whether it should (i) consider any events beyond those enumerated in proposed regulation § 39.13(j)(1)(ii)(A) through (I) as inconsistent with the ordinary course of business for purposes of the application of proposed regulation § 39.13(j); (ii) change the specification of any of the events in proposed regulation § 39.13(j)(1)(ii)(A) through (I); or (iii) delete any of those events (because the proposed event is not inconsistent with the ordinary course of business).

*C. Proposed Regulation § 39.13(j)(2)*

Proposed regulation § 39.13(j)(2) would require that the clearing member obtain from the customer or, as applicable, the manager of a separate account, information sufficient to (i) assess the value of the assets dedicated to the separate account and (ii) identify the direct or indirect parent company of the customer, as applicable, if the customer has a direct or indirect parent company.[57] Proposed regulation § 39.13(j)(2)(i) is intended to ensure that clearing members have visibility with respect to customers' financial resources appropriate to ensure that a customer's separate account is adequately margined, and to identify when a customer's financial circumstances would necessitate the cessation of separate account treatment. Proposed regulation § 39.13(j)(2)(i) contemplates that, in certain instances, an investment manager may manage one or more accounts under power of attorney on a customer's behalf; in such cases, a clearing member may obtain the requisite financial information from the investment manager. Proposed regulation § 39.13(j)(2)(ii) is intended to ensure that clearing members have sufficient information to identify the direct or indirect parent company of a customer so that they may identify when a parent company of a customer has become insolvent, for purposes of proposed regulation § 39.13(j)(1)(ii)(D).

Request for Comment

*Question 4:* The Commission requests comment on whether proposed regulation § 39.13(j)(2) should require a clearing member to obtain from a customer or, as applicable, the manager of a separate account, any specific information or documentation relevant to determining the value of assets dedicated to a separate account, or, more broadly, any information relevant to determining the value of assets available to meet the obligations of the customer's accounts on a combined basis. The Commission further requests comment on whether it should prescribe a minimum requirement of how often such information should be obtained and/or updated.

*D. Proposed Regulation § 39.13(j)(3)*

Proposed regulation § 39.13(j)(3) provides that the clearing member's internal risk management policies and procedures must provide for stress testing and credit limits for customers with separate accounts. Furthermore, proposed regulation § 39.13(j)(3) provides that stress testing must be performed, and credit limits must be applied, both on an individual separate account and on a combined account basis. By conducting stress testing on both an individual separate account and on a combined account basis, a clearing member can determine the potential for significant loss in the event of extreme market conditions, and the ability of traders and clearing members to absorb those losses, with respect to each individual account of a customer, as well as with respect to all of the customer's accounts.[58] Additionally, by applying credit limits on both an individual separate account basis and on a combined account basis, a clearing member can be in a better position to manage the financial risks they incur as a result of clearing trades both for a customer's separate account and for all of the customer's accounts.[59] By better managing the financial risks posed by customers and understanding the extent of customers' risk exposures, clearing members can better mitigate the risk that customers do not maintain sufficient funds to meet initial margin requirements, and anticipate and mitigate the risk of the occurrence of

[54] SIFMA–AMG Letter.

[55] CME Letter.

[56] *Id.*

[57] The Commission understands that, in certain cases, such as when a customer is a fund, the customer may not have a parent company. In such cases, the requirement to obtain information sufficient to identify the direct or indirect parent company would not apply.

[58] *See* 17 CFR 1.73(a)(4) (requiring each FCM that is a clearing member of a DCO to conduct stress tests under extreme but plausible conditions of all positions in the proprietary account and in each customer account that could pose material risk to the FCM at least once per week); *see also* Customer Clearing Documentation, Timing of Acceptance for Clearing, and Clearing Member Risk Management, 77 FR 217278, 21289 (Apr. 9, 2012).

[59] *See* 17 CFR 1.73(a)(1) (requiring clearing FCMs to establish risk-based limits in the proprietary account, and in each customer account, based on position size, order size, margin requirements, or similar factors); *see also* Customer Clearing Documentation, Timing of Acceptance for Clearing, and Clearing Member Risk Management, 77 FR at 21287.

certain of the events detailed in proposed regulation § 39.13(j)(1)(ii)(A)-(I), such as a customer's failure to make margin payments as specified by proposed regulation § 39.13(j)(4).

*E. Proposed Regulation § 39.13(j)(4)*

Proposed regulation § 39.13(j)(4) provides that each separate account must be on a one business day margin call, subject to certain requirements that apply solely for purposes of that proposed regulation. Providing for a ''one business day margin call,'' as defined in this paragraph, ensures that margin shortfalls are timely corrected, and a customer's inability to meet a margin call is timely identified. However, in certain circumstances, it may be impracticable for payments to be received on a same-day basis due to the mechanics of international payment systems. In proposing requirements to define timely payment of margin for purposes of the standard set forth in proposed regulation § 39.13(j)(4), the Commission's goal is to establish requirements that reflect industry best practices among DCOs, clearing members, and customers.

Specifically, the Commission understands that, while margin calls made in the morning in the U.S. Eastern Time Zone are typically capable of being met on a same-day basis when margin is paid in United States dollars (USD) and Canadian dollars (CAD), the operation of time zones and banking conventions in other jurisdictions may necessitate additional time when margin is paid in other currencies. For example, the Commission understands that margin paid in Japanese yen (JPY) is typically received two business days after a margin call is issued, and margin paid in British pounds (GBP), euros (EUR), and other non-USD/CAD/JPY currencies is typically received one business day after a margin call is issued.

Proposed regulation § 39.13(j)(4)(i) provides that, subject to certain exceptions, discussed below, a ''one business day margin call'' (as that term used in proposed regulation § 39.13(j)(4)), issued by 11:00 a.m. Eastern Time (ET) on a United States business day,[60] must be met by the applicable customer by the close of the Fedwire Funds Service[61] on the day on which it is issued. A margin call issued after 11:00 a.m. ET on a United States business day, or on a Saturday, Sunday, or a Federal holiday, would be considered to have been issued before 11:00 a.m. ET on the next day that is a United States business day. The Commission proposes that a clearing member be prohibited from contractually agreeing to delay calling for margin until after 11:00 a.m. ET on any given United States business day, and from engaging in practices that are designed to circumvent proposed regulation § 39.13(j)(4) by causing such delay.[62] Additionally, the Commission proposes, in proposed regulation § 39.13(j)(4)(vi), that a clearing member would not be in compliance with the requirements of proposed regulation § 39.13(j)(4) if it contractually agrees to provide for a period of time to meet margin calls that extends beyond the time periods specified in proposed regulation § 39.13(j)(4)(i)–(v)[63] or engages in practices designed to circumvent the requirements of proposed regulation § 39.13(j)(4).

The Commission proposes this provision in order to make clear that it is establishing a maximum period of time in which a margin call must be met for purposes of this regulation, rather than establishing a minimum time that must be allowed. Proposed regulation § 39.13(j)(4) would not preclude a clearing member from having customer agreements that provide for more stringent margining requirements, or applying more stringent margining requirements in appropriate circumstances.[64] Moreover, the statement that these requirements apply solely for purposes of this paragraph (j)(4) means that such requirements are not intended to apply to any other provision; *e.g.,* they are not intended to define when an account is under-margined for purposes of Commission regulation § 1.17.

Conversely, the Commission does not propose to prohibit contractual arrangements inconsistent with proposed regulation § 39.13(j)(4). However, the clearing member would not be permitted to engage in separate account treatment under such arrangements.

In light of challenges to same-day settlement posed by margining in certain currencies, as described above, and in recognition of the particular banking conventions around payments in JPY, proposed regulation § 39.13(j)(4)(ii) provides that payment of margin in JPY shall be considered in compliance with the requirements of proposed regulation § 39.13(j)(4) if received by the applicable clearing member by 12:00 p.m. ET on the second United States business day after the margin call is issued. Furthermore, proposed regulation § 39.13(j)(4)(iii) provides that payment of margin in fiat currencies other than USD, CAD, or JPY shall be considered in compliance with the requirements of proposed regulation § 39.13(j)(4) if received by the applicable clearing member by 12:00 p.m. ET on the United States business day after the day the margin call is issued.[65] The Commission proposes to define ''United States business day'' in proposed regulation § 39.13(j)(4)(vii) as meaning weekdays, not including Federal holidays as established by 5 U.S.C. 6103. The term ''United States business day'' is intended to encompass days on which banks and custodians are open in the United States to facilitate payment

[60] The definition of ''United States business day'' is discussed below.

[61] The Fedwire Funds Service is an electronic funds transfer service commonly used for settlement and clearing arrangements. The service currently closes at 7:00 p.m. ET. For purposes of the Fedwire Funds Service, Federal Reserve Banks observe as holidays all Saturdays, all Sundays, and the holidays listed on the Federal Reserve Banks' Holiday Schedules. *See* The Federal Reserve, Fedwire® Funds Service and National Settlement Service Operating Hours and FedPayments® Manager Hours of Availability, available at *https://www.frbservices.org/resources/financial-services/wires/operating-hours.html.* Because the Fedwire Funds Service hours of operations may be subject to change, the Commission has determined to tie the timeframe to fulfill the one business day margin call requirements of proposed regulation § 39.13(j)(4) to the Fedwire Funds Service's closing rather than an absolute time.

[62] The clearing member would *not* be prohibited from making a margin call after 11:00 a.m. ET if it deemed it appropriate to do so, it simply would be prohibited from contractually *agreeing to delay* making the margin call until after that time (which would have the effect of delaying the date on which payment is due).

[63] For example, if a clearing FCM and a customer contract for a grace or cure period that would operate to make margin due and payable later than the deadlines described herein, including a case where the FCM would not have the discretion to liquidate the customer's positions and/or collateral where margin is not paid by such time, such an agreement would be inconsistent with the conditions under which such clearing FCM may engage in separate account treatment.

[64] For example, a clearing member (or other contractual) requirement that a margin call issued by 12:00 p.m. ET be met by the applicable customer by 6:00 p.m. ET on the same day would not be inconsistent with proposed regulation § 39.13(j)(4).

[65] The Commission notes that while it proposes to require that a one business day margin call be *met by the applicable customer* by the close of the Fedwire Funds Service on the day it is issued (as long as it is issued by 11:00 a.m. ET on a United States business day) where margin is paid in USD or CAD, it proposes to require that a one business day margin call be *received by the applicable clearing member* by 12:00 p.m. ET on the next United States business day after the margin call is issued, where the payment of margin is in fiat currencies other than USD, CAD, or JPY, and *received by the applicable clearing member* by 12:00 p.m. ET on the second United States business day after the margin call is issued, where the payment of margin is in JPY. As discussed above, these distinct requirements are intended to account for the lead time required when fund transfers are made in non-USD and CAD currencies, and to ensure that clearing members are not unduly delayed in collecting margin.

of margin for clearing members and their customers.[66]

The occurrence of a foreign holiday during which banks are closed may also create difficulties in payment of margin in a fiat currency other than USD. Therefore, the Commission proposes regulation § 39.13(j)(4)(iv), which provides that the relevant deadline for payments of margin in fiat currencies other than USD may be extended by up to one United States business day and still considered in compliance with the requirements of proposed regulation § 39.13(j)(4) if payment is delayed due to a banking holiday in the jurisdiction of issue of the currency in which margin is paid. Where margin is paid in EUR, the customer or investment manager managing the separate account may designate one country within the Eurozone with which the customer or investment manager, as applicable, has the most significant contacts for purposes of meeting margin calls, whose banking holidays will be referred to for purposes of compliance with the regulation.[67] Proposed regulation § 39.13(j)(4)(iv) is designed to provide clearing FCMs with a level of discretion in how they manage risk by allowing for limited delays in margin payments due to non-U.S. banking conventions. Proposed regulation § 39.13(j)(4)(iv) would not, however, require a clearing FCM to extend the deadline for payments of margin. Here, the Commission is seeking to allow DCOs to permit their members to exercise risk management judgment in balancing, within limits, the risk management challenges caused by extending the time before a margin call is met with the burdens involved in requiring the client or investment manager to prefund potential margin calls in advance of the holiday or to arrange to pay margin more promptly in USD or another currency not affected by the holiday.

The Commission expects that clearing FCM risk management decisions, including the use of any extension permitted under proposed regulation § 39.13(j)(4)(iv), will be made in consideration of a client's risk profile, market conditions, and other relevant factors, evaluated at the time the risk management decisions are made.[68]

Lastly, in CFTC Letter No. 19–17, staff stated that a failure to deposit, maintain, or pay margin or option premium due to administrative errors or operational constraints would not constitute a failure to timely deposit or maintain initial or variation margin that would place a customer out of the ordinary course of business. This provision was intended to prevent a clearing FCM from being excluded from relying on the no-action position as a result of one-off exceptions, such as mis-entered data, a flawed software update, or an unusual and unexpected information technology outage (*e.g.,* an unanticipated outage of the Fedwire Funds Service). Accordingly, the Commission proposes regulation § 39.13(j)(4)(v), which provides that a failure to deposit, maintain, or pay margin or option premium does not constitute a failure to comply with the requirements of proposed regulation § 39.13(j)(4) if such failure is due to unusual administrative error or operational constraints that a customer or investment manager acting diligently and in good faith could not have reasonably foreseen.[69] Proposed regulation § 39.13(j)(4)(v) provides that, for these purposes, a clearing member's determination that failure to deposit, maintain, or pay margin or option premium is due to such administrative error or operational constraint would be based on the clearing member's reasonable belief in light of information known to the clearing member, at the time the clearing member learns of the relevant administrative error or operational constraint.[70]

Request for Comment

Question 5: The Commission requests comment on whether the regulatory framework set forth in proposed regulation § 39.13(j)(4) appropriately balances practicability and burden with risk management. If not, what alternative approach should be taken? How would such an alternative approach better balance those considerations? In particular, the Commission requests comment on whether the proposed standard of timeliness for a one business day margin call set forth in proposed regulation § 39.13(j)(4)(i)–(iii) presents practicability challenges and, if so, what those challenges are, and how the proposed standard of timeliness could be improved.

*Question 6:* With respect to the proposed standard of timeliness for a one business day margin call:

(a) Are there other currencies, besides JPY, where relevant banking conventions render payment before the second U.S. business day after a margin call is issued impracticable? If so, the Commission requests commenters to specifically identify any such currencies, and provide specifics about the operational issues involved for each.

(b) Should the Commission establish a mechanism (*e.g.,* through action by Commission order, potentially with authority delegated to the Director of the Division of Clearing and Risk, or through action by DCOs) to address cases where the taxonomy of which currencies can practicably be paid on the same day/first U.S. business day/second U.S. business day after a margin call is issued should be changed, due to changes in banking conventions or newly discovered information?

(c) The Commission requests comment on whether, and if so, how, proposed regulation § 39.13(j)(4) should explicitly address timing of payment of margin in the event of an unscheduled United States banking holiday (*e.g.,* due to a national day of mourning).

(d) The Commission requests comment on whether, and if so, how, proposed regulation § 39.13(j) should explicitly address timing of payment of margin in the event of scheduled or unscheduled closures of United States securities markets.

[66] As used in proposed regulation § 39.13(j)(4), the term ''United States business day'' is specifically intended to be distinct from the intraday period encompassed by the definition of business day in regulation § 39.2.

[67] With respect to margin payments in EUR, proposed regulation § 39.13(j)(4)(iv) is intended to prevent customers or investment managers from leveraging banking holidays in jurisdictions with which they have no significant commercial nexus, or in a multiplicity of jurisdictions, to circumvent requirements to pay margin timely. The Commission requests comment on the practicability of this standard below.

[68] This expectation is consistent with the statement of the directors of DCR and DSIO in issuing CFTC Letter No. 19–17. CFTC, Statement by the Directors of the Division of Clearing and Risk and the Division of Swap Dealer and Intermediary Oversight Concerning the Treatment of Separate Accounts of the Same Beneficial Owner, Sept. 13, 2019, available at *https://www.cftc.gov/PressRoom/SpeechesTestimony/dcrdsiodirectorstatement091319* (''We fully expect that DCOs and FCMs and their customers will agree that FCMs must retain, at all times, the discretion to determine that the facts and circumstances of a particular shortfall are extraordinary and therefore necessitate accelerating the timeline and relying on the FCM's protocol for liquidation or for accessing funds in the other accounts of the beneficial owner held at the FCM.''). *See also* CFTC Letter No. 20–28 (stating the same).

[69] One would expect that administrative errors at a well-run clearing FCM or money manager to be unusual and unforeseen. For the avoidance of doubt, ''unforeseen'' refers to the particular occurrence of a constraint or error; for example, the fact that some small percentage of errors may be foreseen does not mean that any particular error is foreseen (and ''unusual'' means that such percentage should indeed be small).

[70] For purposes of clarity and certainty, the Commission proposes to establish this reasonableness standard for a clearing member's determination that a failure to timely deposit, maintain, or pay margin or option premium on the basis of administrative error or operational constraints. The Commission believes the proposed standard confers significant discretion upon clearing FCMs to assess the disposition of their customers while requiring that clearing FCMs act reasonably and on the basis of current and relevant information, diligently gathered.

*Question 7:* With respect to the criteria for extending payment of margin in EUR due to a banking holiday in the Eurozone pursuant to proposed regulation § 39.13(j)(4)(iv), the Commission requests comment on whether, and if so, how, the banking laws of national authorities within the Eurozone, operational issues, or other factors present practicability challenges to compliance. If commenters believe such challenges exist, the Commission seeks comment on whether a different standard would be more practicable, while achieving the goal of preventing customers or investment managers from claiming an extension of time to pay margin due to banking holidays in a multiplicity of jurisdictions, or in (a) jurisdiction(s) with which such customer or investment manager has no significant commercial nexus.

*Question 8:* In anticipation of potential developments with respect to the use of central bank digital currencies or other digital assets, the Commission requests comment on whether and, if so, how, proposed regulation § 39.13(j)(4) should explicitly address the timing of payment of margin in digital assets.

*Question 9:* The Commission requests comment regarding whether there are any other international considerations, beyond the time required to process payment of margin in different currencies, that the Commission should take into account in establishing requirements for compliance with the ''one business day'' margin call standard for purposes of proposed regulation § 39.13(j)(4). If so, the Commission requests comment regarding how proposed regulation § 39.13(j) should be modified, if at all, to account for such considerations.

*F. Proposed Regulation § 39.13(j)(5)–(10)*

Where a clearing member permits disbursements on a separate account basis, it is important that the clearing member treat such accounts as separate in a consistent manner. As FIA noted in its June 26, 2019 letter, customer agreements that provide for separate account treatment generally require that a separate account be margined separately from any other account maintained for the customer with the FCM, and assets held in one separate account should not ordinarily be used to meet or offset any obligations of another separate account, including obligations that it or another investment manager may have incurred on behalf of a different account of the same customer.[71] FIA observed that these restrictions serve to assure the customer, or the asset manager responsible for a particular account, that the account will not be subject to unanticipated interference that may exacerbate stress on a customer's aggregate exposure to the FCM.[72] Additionally, FIA noted that where an FCM treats separate accounts as separate customers for risk management purposes, the FCM may manage risk more conservatively against the customer under the assumption that the customer has fewer assets than it may in fact have.[73]

Accordingly, the Commission in proposed regulation § 39.13(j)(5)–(10) proposes to adopt those conditions in CFTC Letter No. 19–17 designed to provide for consistent treatment of separate accounts. Proposed regulation § 39.13(j)(5)–(10) requires a separate account of a customer to be treated separately from other separate accounts of the same customer for purposes of certain existing computational and recordkeeping requirements, which would otherwise be met by treating accounts of the same customer on a combined basis. Because accounts subject to proposed regulation § 39.13(j) would be risk-managed on a separate basis, the Commission believes it is appropriate for the proposed regulation to provide that DCOs that permit separate account treatment require that the relevant clearing FCMs similarly apply these risk-mitigating computational and recordkeeping requirements on a separate account basis. The effect of the requirements in these paragraphs is to augment the FCM's existing obligations under various provisions of regulation § 1.17.

Proposed regulation § 39.13(j)(5) provides that the margin requirement for each separate account is calculated independently from all other separate accounts of the same customer, with no offsets or spreads recognized across the separate accounts. A clearing member would be required to treat each separate account of a customer independently from all other separate accounts of the same customer for purposes of computing capital charges for under-margined customer accounts in determining its adjusted net capital under regulation § 1.17. Additionally, proposed regulation § 39.13(j)(6) provides that the clearing member must record each separate account independently in its books and records. In other words, the clearing member must record the balance of each separate account either as a receivable or payable, with no offsets between other separate accounts of the same customer. A clearing member would be required to treat each separate account of a customer independently from all other separate accounts of the same customer for purposes of determining whether a receivable from a separate account that represents a debit or deficit ledger balance may be included in the clearing member's current assets in computing its adjusted net capital under regulation § 1.17(c)(2).

Proposed regulation § 39.13(j)(7) provides that the receivable for a debit or deficit from a separate account must only be considered a current or allowable asset for purposes of regulation § 1.17(c)(2) based on the assets of that separate account, and not on the assets held in another separate account of the same customer. Proposed regulation § 39.13(j)(8) provides that in calculating the amount of its own funds it must use to cover debit or deficit balances, the clearing member must include any debit or deficit of any separate account, and reflect that calculation on the applicable report.

Proposed regulation § 39.13(j)(9) provides that the clearing member must include the margin deficiency of each separate account, and cover such deficiency with its own funds, as applicable, for purposes of its residual interest and legally segregated operationally commingled compliance calculations, as applicable under Commission regulations §§ 1.22, 22.2, and 30.7. Lastly, proposed regulation § 39.13(j)(10) provides that in determining its residual interest target for purposes of Commission regulation § 1.23(c), the clearing member must calculate customer receivables computed on a separate account basis. Currently, Commission regulations require an FCM to maintain its own capital, or residual interest, in customer segregated accounts in an amount equal to or greater than its customers' aggregate under-margined accounts.[74] Additionally, each day, an FCM is required to perform a segregated calculation to verify its compliance with segregation requirements. The FCM must file a daily electronic report showing its segregation calculation with its DSRO, and the DSRO must be provided with electronic access to the FCM's bank accounts to verify that the funds are maintained. The FCM must also assure its DSRO that when it meets a margin call for customer positions, it never uses value provided by one customer to meet another customer's

[71] First FIA Letter.

[72] *Id.*

[73] *Id.*

[74] *See e.g.*, 17 CFR 1.22(c)(3); 17 CFR 22.2(f)(6)(iii)(A).

obligation.[75] These requirements are intended to prevent FCMs from being induced to cover one customer's margin shortfall with another customer's excess margin, and allow DSROs to verify that FCMs are not in fact doing so. Proposed regulation § 39.13(j)(10) is designed to ensure that margin deficiencies are calculated accurately for accounts receiving separate treatment, and that such deficiencies are covered consistent with existing Commission regulations.

*G. Proposed Regulation § 39.13(j)(11)*

Proposed regulation § 39.13(j)(11) provides that where the customer of separate accounts subject to separate treatment has appointed a third party as the primary contact to the clearing member, the clearing member must obtain and maintain current contact information of an authorized representative at the customer and take reasonable steps to verify that such person is in fact an authorized representative of the customer. The clearing member would be required to review and, if necessary, update such information no less than annually. In many cases, an investment manager acts under a power of attorney on behalf of a customer, and the FCM has little direct contact with the customer. Proposed regulation § 39.13(j)(11) is designed to ensure that clearing FCMs have a reliable means of contacting customers directly if the investment manager fails to pay promptly.

Request for Comment

*Question 10:* The Commission requests comment on whether it should prescribe specific steps that a DCO must require a clearing member to take to verify the identity of an authorized representative of a customer, and if so, what such steps should entail. The Commission further requests comment on the potential time and cost burden of such steps. Commenters are requested to provide quantitative data where available.

*H. Proposed Regulation § 39.13(j)(12)*

Proposed regulation § 39.13(j)(12) provides that the clearing member must provide each customer using separate accounts with a disclosure that, pursuant to part 190 of the Commission's regulations, all separate accounts of the customer in each account class will be combined in the event of the clearing member's bankruptcy. The disclosure statement must be delivered separately to the customer via electronic means in writing or in another manner in which the clearing member customarily delivers disclosures pursuant to applicable Commission regulations, and as permissible under its customer documentation. The clearing member must also maintain documentation demonstrating that the disclosure statement was delivered directly to the customer. The clearing member must also include the disclosure statement on its website or within its disclosure documentation, as required by Commission regulation § 1.55(i).

The Bankruptcy Reform Act of 1978[76] enacted subchapter IV of chapter 7 of the Bankruptcy Code, title 11 of the U.S. Code, to add certain provisions designed to afford enhanced protections to commodity customer property and protect markets from the reversal of certain transfers of money or other property, in recognition of the complexity of the commodity business.[77] The Commission enacted part 190 of its regulations, 17 CFR part 190, to implement subchapter IV. Under part 190, all separate accounts of a customer in an account class will be combined in the event of a clearing member's bankruptcy.[78] The Commission proposes to adopt proposed regulation § 39.13(j)(12) so that customers receive full and fair disclosure as to the treatment of their accounts in a clearing FCM bankruptcy.

*I. Proposed Regulation § 39.13(j)(13)*

Proposed regulation § 39.13(j)(13) provides that the clearing member must disclose in its Disclosure Document required under Commission regulation § 1.55(i) that it permits the separate treatment of accounts for the same customer. Regulation § 1.55 was adopted to ''advise new customers of the substantial risk of loss inherent in trading commodity futures.'' [79] The Commission amended regulation § 1.55 in 2013 to, among other things, add new paragraph (i) requiring FCMs to disclose to customers all information about the FCM, including its business, operations, risk profile, and affiliates, that would be material to the customer's decision to entrust funds to and otherwise do business with the FCM and that is otherwise necessary for full and fair disclosure.[80] Such disclosures include material information regarding specific topics identified in regulation § 1.55(k), which include a basic overview of customer fund segregation, as well as current risk practices, controls, and procedures.[81] These disclosures are designed to enable customers to make informed judgments regarding the appropriateness of selecting an FCM and enhance the diligence that a customer can conduct prior to opening an account and on an ongoing basis.[82]

The Commission believes that the application of separate account treatment for some customers of a clearing FCM, as permitted by a DCO, is material to the decision to entrust funds to and otherwise do business with the FCM with respect to customers of such FCM generally because, in the event that separate account treatment for some customers were to contribute to a loss that exceeds the FCM's ability to cover, that loss might affect the segregated funds of all of the FCM's customers in one or more account classes. Accordingly, the Commission proposes regulation § 39.13(j)(13) to ensure that customers are apprised of a matter that is relevant to the clearing FCM's risk management policies.

*J. Proposed Regulation § 39.13(j)(14)*

Proposed regulation § 39.13(j)(14) provides that, to the extent the clearing member treats the separate accounts of a customer as accounts of separate entities, the clearing member must (i) apply such treatment in a consistent manner over time; (ii) provide a one-time notification to its DSRO and any DCO of which it is a clearing member that it will apply such treatment;[83] and (iii) maintain and keep current a list of all separate accounts receiving such treatment. With respect to proposed regulation § 39.13(j)(14)(iii), the clearing member would be required to conduct a review of its records of accounts receiving separate treatment no less than quarterly. Proposed regulation

[75] *See e.g.,* 17 CFR 22.2(g).

[76] Public Law 95–598, 92 Stat. 2549.

[77] Bankruptcy, 46 FR 57535, 57535–36 (Nov. 24, 1981)

[78] 17 CFR 190.08(b)(2)(i) and (xii) (Aggregate the credit and debit equity balances of all accounts of the same class held by a customer in the same capacity—Except as otherwise provided in this paragraph (b)(2), all accounts that are deemed to be held by a person in its individual capacity shall be deemed to be held in the same capacity—Except as otherwise provided in this section, an account maintained with a debtor by an agent or nominee for a principal or a beneficial owner shall be deemed to be an account held in the individual capacity of such principal or beneficial owner.).

[79] Adoption of Customer Protection Rules, 43 FR 31886, 31888 (July 24, 1978).

[80] 17 CFR 1.55(i).

[81] 17 CFR 1.55(k)(8), (11).

[82] Enhancing Protections Afforded Customers and Customer Funds Held by Futures Commission Merchants and Derivatives Clearing Organizations, 78 FR 68506, 68564 (Nov. 14, 2013).

[83] As stated in the proposed regulatory text below, once this notification is made, the clearing member would not be required to repeat it. In other words, once a clearing member notifies its DSRO that it will apply separate account treatment to one or more customers, such clearing member would not be required to provide the same notification to its DSRO each time it applies separate account treatment to a new or additional customer.

§ 39.13(j)(14) is intended to ensure that clearing FCMs employ separate account treatment in a way that is consistent with the customer protection and DCO risk management provisions of the CEA and Commission regulations, that DSROs are able to effectively monitor and regulate clearing FCMs that engage in separate account treatment, and that clearing FCMs have the records necessary to understand which accounts receive separate treatment for purposes of monitoring compliance with the proposed regulation.

The Commission recognizes that, while bona fide business or risk management purposes may at times warrant application or cessation of separate account treatment, clearing members should not apply or cease separate account treatment for reasons, or in a manner, that would contravene the customer protection and risk mitigation purposes of the CEA and Commission regulations. For instance, a clearing member should not switch between separate and combined treatment for customer accounts in order to achieve more preferable margining outcomes or offset margin shortfalls in particular accounts. The Commission recognizes that there are a wide variety of circumstances that may indicate inconsistent application of separate account treatment, and proposes to provide DCOs with a degree of discretion in ascertaining, consistent with their rules, whether a clearing member applies such treatment consistently over time.[84]

Request for Comment

*Question 11:* The Commission requests comment on the appropriateness of its proposed approach of providing DCOs with discretion in determining whether a clearing FCM has applied separate account treatment consistently over time.

## III. Cost Benefit Considerations

### *A. Statutory and Regulatory Background*

Core Principle D, concerning risk management, imposes a number of duties upon DCOs related to their ability to manage the risks associated with discharging their responsibilities as DCOs, measuring credit exposures, limiting exposures to potential default-related losses, margin requirements, and risk management models and parameters.[85] Among other requirements, Core Principle D requires that the margin required from each member and participant of a DCO be sufficient to cover potential exposures in normal market conditions.[86] Commission regulation § 39.13 implements Core Principle D, including through regulation § 39.13(g)(8)(iii)'s restrictions on withdrawal of customer initial margin. Regulation § 39.13(g)(8)(iii) is designed to ensure that DCOs do not permit clearing FCMs to allow customers to withdraw funds from their accounts unless sufficient funds remain to meet customer initial margin requirements with respect to all products and swap portfolios held in the customer's account and cleared by the DCO. This requirement is intended to prevent the under-margining of customer accounts, and thus mitigate the risk of a clearing member default and the consequences that could accrue to the broader financial system.

Proposed regulation § 39.13(j) amends regulation § 39.13 by allowing a DCO to permit a clearing FCM to treat accounts separately for purposes of regulation § 39.13(g)(8)(iii), subject to specified conditions. Those conditions are in turn designed to ensure that clearing FCMs (i) carry out such separate account treatment in a consistent and documented manner; (ii) monitor customer accounts on a separate and combined basis; (iii) identify and act upon instances of financial or operational distress that necessitate a cessation of separate account treatment; (iv) provide appropriate disclosures to customers regarding separate account treatment; and (v) apprise their DSROs when they apply separate account treatment or an event has occurred that would necessitate cessation of separate account treatment. The Commission believes that separate account treatment, subject to these conditions, is consistent with Core Principle D.

### *B. Consideration of the Costs and Benefits of the Commission's Action*

#### 1. CEA Section 15(a)

Section 15(a) of the CEA requires the Commission to ''consider the costs and benefits'' of its actions before promulgating a regulation under the CEA or issuing certain orders.[87] Section 15(a) further specifies that the costs and benefits shall be evaluated in light of five broad areas of market and public concern: (1) protection of market participants and the public, (2) efficiency, competitiveness and financial integrity of markets, (3) price discovery, (4) sound risk management practices, and (5) other public interest considerations (collectively referred to herein as the Section 15(a) Factors). Accordingly, the Commission considers the costs and benefits associated with the proposed regulation in light of the Section 15(a) Factors. In the sections that follow, the Commission considers: (1) the costs and benefits of the proposed regulation; (2) the alternatives contemplated by the Commission and their costs and benefits; and (3) the impact of the proposed regulation on the Section 15(a) Factors.

The Commission notes that this consideration of costs and benefits is based on, *inter alia,* the understanding that the futures and swaps markets function internationally, with many transactions involving U.S. firms taking place across international boundaries, with some Commission registrants and their clients being organized outside of the United States, with leading industry members typically conducting operations both within and outside the United States, and with industry members commonly following substantially similar business practices wherever located. Where the Commission does not specifically refer to matters of location, the discussion of costs and benefits below refers to the effects of the proposed regulation on all relevant futures and swaps activity, whether by virtue of the activity's physical location in the United States or by virtue of the activity's connection with activities in, or effect on, U.S. commerce under CEA section 2(i).

#### 2. Costs and Benefits of the Proposed Regulation

The baseline for the Commission's consideration of the costs and benefits of the proposal is the Commission's current regulation § 39.13. The Commission recognizes, however, that to the extent that clearing FCMs have relied on CFTC Letter No. 19–17, the actual costs and benefits of the proposed regulation may not be as significant.

##### a. Benefits

Regulation § 39.13(g)(8)(iii) provides that a DCO shall require its clearing members to ensure that their customers do not withdraw funds from their accounts with such clearing members if such withdrawal would result in funds insufficient to meet the customer initial margin requirements with respect to all products and swap portfolios held in the customer's account which are cleared by the DCO. This requirement

[84] Core Principle A provides that a DCO shall have reasonable discretion in establishing the manner by which it complies with each core principle. Section 5b(c)(2)(A)(ii) of the CEA, 7 U.S.C. 7a–1(c)(2)(A)(ii).

[85] Section 5b(c)(2)(D) of the CEA, 7 U.S.C. 7a–1(c)(2)(D).

[86] Section 5b(c)(2)(D)(iv) of the CEA, 7 U.S.C. 7a–1(c)(2)(D)(iv).

[87] 7 U.S.C. 19(a).

serves important customer funds protection and risk mitigation purposes. However, combination of all accounts of the same customer within the same regulatory account classification for purposes of margining and determining funds available for disbursement may make it challenging for certain customers and their investment managers to achieve certain commercial purposes.[88] For example, where a customer has apportioned assets among multiple investment managers, neither the customer nor their investment managers may be able to obtain certainty that the individual portion of funds allocated to one investment manager will not be affected by the activities of other investment managers. Where clearing FCMs are able to treat the separate accounts of a single customer as accounts of separate entities, subject to certain regulatory safeguards, customers are better able to leverage the skills and expertise of investment managers, and realize the benefits of a balance of investment strategies in order to meet specific commercial goals in a manner that would not contravene the customer funds protection and risk mitigation purposes of the CEA and Commission regulations.

The Commission also notes that, to the extent that DCOs and their clearing FCMs currently rely on the no-action position in CFTC Letter No. 19–17, those FCMs would retain the benefit of costs and resources already expended in order to comply with the conditions of the no-action position. In a letter to the Commission staff dated April 1, 2022, FIA noted that, ''For many FCMs and their customers, the terms and conditions of the no-action position . . . presented significant operational and systems challenges,'' as FCMs were required to ''(i) adopt new practices for stress testing accounts; (ii) review and possibly change margin-timing expectations for non-US accounts; (iii) undertake legal analysis to clarify interpretive questions; and (iv) revise their segregation calculation and recordkeeping practices,'' as well as engage in ''time-consuming documentation changes and customer outreach.'' [89]

FIA further described these challenges in a letter to the Commission staff dated May 11, 2022, noting that in order to meet the conditions of the no-action position, FCMs were required to review and in some cases amend customer agreements, and identify and implement information technology systems changes.[90] FIA also asserted that FCMs were likely required to revise internal controls and procedures.[91] FIA stated that while the costs incurred by each FCM varied depending on its customer base, among larger FCMs with a significant institutional customer base, personnel costs would have included identifying and reviewing up to 3,000 customer agreements to determine which agreements required modification, and then negotiating amendments with customers or their advisers.[92] FIA further stated that because the relevant provisions of these agreements were not uniform, they generally required individual attention.[93]

If the Commission were to decide to forego this rulemaking, and if the no-action position expired, these changes would need to be reversed. FIA noted that, if required to reverse these changes, the burdens on FCMs and their customers would be ''significant.'' [94] Specifically, FIA asserted that FCMs would again be required to review and amend customer agreements, noting that negotiations to amend such agreements would likely prove ''extremely difficult'' as ''advisers would seek to assure that their ability to manage their clients' assets entrusted to them would not be adversely affected by the actions (or inactions) of another adviser.'' [95] FCMs would also again be required to revise their internal controls and procedures, and identify and implement information technology systems changes.[96] DCOs, FCMs, and customers of FCMs already relying on the no-action position would also obtain the benefit of continuing to leverage existing systems and procedures to provide for separate account treatment.

Request for Comment

*Question 12:* The Commission requests comment on the extent to which DCOs, clearing members, and customers currently rely on the no-action position in CFTC Letter No. 19–17 (including the extensions of time in CFTC Letters No. 20–28, 21–29, and 22–11) to permit and/or engage in separate account treatment. Commenters are requested to provide data where available (*e.g.,* number of DCOs and/or clearing members that allow for separate account treatment, or size of clearing members providing for separate account treatment by customer funds in segregation or number of customers, as well as the nature and the extent of the costs that they would incur if the relevant no-action position were to be permitted to expire).

b. Costs

The proposed regulation would not require DCOs to allow for separate account treatment, and DCOs that do not presently allow for separate account treatment, and do not desire to do so in the future, would not incur any costs as a result of the proposed regulation. Furthermore, the Commission believes that a DCO electing to allow for separate account treatment will do so because they believe that the benefits of doing so will exceed the costs of doing so.

DCOs that wish to allow for separate account treatment would likely incur certain costs related to the implementation of the proposed regulation, some of which would be incurred on a one-time basis, and some of which would be recurring. DCOs that wish to allow for separate account treatment would likely incur costs in connection with updating their rulebooks to allow for separate account treatment under the conditions codified in the proposed regulation. The Commission anticipates that this would generally be a one-time cost. Such DCOs would also likely incur legal, compliance, and other costs related to monitoring, examination, and enforcement with respect to clearing members and customers that engage in separate account treatment. The Commission expects that such costs may be reduced where a DCO already allows for separate account treatment under the terms of the no-action position and is able to leverage existing rules and compliance infrastructure to implement the proposed regulation. While the Commission anticipates that certain DCOs that do not now rely on the no-action position may in the future choose to allow for separate account treatment, the Commission also expects that the number of DCOs that would do so would be small.

The Commission notes however that because the provisions of the proposed regulation vary in some respects from the terms of the no-action position, and

[88] *See* First FIA Letter.

[89] FIA letter dated Apr. 1, 2022 to Clark Hutchison and Amanda Olear (Second FIA Letter).

[90] FIA letter dated May 11, 2022 to Robert Wasserman (Third FIA Letter). FIA noted that these changes were particularly challenging for FCMs that are part of a bank holding company structure, as ''[m]odifying integrated technology information systems across a bank holding company structure is complicated, expensive and time consuming.'' *Id.*

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] Second FIA Letter.

[95] Third FIA Letter. FIA further noted that ''an adviser may be less likely to use exchange-traded derivatives to hedge its customers' cash market positions if the adviser could not have confidence that it would be able to withdraw its customers' excess margin as necessary to meet its obligations in other markets.'' *Id.*

[96] *Id.*

DCOs may implement the proposed regulation in their rules in a different manner than the conditions of the no-action position,[97] at least some additional costs are likely to be incurred by DCOs that already rely on the no-action position.

The costs of the proposed regulation will likely vary across DCOs depending on whether they already allow for separate account treatment and the nature of their existing rule and compliance infrastructures to support separate account treatment, and as such would be difficult to quantify with precision.

Similarly, the proposed regulation would not require clearing FCMs to engage in separate account treatment. Clearing FCMs that do not now engage in separate account treatment, and wish not to do so in the future, would not incur any costs as a result of the proposed regulation. However, for those clearing FCMs that choose to comply with the proposed regulation, the costs of compliance could be significant, and may vary based on factors such as the size and existing compliance resources of a particular FCM. While the Commission, in connection with its Paperwork Reduction Act assessment below, estimates that certain reporting, disclosure, and recordkeeping costs would not be significant on an entity level, as FIA noted, taken as a whole, compliance with the conditions that the proposed regulation would codify could result in significant operational and systems costs.

In other words, the Commission anticipates that clearing FCMs—specifically, existing clearing FCMs that do not already rely on the no-action position, but may choose in future to rely upon the proposed regulation—may incur relatively significant costs related to designing and implementing new systems, or enhancing existing systems, to comply with the proposed regulation, as well as negotiation costs, even where direct recordkeeping costs may not be significant on an entity-by-entity basis.[98] However, the Commission notes that many of the requirements of the proposed regulation would involve one-time costs in order to update systems, procedures, disclosure documents, and recordkeeping practices, and that ongoing costs of maintaining compliance may be less significant. To the extent clearing FCMs already rely on the no-action position, the tools (*e.g.,* software, as well as policies and procedures) necessary to comply with the proposed regulations on an ongoing basis will largely have already been built, and the costs associated with compliance will largely have already been incurred. Furthermore, while the Commission expects that certain FCMs that do not now rely on the no-action position may in the future choose to engage in separate account treatment, and would need to incur these costs to come into compliance with the proposed regulation, the Commission also anticipates that the number of FCMs that would do so would be small.

### *C. Costs and Benefits of the Commission's Action as Compared to Alternatives*

The Commission considered several alternatives to the proposed regulation. On one hand, the Commission, for analytical completeness, considered allowing the no-action position announced in CFTC Letter No. 19–17 and its superseding letters to expire. When compared only to the existing regulation § 39.13(g)(8)(iii), which is the baseline for the cost and benefit considerations, this alternative imposes neither costs nor benefits, because this approach would effectively constitute a reversion to regulation § 39.13(g)(8)(iii) prior to the issuance of CFTC Letter No. 19–17 and its superseding letters. However, the Commission does not anticipate that there would be any significant benefit to this approach relative to the approach contemplated by the proposed regulation, and indeed, preliminarily believes that there would be significant costs to market participants when compared to the proposed regulation, particularly in consideration of market participants' reliance on the no-action letters, which the proposed regulation is designed to codify. Allowing the no-action position to expire without codifying its terms would, as noted above, preclude customers from achieving certain important financial objectives that could be achieved in a manner consistent with the customer funds protection and risk mitigation purposes of the CEA and Commission regulations. Additionally, while it would not result in costs for FCMs that do not now choose to comply with the conditions of the no-action position, it would appear to require clearing FCMs that currently rely on the no-action position to make significant expenditures of funds and resources in order to rework systems, procedures, and customer documentation to ensure compliance with regulation § 39.13(g)(8)(iii).

Because the no-action position has been applied successfully since July 2019, the Commission preliminarily believes codifying its provisions to be the most appropriate and beneficial approach for FCMs and their customers, and will preserve the customer funds protection and risk mitigation conditions of the no-action position.

Alternatively, the Commission, for analytical completeness, also considered extending the no-action position absent the conditions. This alternative would preserve the benefits of the no-action position for DCOs, FCMs, and customers. However, as discussed further below, the conditions of the no-action position—proposed to be codified herein—are designed to permit separate account treatment only to the extent that such treatment would not contravene the risk mitigation goals of regulation § 39.13. The Commission preliminarily believes that extending the no-action position without the conditions would exacerbate risks for DCOs, FCMs, and customers. For instance, without a requirement to cease separate account treatment in cases in which a customer is in financial distress, it is more likely that an under-margining scenario would be exacerbated, and a customer default to the clearing FCM—and potentially a default of the clearing FCM to the DCO—would be more likely.

### *D. Section 15(a) Factors*

Section 15(a) of the CEA requires the Commission to consider the effects of its actions in light of the following five factors:

#### 1. Protection of Market Participants and the Public

Section 15(a)(2)(A) of the CEA requires the Commission to evaluate the costs and benefits of a proposed regulation in light of considerations of protection of market participants and the public. The Commission preliminarily believes that the amendments proposed herein maintain the efficacy of protections for customers and the broader financial system contained in Core Principle D and regulation § 39.13.

Regulation § 39.13(g)(8)(iii) implements Core Principle D requirements for DCOs to limit exposure to potential losses from defaults and

[97] For instance, CME has provided for separate account treatment under the terms of the no-action position through member bulletins. *See, e.g.,* Financial and Regulatory Bulletin # 20–01, CFTC Letter No. 20–28 Extension of CFTC Letter No. 19–17 Time-Limited No-Action Relief with Respect to the Treatment of Separate Accounts by Futures Commission Merchants, Sept. 23, 2020, available at *https://www.cmegroup.com/notices/clearing/2020/09/frb--20-01.html.*

[98] This may be true to a lesser extent with respect to new entrants to the FCM business, in that those FCMs would incur the cost of implementing policies, procedures, and systems that comply with the conditions of the proposed regulation, but would not need to retrofit existing policies, procedures, and systems.

maintain margin sufficient to cover potential exposures in normal market conditions [99] by requiring DCOs to ensure that their members do not allow customers to withdraw funds from their accounts if such withdrawal would create or exacerbate an initial margin shortfall. This requirement protects not only market participants by requiring clearing FCMs to ensure that adequate margin exists to cover customer positions; it also protects the public from disruption to the wider financial system by mitigating the risk that a clearing FCM will default due to customer nonpayment of variation margin obligations combined with insufficient initial margin. While DCOs are required to, and do, maintain robust default management protections and procedures, any default of a clearing FCM nonetheless increases the risk of a DCO default. The conditions of the no-action position outlined in CFTC Letter No. 19–17, and proposed to be codified herein, are designed to effectuate these customer protection and risk mitigation goals notwithstanding a clearing FCM's application of separate account treatment. For example, separate account treatment is not permitted in certain circumstances outside the ordinary course of business (*e.g.,* where a clearing FCM learns a customer is in financial distress, and thus may be unable promptly to meet initial margin requirements, whether in one or more separate accounts or on a combined account basis).

Proposed regulation § 39.13(j) would also codify conditions for clearing FCMs designed to ensure that they collect information sufficient to understand the value of assets dedicated to a separate account, apply separate account treatment consistently, and maintain reliable lines of contact for the ultimate customer of the account. DCOs have successfully relied on these conditions for over two years, and the Commission believes codification of these conditions, as proposed herein, supports protection of market participants and the public.

2. Efficiency, Competitiveness, and Financial Integrity of Futures Markets

Section 15(a)(2)(B) of the CEA requires the Commission to evaluate the costs and benefits of a proposed regulation in light of efficiency, competitiveness, and financial integrity of futures markets. The Commission preliminarily believes that the proposed regulation may carry potential implications for the financial integrity of markets, but not for the efficiency or competitiveness of markets, which the Commission preliminarily believes remain unchanged.

As stated above, the purposes of the Commission's customer funds protection and risk management regulations, including regulation § 39.13(g)(8)(iii) include not just protection of customer assets, but also mitigation of systemic risk: a customer in default to a clearing FCM may in turn trigger the clearing FCM to default to the DCO, with cascading consequences for the DCO and the wider financial system. The proposed amendments reflect the Commission's preliminary determination that the conditions of CFTC Letter No. 19–17, as proposed to be codified herein, are sufficient and appropriate to guard against such risk for purposes of regulation § 39.13(g)(8)(iii).

In CFTC Letter No. 19–17, the Commission staff highlighted market participants' concerns that the Commission should recognize ''diverse practices among FCMs and their customers with respect to the handling of separate accounts of the same beneficial owner'' as consistent with regulation § 39.13(g)(8)(iii). FIA, in particular, outlined several business cases in which a customer or a clearing FCM may want to apply separate account treatment, and each of SIFMA–AMG, FIA, and CME outlined controls that clearing FCMs could apply to ensure that, in instances in which separate account treatment is desired, such treatment can be applied in a manner that effectively prevents systemic risk.[100] By proposing to codify the no-action position provided for by CFTC Letter No. 19–17 and its superseding letters, the Commission is proposing to preserve the option for clearing FCMs to engage in separate account treatment, thereby providing clearing FCMs with further opportunity to compete on services offered to customers, and providing customers with a greater variety of options to address their financial needs.

3. Price Discovery

Section 15(a)(2)(C) of the CEA requires the Commission to evaluate the costs and benefits of a proposed regulation in light of price discovery considerations. The Commission preliminarily believes that the proposed amendments will not have a significant impact on price discovery.

4. Sound Risk Management Practices

Section 15(a)(2)(D) of the CEA requires the Commission to evaluate the costs and benefits of a proposed regulation in light of sound risk management practices. As discussed above, regulation § 39.13(g)(8)(iii) implements the risk management standards of Core Principle D by requiring DCOs to ensure that their members do not allow customers to increase under-margining in their accounts through withdrawals of funds. Thus, any amendment to regulation § 39.13 should not undermine these risk management goals. As discussed further above with regard to protection of customers and the public, the conditions of the no-action position proposed to be codified herein are designed, and have been successfully used, to allow clearing FCMs to engage in separate account treatment in a manner that is consistent with the protection of customer funds and the mitigation of systemic risk, including by requiring the application of separate account treatment in a consistent manner, and requiring regulatory notifications and the cessation of separate account treatment in certain instances of operational or financial distress. The Commission therefore preliminarily believes the proposed regulations promotes sound DCO risk management practices.[101]

5. Other Public Interest Considerations

Section 15(a)(2)(e) of the CEA requires the Commission to evaluate the costs and benefits of a proposed regulation in light of other public interest considerations. The Commission is identifying a public interest benefit in codifying the Divisions' no-action position, where the efficacy of that position has been demonstrated. In such a situation, the Commission believes it serves the public interest and, in particular, the interests of market participants, to engage in notice-and-comment rulemaking, where it seeks and considers the views of the public in amending its regulations, rather than for market participants to continue to rely on a time-limited no-action position that can be easily withdrawn, provides less long-term certainty for market participants, and offers a more limited opportunity for public input.

Request for Comment [102]

*Question 13:* The Commission requests comment, including any

[99] 7 U.S.C. 7a–1(c)(2)(D)(iii)–(iv).

[100] *See* First FIA Letter; SIFMA–AMG Letter; CME Letter.

[101] *See, e.g.,* First FIA Letter (describing use of separate account treatment for hedging purposes).

[102] In section II above, the Commission requested comment on the potential time and cost burden

available quantifiable data and analysis, concerning the costs and benefits of the proposed regulation for DCOs, FCMs, and any other market participant(s), including regarding the extent to which market participants already enjoy any such benefits or incur any such costs.

*Question 14:* The Commission requests comment, including any available quantifiable data and analysis, concerning whether the tradeoff of costs and benefits of the proposed regulation for DCOs, FCMs, and any other market participant(s), could be improved by modifying the set of conditions set forth therein (*i.e.,* by deleting or modifying in a specified fashion any of the proposed conditions, or by adding specified additional conditions).

*Question 15:* The Commission requests comment regarding whether there are FCMs which chose not to rely on the no-action position provided by CFTC Letter No. 19–17 due to the conditions required to rely on that position. The Commission further requests comment on how those conditions could be modified to mitigate the burden of compliance while achieving the goals of mitigating systemic risk and protecting customer funds.

## IV. Related Matters

### *A. Antitrust Considerations*

Section 15(b) of the CEA requires the Commission to take into consideration the public interest to be protected by the antitrust laws and endeavor to take the least anticompetitive means of achieving the purposes of the CEA in issuing any order or adopting any Commission rule or regulation.[103]

The Commission believes that the public interest to be protected by the antitrust laws is generally to protect competition. The Commission requests comment on whether the proposed regulation implicates any other specific public interest to be protected by the antitrust laws.

The Commission has considered the proposed regulation to determine whether it is anticompetitive and has preliminarily identified no anticompetitive effects. The Commission requests comment on whether the proposed regulation is anticompetitive and, if it is, what the anticompetitive effects are.

Because the Commission has preliminarily determined that the proposed regulation is not anticompetitive and has no anticompetitive effects, the Commission has not identified any less anticompetitive means of achieving the purposes of the CEA. The Commission requests comment on whether there are less anticompetitive means of achieving the relevant purposes of the CEA that would otherwise be served by adopting the proposed regulation.

### *B. Regulatory Flexibility Act*

The Regulatory Flexibility Act (RFA) requires agencies to consider whether the rules they propose will have a significant economic impact on a substantial number of small entities and, if so, provide a regulatory flexibility analysis with respect to such impact.[104] The rules proposed herein would establish conditions under which DCOs may permit clearing FCMs to engage in separate account treatment, and therefore the rules would directly affect DCOs. However, the proposed regulation would also affect FCMs, insofar as FCMs permitted by DCOs to engage in separate account treatment, and which choose to do so, would be required to comply with the conditions proposed to be codified. The Commission has previously established certain definitions of ''small entities'' to be used by the Commission in evaluating the impact of its regulations on small entities in accordance with the RFA.[105] The Commission has previously determined that neither DCOs nor FCMs are small entities for the purpose of the RFA.[106] Accordingly, the Chairman, on behalf of the Commission, hereby certifies pursuant to 5 U.S.C. 605(b) that these proposed rules will not have a significant economic impact on a substantial number of small entities.

### *C. Paperwork Reduction Act*

The Paperwork Reduction Act (PRA) [107] imposes certain requirements on Federal agencies in connection with their conducting or sponsoring any collection of information as defined by the PRA. Any agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number. The Office of Management and Budget (OMB) has not yet assigned a control number to the new collection.

This proposed rulemaking would result in a new collection of information within the meaning of the PRA, as discussed below. The Commission therefore is submitting this proposal to OMB for review, in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. If adopted, responses to this collection of information would be required to obtain a benefit. Specifically, clearing FCMs would be required to respond to the collection in order to obtain the benefit of engaging in separate account treatment for purposes of regulation § 39.13(g)(8)(iii), to the extent permitted by the DCOs of which they are clearing members.

The Commission will protect proprietary information it may receive according to the Freedom of Information Act and 17 CFR part 145, ''Commission Records and Information.'' In addition, section 8(a)(1) of the CEA strictly prohibits the Commission, unless specifically authorized by the CEA, from making public ''data and information that would separately disclose the business transactions or market positions of any person and trade secrets or names of customers.'' [108] The Commission also is required to protect certain information contained in a government system of records according to the Privacy Act of 1974, 5 U.S.C. 552a.

#### 1. Information Provided by Reporting Entities/Persons

The proposed regulation applies directly to DCOs and would not result in any new collections of information from DCOs. However, to the extent a DCO permits clearing FCMs to engage in separate account treatment pursuant to the proposed regulation, such clearing FCMs would be subject to certain reporting, disclosure, and recordkeeping requirements as a result of DCO requirements to comply with the conditions specified in proposed regulation § 39.13(j)(1)–(14). The Commission estimates burden hours and costs using current regulation § 39.13 as a baseline. However, the Commission notes that many clearing FCMs already comply with the conditions of the no-action position, which are substantially similar to the proposed regulation. For these clearing FCMs, the Commission expects that any additional cost or administrative burden associated with complying with the

associated with specific steps to verify the identity of an authorized representative of a customer pursuant to proposed regulation § 39.13(j)(11), to the extent that commenters believe the Commission should prescribe such steps.

[103] 7 U.S.C. 19(b).

[104] 5 U.S.C. 601 *et seq.*

[105] Bankruptcy Regulations, 86 FR 19324, 19416 (Apr. 13, 2021) (citing Policy Statement and Establishment of Definitions of ''Small Entities'' for Purposes of the Regulatory Flexibility Act, 47 FR 18618 (Apr. 30, 1982)).

[106] *See id.* (citing New Regulatory Framework for Clearing Organizations, 66 FR 45604, 45609 (Aug. 29, 2001); Customer Margin Rules Relating to Security Futures, 67 FR 53146, 53171 (Aug. 14, 2002)).

[107] 44 U.S.C. 3501 *et seq.*

[108] 7 U.S.C. 12(a)(1).

proposed regulation would be negligible.[109]

a. Reporting Requirements

The proposed regulation contains three reporting requirements that could result in a collection of information from ten or more persons over a 12-month period.

First, proposed regulation § 39.13(j)(1)(iii) requires a clearing member to communicate promptly in writing to its DSRO and to any DCO of which it is a clearing member the occurrence of certain enumerated ''non-ordinary course of business'' events. There are currently approximately 62 registered FCMs.[110] The Commission staff estimates that slightly less than half of all FCMs would engage in separate account treatment under the proposed regulation, resulting in approximately 30 respondents. The Commission staff estimates that each such FCM may experience two non-ordinary course of business events per year, either with respect to themselves, or a customer. For purposes of determining the number of responses, the Commission staff anticipates that additional notifications of substantially the same information, and at substantially the same time, by means of electronic communication to additional DCOs of which the FCM is a clearing member (beyond the notification to the FCM's DSRO) would not materially increase the time and cost burden for such FCM. Therefore, for purposes of these estimates, the Commission staff treats a set of notifications sent to a DSRO and DCOs as a single response.[111] Accordingly, the Commission staff estimates a total of two responses per respondent on an annual basis. In addition, the Commission staff estimates that each response would take eight hours. This yields a total annual burden of 480 hours. In addition, the Commission staff estimates that respondents could expend up to $2,384 annually, based on an hourly rate of $149, to comply with this requirement.[112] This would result in an aggregated cost of $71,520 per annum (30 respondents × $2,384).

Second, proposed regulation § 39.13(j)(1)(iv) provides an avenue for a clearing member to resume separate account treatment when it returns to the ordinary course of business, which would require a notification to its DSRO and any DCO of which it is a clearing member. The Commission staff estimates that, in many cases, there may be a reversion to the ordinary course of business, which a clearing FCM would need to report to its DSRO and any DCO of which it is a clearing member in order to resume separate account treatment, in accordance with the requirements of proposed regulation § 39.13(j)(1)(iv). The Commission staff estimates that for each non-ordinary course of business event, there would ultimately be a reversion to the ordinary course of business, resulting in two additional responses per respondent on an annual basis. In addition, the Commission staff estimates that each response would take eight hours. This yields a total annual burden of 480 hours. In addition, the Commission staff estimates that respondents could expend up to $2,384 annually, based on an hourly rate of $149, to comply with this requirement. This would result in an aggregated cost of $71,520 per annum (30 respondents × $2,384).

Third, proposed regulation § 39.13(j)(14)(ii) provides that, to the extent a clearing member treats the separate accounts of a customer as accounts of separate entities pursuant to the terms of proposed regulation § 39.13(j), the clearing member must provide a one-time notification to its designated self-regulatory organization and any DCO of which it is a clearing member that it will apply such treatment. The Commission staff estimates this would result in a total of one response per respondent on a one-time basis, and that respondents could expend up to $149, based on an hourly rate of $149, to comply with the proposed regulation. This would result in an annual burden of 30 hours and an aggregated cost of $4,470 (30 respondents × $149). The aggregate information collection burden estimate associated with the proposed reporting requirements is as follows:[113]

*Estimated number of respondents:* 30.
*Estimated number of reports:* 150.
*Estimated annual hours burden:* 990.
*Estimated annual cost:* $147,510.

b. Disclosure Requirements

The proposed regulation contains three disclosure requirements that could affect ten or more persons in a 12-month period.

First, proposed regulation § 39.13(j)(12) requires a clearing member to provide each customer using separate accounts with a disclosure that, pursuant to part 190 of the Commission's regulations, all separate accounts of the customer will be combined in the event of the clearing member's bankruptcy. The Commission staff estimates that this would result in a total of one response per respondent on a one-time basis, and that respondents are likely to spend three hours to comply with this requirement for a total of 90 annual burden hours and up to $447 annually, based on an hourly rate of $149. This would result in an aggregated cost of $13,410 (30 respondents × $447). This estimate reflects an initial disclosure distributed to existing customers subject to separate account treatment. The Commission staff expects that, on a going forward basis, this disclosure would be included in standard disclosures for new customers, and would therefore not result in any additional costs.

Second, proposed regulation § 39.13(j)(12)(iii) requires that a clearing member include the disclosure statement required by proposed regulation § 39.13(j)(12) on its website or within its Disclosure Document

[109] However, the Commission expects that FCMs that do not currently rely on the no-action position, but choose to apply separate account treatment after the proposed regulation is finalized, would incur new costs.

[110] *See* CFTC, Selected FCM Financial Data as of October 31, 2022 from Reports Filed by November 26, 2022, available at *https://www.cftc.gov/sites/default/files/2022-12/01%20-%20FCM%20Webpage%20Update%20-%20October%202022.pdf.*

[111] The Commission staff applies the same assumption to notifications to DSROs and DCOs with respect to proposed regulation § 39.13(j)(1)(iv) and proposed regulation § 39.13(j)(14)(ii), discussed below.

[112] This figure is rounded to the nearest dollar and based on the annual mean wage for U.S. Bureau of Labor Statistics (BLS) category 13–2061, ''Financial Examiners.'' BLS, Occupational Employment and Wages, May 2021 [hereinafter ''BLS Data''], available at *https://www.bls.gov/oes/current/oes_nat.htm.* This category consists of professionals who ''[e]nforce or ensure compliance with laws and regulations governing financial and securities institutions and financial and real estate transactions.'' BLS, Occupational Employment and Wages, May 2021: 13–2061 Financial Examiners, available at *https://www.bls.gov/oes/current/oes132061.htm.* According to BLS, the mean salary for this category is $96,180. This number is divided by 1,800 work hours in a year to account for sick leave and vacations and multiplied by 2.5 to account for retirement, health, and other benefits, as well as for office space, computer equipment support, and human resources support. This number is further multiplied by 1.113625 to account for the 11.3625% change in the Consumer Price Index for Urban Wage-Earners and Clerical Workers between May 2021 and January 2023 (263.612 to 293.565). BLS, CPI for Urban Wage Earners and Clerical Workers (CPI–W), U.S. City Average, All Items—CWUR0000SA0, available at *https://www.bls.gov/data/#prices.* Together, these modifications yield an hourly rate of $149. The rounding and modifications applied with respect to the estimated average burden hour cost for this occupational category have been applied with respect to each occupational category discussed as part of this analysis.

[113] This estimate reflects the aggregate information collection burden estimate associated with the proposed reporting requirements for the first annual period following implementation of the proposed regulation. Because proposed regulation § 39.13(j)(14)(ii) would result in a one-time reporting requirement, the Commission staff estimates that for each subsequent annual period, the number of reports, burden hours, and burden cost would be reduced accordingly.

required by regulation § 1.55(i). If the clearing member opts to update its Disclosure Document, the Commission staff estimates that this proposed requirement would result in a total of one response on a one-time basis, and that respondents could expend up to $149 annually, based on an hourly rate of $149, to comply with the proposed regulation. This would result in an estimated 30 burden hours annually and an aggregated cost of $4,470 (30 respondents × $149). This estimate reflects one updated disclosure distributed to existing customers. If the clearing member opts to include the disclosure on its website, the Commission staff estimates that this proposed requirement would result in a total of one response on a one-time basis, and that respondents could expend up to $126 annually, based on an hourly rate of $126, to comply with the proposed regulation.[114] This would result in an estimated 30 burden hours annually and an aggregated cost of $3,780 (30 respondents × $126). The Commission staff expects that once the disclosure is included in the Disclosure Document required by regulation § 1.55(i) or posted on the clearing member's website, the clearing member would not incur any additional costs.

Third, proposed regulation § 39.13(j)(13) requires a clearing member to disclose in the Disclosure Document required under Commission regulation § 1.55(i) that it permits the separate treatment of accounts for the same customer under the terms and conditions of regulation § 39.13(j). The Commission staff estimates that this would result in a total of one response per respondent on a one-time basis, and that respondents could expend up to $149 annually, based on an hourly rate of $149, to comply with the proposed regulation. This would result in an estimated 30 burden hours annually and an aggregated cost of $4,470 (30 respondents × $149). This estimate reflects an initial updated disclosure distributed to existing customers. The Commission staff expects that once this disclosure is made, the disclosure would be included in the Disclosure Document required by regulation § 1.55(i) going forward, and would not result in any additional costs.

The aggregate information collection burden estimate associated with the proposed reporting requirements is as follows:[115]

*Estimated number of respondents:* 30.

*Estimated number of reports:* 120.

*Estimated annual hours burden:* 180.

*Estimated annual cost:* $26,130.

c. Recordkeeping Requirements

The proposed regulation contains three recordkeeping requirements that could affect ten or more persons in a 12-month period.

First, proposed regulation § 39.13(j)(11) provides that where the customer of separate accounts subject to separate treatment pursuant to regulation § 39.13(j) has appointed a third-party as the primary contact to the clearing member, the clearing member must obtain and maintain current contact information of an authorized representative(s) at the customer and take reasonable steps to verify that such person is in fact an authorized representative of the customer. The clearing member would be required to review and, as necessary, update such information on at least an annual basis. The Commission staff estimates this would result in a total of 600 responses per respondent on an annual basis,[116] and that respondents could expend up to $42,000 annually, based on an hourly rate of $70.[117] This would result in an estimated 18,000 burden hours annually and an aggregated cost of $1,260,000 per annum (30 respondents × $42,000). This estimate contemplates annual validation of contact information for each customer.

Second, proposed regulation § 39.13(j)(12)(ii) requires that a clearing member maintain documentation demonstrating that the part 190 disclosure statement required by proposed regulation § 39.13(j)(12) was delivered directly to the customer. The Commission staff estimates that this would result in a total of 600 responses on a one-time basis, and that respondents could expend up to $4,200 annually, based on an hourly rate of $70, to comply with the proposed regulation. This would result in an estimated 1,800 burden hours annually and an aggregated cost of $126,000 (30 respondents × $4,200). This estimate reflects initial recordkeeping of documentation that the disclosure was delivered to existing customers subject to separate account treatment. The Commission staff estimates that, once such recordkeeping is complete, the recordkeeping required by proposed regulation § 39.13(j)(12)(ii) would be required only with respect to new customers who receive disclosures pursuant to proposed regulation § 39.13(j)(12), and the costs and burden hours associated with proposed regulation § 39.13(j)(12)(ii) would be reduced accordingly.

Third, proposed regulation § 39.13(j)(14)(iii) provides that, to the extent the clearing member treats the separate accounts of a customer as accounts of separate entities, pursuant to the terms of proposed regulation § 39.13(j), the clearing member must maintain and keep current a list of all separate accounts receiving such treatment. The Commission staff believes the cost and time burden associated with, on an ongoing basis, maintaining and keeping current a list of all separate accounts receiving separate account treatment would vary among FCMs based on factors such as business conditions, customer needs, entry of new customers, and exit of other customers, and would be challenging to estimate with precision. The Commission staff anticipates that the marginal time and cost burden of the recordkeeping required by the regulation, done in the routine course of business, would be negligible. However, proposed regulation § 39.13(j)(14)(iii) also requires a holistic review of such records no less than quarterly. The Commission staff estimates this would result in a total of four responses per respondent on an annual basis, and that respondents could expend up to $2,384 annually, based on an hourly rate of $149, to comply with the proposed

[114] This figure is based on the annual mean wage for U.S. Bureau of Labor Statistics (BLS) category 15–1254, ''Web Developers.'' BLS Data.

[115] For purposes of this analysis, the Commission staff calculates the aggregate information collection burden assuming that respondents choose to include the disclosure statement required by proposed regulation § 39.13(j)(12) on their websites *and* within their Disclosure Document required by proposed regulation § 1.55(i), in order to comply with proposed regulation § 39.13(j)(12)(iii). Additionally, this estimate reflects the aggregate information collection burden estimate associated with the proposed disclosure requirements for the first annual period following implementation of the proposed regulation. Because each of proposed regulation § 39.13(j)(12), § 39.13(j)(12)(iii), and § 39.13(j)(13)(ii) would result in a one-time disclosure requirement for PRA purposes, the Commission staff estimates that for each subsequent annual period the number of respondents, reports, burden hours, and burden cost would be reduced accordingly.

[116] FIA stated that while the costs incurred by each FCM to comply with the conditions of CFTC Letter No. 19–17 varies depending on customer base, among larger FCMs with a significant institutional customer base, personnel costs would have included identifying and reviewing up to 3,000 customer agreements to determine which agreements required modification, and then negotiating amendments with customers or their advisors. The Commission staff estimates, based on the 30 largest FCMs by customer assets in segregation as of the Commission's FCM financial data report for May 31, 2022, that there are 18,000 customers of FCMs whose accounts could be in scope for the proposed regulation, with an average of 600 customers per FCM.

[117] This figure is based on the annual mean wage for BLS category 43–6010, ''Secretaries & Administrative Assistants.'' BLS Data.

regulation.[118] This would result in an estimated 480 burden hours annually and an aggregated cost of $71,520 per annum (30 respondents × $2,384).

The Commission notes that while certain other provisions of the proposed regulation may result in recordkeeping requirements, the Commission anticipates that any burden associated with these requirements is likely to be *de minimis* and therefore does not expect these provisions to increase the recordkeeping burden for FCMs.[119]

The aggregate information collection burden estimate associated with the proposed reporting requirements is as follows: [120]

*Estimated number of respondents:* 30.

*Estimated number of reports:* 36,120.

*Estimated annual hours burden:* 20,280.

*Estimated annual cost:* $1,457,520.

2. Information Collection Comments

The Commission invites the public and other Federal agencies to comment on any aspect of the proposed information collection requirements discussed above. Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission will consider public comments on this proposed collection of information regarding:

- Evaluating whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have a practical use;
- Evaluating the accuracy of the estimated burden of the proposed collection of information, including the degree to which the methodology and the assumptions that the Commission employed were valid;
- Enhancing the quality, utility, and clarity of the information proposed to be collected; and
- Reducing the burden of the proposed information collection requirements on registered entities, including through the use of appropriate automated, electronic, mechanical, or other technological information collection techniques; *e.g.,* permitting electronic submission of responses.

Organizations and individuals desiring to submit comments on the proposed information collection requirements should send those comments to:

- The Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503, Attn: Desk Officer of the Commodity Futures Trading Commission;
- (202) 395–6566 (fax); or
- *OIRAsubmissions@omb.eop.gov* (email).

Please provide the Commission with a copy of submitted comments so that, if the Commission determines to promulgate a final rule, all such comments can be summarized and addressed in the final rule preamble. Refer to the **ADDRESSES** section of this notice of proposed rulemaking for comment submission instructions to the Commission. A copy of the supporting statements for the collections of information discussed above may be obtained by visiting *RegInfo.gov.* OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of receiving full consideration if OMB receives it within 30 days of publication of this notice of proposed rulemaking. Nothing in the foregoing affects the deadline enumerated above for public comment to the Commission on the proposed rules.

**List of Subjects in 17 CFR Part 39**

Clearing, Clearing Organizations, Commodity Futures, Consumer Protection.

For the reasons set forth in the preamble, the Commodity Futures Trading Commission proposes to amend 17 CFR part 39 as follows:

## PART 39—DERIVATIVES CLEARING ORGANIZATIONS

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

**Authority:** 7 U.S.C. 2, 6(c), 7a–1, and 12a(5); 12 U.S.C. 5464; 15 U.S.C. 8325; Section 752 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, title VII, sec. 752, July 21, 2010, 124 Stat. 1749.

■ 2. In § 39.13, add paragraph (j) to read as follows:

**§ 39.13 Risk management.**

* * * * *

(j) *Separate account treatment with respect to withdrawal of customer initial margin.* For purposes of paragraph (g)(8)(iii) of this section, a derivatives clearing organization may permit a clearing member that is a futures commission merchant to treat the separate accounts of a customer as accounts of separate entities if such clearing member's written internal controls and procedures permit it to do so, and the derivatives clearing organization requires such clearing member to comply with the following conditions with respect to such separate accounts:

(1) The clearing member permits disbursements on a separate account basis only during the ordinary course of business.

(i) For purposes of this paragraph (j), ''separate account'' means any one of multiple accounts of the same customer that are carried by the same futures commission merchant that is a clearing member of a derivatives clearing organization.

(ii) For purposes of this paragraph (j), ''ordinary course of business'' means the standard day-to-day operation of the clearing member's business relationship with its customer. The following events are inconsistent with the ordinary course of business and would require the clearing member to cease permitting disbursements on a separate account basis with respect to all accounts of the relevant customer receiving separate account treatment, where such event occurs with respect to a customer as described in paragraphs (j)(1)(ii)(A) through (F) of this section, or with respect to all customer accounts receiving separate account treatment, where such event occurs with respect to the clearing member as described in paragraphs (j)(1)(ii)(G) through (I) of this section.

(A) Such customer, including any separate account of such customer, fails to deposit or maintain initial or maintenance margin or make payment of variation margin or option premium as specified in paragraph (j)(4) of this section.

(B) The occurrence and declaration by the clearing member of an event of default as defined in the account documentation executed between the clearing member and the customer.

(C) A good faith determination by the clearing member's chief compliance officer, one of its senior risk managers, or other senior manager, following such

[118] For purposes of these estimates, the Commission staff treats each quarterly review by an FCM as a single response.

[119] *See, e.g.,* 17 CFR 1.32 (setting forth requirements for computation of customer segregated accounts); 17 CFR 1.73(a)(4) (requiring clearing FCMs to conduct stress tests in each customer account that could pose material risk to the FCM); 17 CFR 22.7(f)(6)(iii) (requirement to maintain residual interest); 17 CFR 1.22 & 22.7 (requirements to compute margin deficiencies).

[120] This estimate reflects the aggregate information collection burden estimates associated with the proposed disclosure requirements for the first annual period following implementation of the proposed regulation. Because, as noted above, proposed regulation § 39.13(j)(12)(ii) would result in a one-time recordkeeping requirement as to each customer (*i.e.,* once the disclosure is provided to existing customers, it would need to be provided only to new customers on a going forward basis), the Commission staff estimates that for each subsequent annual period the number of reports, burden hours, and burden cost would be reduced accordingly.

clearing member's own internal escalation procedures, that the customer is in financial distress, or there is significant and bona fide risk that the customer will be unable promptly to perform its financial obligations to the clearing member, whether due to operational reasons or otherwise.

(D) The insolvency or bankruptcy of the customer or a parent company of the customer.

(E) The clearing member receives notification that a board of trade, a derivatives clearing organization, a self-regulatory organization as defined in section 1.3 of this chapter or section 3(a)(26) of the Securities Exchange Act of 1934, the Commission, or another regulator with jurisdiction over the customer, has initiated an action with respect to the customer based on an allegation that the customer is in financial distress.

(F) The clearing member is directed to cease permitting disbursements on a separate account basis, with respect to one or more customers, by a board of trade, a derivatives clearing organization, a self-regulatory organization, the Commission, or another regulator with jurisdiction over the clearing member, pursuant to, as applicable, board of trade, derivatives clearing organization or self-regulatory organization rules, government regulations, or law.

(G) The clearing member is notified by a board of trade, a derivatives clearing organization, a self-regulatory organization, the Commission, or another regulator with jurisdiction over the clearing member, that the board of trade, the derivatives clearing organization, the self-regulatory organization, the Commission, or other regulator, as applicable, believes the clearing member is in financial or other distress.

(H) The clearing member is under financial or other distress as determined in good faith by its chief compliance officer, senior risk managers, or other senior management.

(I) The bankruptcy of the clearing member or a parent company of the clearing member.

(iii) The clearing member must communicate to its designated self-regulatory organization and any derivatives clearing organization of which it is a clearing member the occurrence of any one of the events enumerated in paragraphs (j)(1)(ii)(A) through (I) of this section. Such communication must be made promptly in writing, and in any case no later than the next business day following the date on which the clearing member identifies or has been informed that such event has occurred.

(iv) A clearing member that has ceased permitting disbursements on a separate account basis pursuant to paragraph (j)(1)(ii) of this section may resume permitting disbursements on a separate account basis if such clearing member reasonably believes, based on new information, that the circumstances triggering cessation of separate account treatment pursuant to paragraphs (j)(1)(ii)(A) through (I) of this section have been cured, and such clearing member provides in writing to its designated self-regulatory organization and any derivatives clearing organization of which it is a clearing member a notification that it will resume separate account treatment, and the factual basis and rationale for its conclusion that the circumstances triggering cessation of separate account treatment pursuant to paragraphs (j)(1)(ii)(A) through (I) of this section have been cured. If the circumstances triggering cessation of separate account treatment were an action or direction by one of the entities described in paragraphs (j)(1)(ii)(E) through (G) of this section, then the cure of those circumstances would require the withdrawal or other appropriate termination of such action or direction by that entity.

(2) The clearing member obtains from the customer or, as applicable, the manager of a separate account, information sufficient for the clearing member to:

(i) Assess the value of the assets dedicated to such separate account; and

(ii) Identify the direct or indirect parent company of the customer, as applicable, if such customer has a direct or indirect parent company.

(3) The clearing member's internal risk management policies and procedures must provide for stress testing and credit limits for customers with separate accounts. This stress testing must be performed, and the credit limits must be applied, both on an individual separate account and on a combined account basis.

(4) Each separate account must be on a ''one business day margin call.'' The following requirements apply solely for purposes of this paragraph (j)(4):

(i) Except as explicitly provided in this paragraph (j)(4), if the margin call is issued by 11:00 a.m. Eastern Time on a United States business day, it must be met by the applicable customer no later than the close of the Fedwire Funds Service on the same United States business day. In no case can a clearing member contractually agree to delay issuing such a margin call until after 11:00 a.m. Eastern Time on any given United States business day or to otherwise engage in practices that are intended to circumvent this paragraph (j)(4) by causing such delay.

(ii) Payment of margin in Japanese Yen shall be considered in compliance with the requirements of this paragraph (j)(4) if received by the applicable clearing member by 12:00 p.m., Eastern Time, on the second United States business day after the business day on which the margin call is issued.

(iii) Payment of margin in fiat currencies other than U.S. Dollars, Canadian Dollars, or Japanese Yen shall be considered in compliance with the requirements of this paragraph (j)(4) if received by the applicable clearing member by 12:00 p.m., Eastern Time, on the United States business day after the business day on which the margin call is issued.

(iv) The relevant deadline for payment of margin in fiat currencies other than U.S. Dollars may be extended by up to one additional United States business day and still be considered in compliance with the requirements of this paragraph (j)(4) if payment is delayed due to a banking holiday in the jurisdiction of issue of the currency. For payments in Euro, either the customer or the investment manager managing the separate account may designate one country within the Eurozone that they have the most significant contacts with for purposes of meeting margin calls, whose banking holidays shall be referred to for this purpose.

(v) A failure to deposit, maintain, or pay margin or option premium due to unusual administrative error or operational constraints that a customer or investment manager acting diligently and in good faith could not have reasonably foreseen does not constitute a failure to comply with the requirements of this paragraph (j)(4). For these purposes, a clearing member's determination that the failure to deposit, maintain, or pay margin or option premium is due to such administrative error or operational constraints must be based on the clearing member's reasonable belief in light of information known to the clearing member at the time the clearing member learns of the relevant administrative error or operational constraint.

(vi) A clearing member would not be in compliance with the requirements of this paragraph (j)(4) if it contractually agrees to provide customers with periods of time to meet margin calls that extend beyond the time periods specified in paragraphs (j)(4)(i) through (v) of this section, or engages in

practices that are designed to circumvent this paragraph (j)(4).

(vii) For purposes of this paragraph (j)(4), ''United States business day'' means weekdays not including Federal holidays as established by 5 U.S.C. 6103. A margin call issued after 11:00 a.m. Eastern Time on a United States business day, or on a Saturday, Sunday, or a Federal holiday, shall be considered to have been issued before 11:00 a.m. Eastern Time on the next day that is a United States business day.

(5) The margin requirement for each separate account is calculated independently from all other separate accounts of the same customer with no offsets or spreads recognized across the separate accounts. A clearing member is required to treat each separate account of a customer independently from all other separate accounts of the same customer for purposes of computing capital charges for under-margined customer accounts in determining its adjusted net capital under § 1.17 of this chapter.

(6) The clearing member must record each separate account independently in its books and records (*i.e.,* the clearing member must record the balance of each separate account as a receivable (debit or deficit) or payable with no offsets between the other separate accounts of the same customer). A clearing member is required to treat each separate account of a customer independently from all other separate accounts of the same customer for purposes of determining whether a receivable from a separate account that represents a deficit or debit ledger balance may be included in the clearing member's current assets in computing its adjusted net capital under § 1.17(c)(2) of this chapter.

(7) A customer receivable for a debit or deficit from a separate account must only be considered a current or allowable asset for purposes of § 1.17(c)(2) of this chapter based on the assets of that separate account, and not on the assets held in another separate account of the same customer.

(8) In calculating the amount of its own funds the clearing member must use to cover debit or deficit balances pursuant to § 1.20(i) or § 22.2(f) of this chapter, the clearing member must include any debit or deficit of any separate account, and must reflect that calculation in each applicable report.

(9) The clearing member must include the margin deficiency of each separate account, and cover such deficiency with its own funds, as applicable, for purposes of its residual interest and legally segregated operationally commingled compliance calculations, as applicable under § 1.22, § 22.2, and 30.7 of this chapter.

(10) In determining its residual interest target for purposes of § 1.23(c) of this chapter, the clearing member must calculate customer receivables computed on a separate account basis.

(11) Where the customer of separate accounts subject to separate treatment pursuant to this paragraph (j) has appointed a third-party as the primary contact to the clearing member, the clearing member must obtain and maintain current contact information of an authorized representative(s) at the customer, and take reasonable steps to verify that such contact information is accurate and that person is in fact an authorized representative of the customer. The clearing member must review and, as applicable, update such contact information no less than annually.

(12) The clearing member must provide each customer using separate accounts with a disclosure that, pursuant to part 190 of this chapter, all separate accounts of the customer in each account class will be combined in the event of the clearing member's bankruptcy.

(i) The disclosure statement required by this paragraph (j)(12) must be delivered separately to the customer via electronic means in writing or in such other manner as the clearing member customarily delivers disclosures pursuant to applicable Commission regulations, and as permissible under the clearing member's customer documentation.

(ii) The clearing member must maintain documentation demonstrating that the disclosure statement required by this paragraph (j)(12) was delivered directly to the customer.

(iii) The clearing member must include the disclosure statement required by this paragraph (j)(12) on its website or within its Disclosure Document required by § 1.55(i) of this chapter.

(13) The clearing member must disclose in the Disclosure Document required under § 1.55(i) of this chapter that it permits the separate treatment of accounts for the same customer under the terms and conditions of this paragraph (j).

(14) To the extent the clearing member treats the separate accounts of a customer as accounts of separate entities, pursuant to the terms of this paragraph (j), the clearing member must:

(i) Apply such treatment in a consistent manner over time;

(ii) Provide a one-time notification (*i.e.,* once such a notification is made, the clearing member is not required to repeat it) to its designated self-regulatory organization and any derivatives clearing organization of which it is a clearing member that it will apply such treatment to one or more customers; and

(iii) Maintain and keep current a list of all separate accounts receiving such treatment. The clearing member must conduct a review of its records of accounts receiving separate treatment no less than quarterly.

* * * * *

Issued in Washington, DC, on March 22, 2023 by the Commission.

**Robert Sidman,**

*Deputy Secretary of the Commission.*

**Note:** The following appendices will not appear in the Code of Federal Regulations.

## Appendices to Derivatives Clearing Organization Risk Management Regulations To Account for the Treatment of Separate Accounts by Futures Commission Merchants—Voting Summary and Commissioner's Statement

### Appendix 1—Voting Summary

On this matter, Chairman Behnam and Commissioners Johnson, Goldsmith Romero, Mersinger, and Pham voted in the affirmative. No Commissioner voted in the negative.

### Appendix 2—Statement of Commissioner Kristin N. Johnson

I support the issuance by the Commodity Futures Trading Commission (CFTC) of the Notice of Proposed Amendments to Derivatives Clearing Organization (DCO) Risk Management Regulations to Account for the Treatment of Separate Accounts by Futures Commission Merchants (FCMs) (the ''NPRM'').

The proposed amendments codify a no-action position issued by the CFTC's Division of Clearing and Risk (DCR) and Market Participants Division (MPD) that imposed certain conditions on FCM's ability to treat accounts owned by a single customer as separate accounts.[1] These conditions aim to protect customer assets and avoid systemic risk.[2] I write today to underscore the

[1] Advisory and Time-Limited No-Action Relief with Respect to the Treatment of Separate Accounts by Futures Commission Merchants, CFTC Letter No. 19–17, July 10, 2019, *https://www.cftc.gov/csl/19-17/download.*

[2] These conditions aim to ensure that FCMs ''(i) carry out such separate account treatment in a consistent and documented manner; (ii) monitor customer accounts on a separate and combined basis; (iii) identify and act upon instances of financial or operational distress that necessitate a cessation of separate account treatment; (iv) provide appropriate disclosures to customers regarding separate account treatment; and (v) apprise their DSROs when they apply separate account treatment or an event has occurred that would necessitate cessation of separate account treatment.'' NPRM at Section II.A.

significance of these protections for customer assets.

Segregating or separating a firm's proprietary funds from customer funds is a critical element in protecting not only customers, but also the broader financial system. In the absence of the proposed risk management conditions and robust compliance with the same, conditions of financial distress could lead to preventable losses for customers or FCMs.[3]

[FR Doc. 2023–06248 Filed 4–13–23; 8:45 am]

**BILLING CODE 6351–01–P**

## DEPARTMENT OF JUSTICE

### Drug Enforcement Administration

### 21 CFR Part 1310

**[Docket No. DEA–1098]**

### Designation of Halides of 4-Anilinopiperidine as List I Chemicals

**AGENCY:** Drug Enforcement Administration, Department of Justice.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Drug Enforcement Administration is proposing to modify the listing of the list I chemical, *N*-phenylpiperidin-4-amine (also known as 4-anilinopiperidine; *N*-phenyl-4-piperidinamine; 4–AP) (hereinafter referred to as 4-anilinopiperidine), to include halides of 4-anilinopiperidine. The current listing of 4-anilinopiperidine includes its amides, its carbamates, and its salts, as list I chemicals under the Controlled Substances Act. The Drug Enforcement Administration proposes the new listing to read as follows: *N*-phenylpiperidin-4-amine (4-anilinopiperidine; *N*-phenyl-4-piperidinamine; 4–AP), its amides, its carbamates, its halides, its salts, and any combination thereof, whenever the existence of such is possible, as a list I chemical under the Controlled Substances Act.

**DATES:** Comments must be submitted electronically or postmarked on or before May 15, 2023. Commenters should be aware that the electronic Federal Docket Management System will not accept any comments after 11:59 p.m. Eastern Time on the last day of the comment period.

**ADDRESSES:** To ensure proper handling of comments, please reference ''Docket No. DEA–1098'' on all electronic and written correspondence, including any attachments.

• *Electronic comments:* The Drug Enforcement Administration encourages 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 completion of your submission, you will receive a Comment Tracking Number for your comment. Please be aware that submitted comments are not instantaneously available for public view on *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.

• *Paper comments:* Paper comments that duplicate electronic submissions are not necessary. Should you wish to mail a paper comment, *in lieu of* an electronic comment, it should be sent via regular or express mail to: Drug Enforcement Administration, Attn: DEA Federal Register Representative/DPW, 8701 Morrissette Drive, Springfield, Virginia 22152.

**FOR FURTHER INFORMATION CONTACT:** Terrence L. Boos, Drug and Chemical Evaluation Section, Diversion Control Division, Drug Enforcement Administration; Telephone: (571) 362–3249.

**SUPPLEMENTARY INFORMATION:**

#### Posting of Public Comments

Please note that all comments received in response to this docket are considered part of the public record. They will, unless reasonable cause is given, be made available by the Drug Enforcement Administration (DEA) for public inspection online at *https://www.regulations.gov.* Such information includes personal identifying information (such as your name, address, etc.) voluntarily submitted by the commenter. The Freedom of Information Act applies to all comments received. 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 made publicly available, you must include the phrase ''PERSONAL IDENTIFYING INFORMATION'' in the first paragraph of your comment. You must also place all of the personal identifying information you do not want made publicly available 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 made publicly available, you must include the phrase ''CONFIDENTIAL BUSINESS INFORMATION'' in the first paragraph of your comment. You must also prominently identify the confidential business information to be redacted within the comment.

Comments containing personal identifying information or confidential business information identified as directed above will be made publicly available in redacted form. If a comment has so much confidential business information that it cannot be effectively redacted, all or part of that comment may not be made publicly available. Comments posted to *https://www.regulations.gov* may include any personal identifying information (such as name, address, and phone number) included in the text of your electronic submission that is not identified as directed above as confidential.

An electronic copy of this proposed rule is available at *https://www.regulations.gov* for easy reference.

#### Legal Authority

The Controlled Substances Act (CSA) gives the Attorney General the authority to specify, by regulation, chemicals as list I chemicals.[1] A ''list I chemical'' is a chemical that is used in manufacturing a controlled substance in violation of the CSA and is important to the manufacture of the controlled substances.[2] The current list of all listed chemicals is published at 21 CFR 1310.02. Pursuant to 28 CFR 0.100(b), the Attorney General has delegated his authority to designate list I chemicals to the Administrator of DEA (Administrator). DEA regulations set forth the process by which DEA may add a chemical as a listed chemical. As set forth in 21 CFR 1310.02(c), the agency may do so by publishing a final rule in the **Federal Register** following a published notice of proposed rulemaking with at least 30 days for public comments.

#### Background

DEA previously found that 4-anilinopiperidine is used in the illicit manufacture of the controlled substance fentanyl (a schedule II substance under the CSA) and fentanyl analogues controlled in schedule I of the CSA, and is important to the manufacture of the controlled substance fentanyl and fentanyl analogues, because it cannot be replaced by other chemicals in its respective synthetic pathways that are used in the illicit manufacture of

[3] *Id.* (discussing Proposed Regulation § 39.13(j)(1)).

[1] 21 U.S.C. 802(34).

[2] *Id.*

fentanyl and fentanyl analogues.[3] On this basis, DEA previously specified that 4-anilinopiperidine is a list I chemical.[4] DEA has now found that halides of 4-anilinopiperidine are also used in the illicit manufacture of schedule I controlled substances, such as *para*-fluorofentanyl, *ortho*-fluorofentanyl, and *para*-chlorofentanyl. Accordingly, if finalized, this action would add halides of 4-anilinopiperidine to the prior listing of 4-anilinopiperidine and thereby subject handlers of halides of 4-anilinopiperidine to the chemical regulatory provisions of the CSA and its implementing regulations.

This proposed rule would not affect current handlers of 4-anilinopiperidine, including its amides, its carbamates, and its salts, as they would already be registered to handle 4-anilinopiperidine. This rulemaking does not establish a threshold for domestic and international transactions of halides of 4-anilinopiperidine. As such, all transactions of chemical mixtures containing halides of 4-anilinopiperidine will be regulated at any concentration and will be subject to control under the CSA.

Fentanyl is a synthetic opioid and was first synthesized in Belgium in the late 1950s. Fentanyl was introduced into medical practice and is approved for medical practitioners in the United States to prescribe lawfully for anesthesia and analgesia. Yet, due to its pharmacological effects, fentanyl can be used as a substitute for heroin, oxycodone, and other opioids. Therefore, despite its accepted medical use in treatment in the United States, the DEA controls fentanyl as a schedule II controlled substance due to its high potential for abuse and dependence.[5]

The unlawful trafficking and distribution of fentanyl and fentanyl analogues in the United States continues to pose an imminent hazard to public safety. Since 2012, fentanyl has shown a dramatic increase in the illicit drug supply as a single substance, in mixtures with other illicit drugs (*i.e.,* heroin, cocaine, and methamphetamine), or in forms that mimic pharmaceutical preparations, including prescription opiates and benzodiazepines.[6]

In recent years, the United States has experienced a significant increase in overdoses and overdose fatalities from fentanyl and fentanyl analogues. According to the Centers for Disease Control and Prevention (CDC), drug-induced overdose deaths involving synthetic opioids (excluding methadone) in the United States increased from 36,359 in 2019, to 56,516 in 2020, and to 70,589 in 2021 (provisional).[7] Further, CDC reports that opioids, mainly synthetic opioids (which includes fentanyl), are predominately responsible for drug overdose fatalities, as the drug overdose death data (109,247) predicted for the 12 month-ending March 2022, synthetic opioids were involved in about 67.3 percent of all drug-induced overdose deaths.[8]

The increase in overdose fatalities involving synthetic opioids coincides with a dramatic increase in law enforcement encounters of fentanyl and fentanyl analogues. According to the National Forensic Laboratory Information System (NFLIS-Drug),[9] reports from forensic laboratories of drug items containing fentanyl and several schedule I fentanyl analogues increased dramatically since 2014, as shown in Table 1.

TABLE 1—ANNUAL REPORTS OF FENTANYL AND HALOGENATED FENTANYL ANALOGUES IDENTIFIED IN DRUG ENCOUNTERS

| Year | 2014 | 2015 | 2016 | 2017 | 2018 | 2019 | 2020 | 2021 |
|---|---|---|---|---|---|---|---|---|
| Fentanyl | 5,553 | 15,461 | 37,144 | 61,628 | 89,890 | 107,928 | 124,773 | 156,629 |
| Halogenated Fentanyl Analogues[10] | 1 | 10 | 435 | 2,628 | 2,960 | 1,013 | 743 | 19,831 |

**Role of 4-Anilinopiperidine in the Synthesis of Fentanyl and Fentanyl Analogues**

Fentanyl and its analogues are not naturally occurring substances. As such, the manufacture of these substances requires them to be produced through synthetic organic chemistry. Synthetic organic chemistry is the process in which a new organic molecule is created through a series of chemical reactions, which involve precursor chemicals. Through chemical reactions, the chemical structures of precursor chemicals are modified in a desired fashion. These chemical reaction sequences, also known as synthetic pathways, are designed to create a desired substance. Several synthetic pathways to fentanyl and fentanyl analogues have been identified in clandestine laboratory settings, including the original ''Janssen method,'' the ''Siegfried method,'' and the ''Gupta method,'' which are further explained below.

In response to the illicit manufacture of fentanyl using these methods, DEA controlled *N*-phenethyl-4-piperidone (NPP);[11] *N*-(1-benzylpiperidin-4-yl)-*N*-phenylpropionamide (benzylfentanyl), *N*-phenylpiperidin-4-amine (4-anilinopiperidine);[12] and proposed control of 4-piperidone[13] as list I chemicals. DEA also controlled 4-anilino-*N*-phenethylpiperidine

[3] 85 FR 20822 (Apr. 15, 2020).

[4] *Id.*

[5] 21 U.S.C. 812(c), Schedule II(b)(6); 21 CFR 1308.12(c).

[6] United Nations Office on Drugs and Crime, Global SMART Update Volume 17, March 2017. *https://www.unodc.org/documents/scientific/Global_SMART_Update_17_web.pdf.*

[7] Centers for Disease Control and Prevention, National Center for Health Statistics. National Vital Statistics System, Provisional Mortality on CDC WONDER Online Database. Data are from the final Multiple Cause of Death Files, 2018–2020, and from provisional data for years 2021–2022, as compiled from data provided by the 57 vital statistics jurisdictions through the Vital Statistics Cooperative Program. Accessed at *https://wonder.cdc.gov/mcd-icd10-provisional.html* on August 15, 2022.

[8] Ahmad FB, Rossen LM, Sutton P. Provisional drug overdose death counts. National Center for Health Statistics. 2021. Accessed at *https://www.cdc.gov/nchs/nvss/vsrr/drug-overdose-data.htm* on May 5, 2022.

[9] The National Forensic Laboratory Information System (NFLIS-Drug) is a national forensic laboratory reporting system that systematically collects results from drug chemistry analyses conducted by Federal, State and local forensic laboratories in the United States. While NFLIS-Drug data is not direct evidence of abuse, it can lead to an inference that a drug has been diverted and abused. See 76 FR 77330, 77332 (Dec. 12, 2011). NFLIS-Drug data was queried on August 15, 2022.

[10] Halogenated fentanyl analogues reported to NFLIS-Drug include: *meta*-fluorofentanyl, *meta*-fluoroisobutyryl fentanyl, *para*-fluoroisobutyryl fentanyl, chlorofentanyl, fluoro furanyl fentanyl, fluorobutyryl fentanyl, fluorobutyryl/fluoroisobutyryl fentanyl, fluorofentanyl, fluoroisobutyryl fentanyl, *meta*-fluoro furanyl fentanyl, *ortho*-fluorobutyryl fentanyl, *ortho*-fluoroisobutyryl fentanyl, *ortho*-fluoro acrylfentanyl, *ortho*-fluoro furanyl fentanyl, *ortho*-fluorofentanyl, *ortho*-chlorofentanyl, *para*-chlorofentanyl, *para*-fluoro furanyl fentanyl, *para*-fluoro valeryl fentanyl, *para*-fluorobutyryl fentanyl, and *para*-fluorofentanyl.

[11] 72 FR 20039 (Apr. 23, 2007).

[12] 85 FR 20822 (Apr. 15, 2020).

[13] 87 FR 57852 (Sept. 22, 2022).

(ANPP) [14] and *N*-phenyl-*N*-(piperidin-4-yl)propionamide (norfentanyl) [15] as schedule II immediate precursors to fentanyl under the CSA.

In 2017, the United Nations Commission on Narcotic Drugs (CND) placed NPP and ANPP in Table I of the Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (1988 Convention) in response to the international reintroduction of fentanyl on the illicit drug market.[16] As such, member states of the United Nations were required to regulate these precursor chemicals at the national level. In addition, the People's Republic of China regulated NPP and ANPP on February 1, 2018.[17]

Following the international control of NPP and ANPP under the 1988 Convention, illicit fentanyl manufacturers moved to unregulated precursor chemicals. These included 4-anilinopiperidine, 1-boc-4–AP, and norfentanyl. In response, the CND placed 4-anilinopiperidine, 1-boc-4–AP, and norfentanyl in Table I of the 1988 Convention.[18]

On May 15, 2020, 4-anilinopiperidine became a list I chemical in the United States due to its role in the illicit manufacture of fentanyl.[19] Since that control action, DEA has observed an increase in identifications of certain fentanyl analogues by law enforcement and public health officials. Many of these fentanyl analogues contain a halogen atom on the aniline ring of its respective chemical structure. The presence of the halogen atom suggests that the fentanyl analogue was synthesized from a halogenated precursor chemical. Indeed, halogenated fentanyl precursors have been identified by law enforcement, such as *tert*-butyl 4-((4-fluorophenyl)amino)piperidine-1-carboxylate (*para*-fluoro 1-boc 4–AP). The chemical structure of this precursor defines it as a halide and carbamate of 4-anilinopiperidine. As such, it falls outside of the current definitions of a list I chemical, simply due to the presence of the fluorine (a halogen) atom. Although it is not regulated as a list I chemical, it can be used in the synthesis of fentanyl analogues, such as the schedule I substances *para*-fluorofentanyl, *para*-fluoroisobutyryl fentanyl, *para*-fluorobutyryl fentanyl, and *para*-fluoro furanyl fentanyl.

In addition, fentanyl analogues with both *meta*- and *ortho*-fluoro substitutions have been identified, such as *ortho*-fluorofuranyl fentanyl and *meta*-fluorofuranyl fentanyl. The identification of these substances suggests illicit fentanyl analogue manufacturers attempt to utilize unregulated precursor chemicals to evade law enforcement detection and precursor chemical controls. This strategy allows for the synthesis of a variety of fentanyl analogues by simply moving the fluorine atom around the aniline ring while maintaining the same synthetic methodology used to synthesize fentanyl and fentanyl analogues.

Likewise, other halogenated fentanyl analogues, such as those containing a chlorine atom, have been reported by forensic laboratories. According to NFLIS-Drug, *para*-chlorofentanyl and *ortho*-chlorofentanyl were reported for the first time in 2020. The identification of these substances suggests that illicit fentanyl analogue manufacturers utilize precursor chemicals containing a chlorine atom as an alternative to a fluorine atom in effort to evade law enforcement detection.

**4-Anilinopiperidine**

The original published synthetic pathway to fentanyl, known as the Janssen method, involves the two important precursors, benzylfentanyl and norfentanyl. 4-Piperidone,[20] a chemical proposed for list I control under the CSA, serves as a precursor chemical to benzylfentanyl, a list I chemical under the CSA,[21] which is converted to norfentanyl, the schedule II immediate precursor in this synthetic pathway. Norfentanyl is then subjected to one simple chemical reaction to complete the synthesis of fentanyl. Norfentanyl is controlled in schedule II of the CSA.[22]

Like the Janssen method, 4-piperidone serves as an early-stage precursor chemical in the Siegfried method. 4-Piperidone is a precursor to NPP, a known fentanyl precursor and list I chemical under the CSA,[23] in the Siegfried method. NPP is then converted to ANPP, the schedule II immediate precursor in this synthetic pathway. ANPP is then subjected to a simple one-step chemical reaction to complete the synthesis of fentanyl. ANPP is controlled as a schedule II immediate precursor under the CSA.[24]

In addition to the Janssen and Siegfried methods, clandestine manufacturers are using other methods to synthesize fentanyl, one of which is known as the Gupta method. 4-Anilinopiperidine, a list I chemical under the CSA,[25] is the key precursor in the Gupta method. 4-Anilinopiperidine serves as an alternative precursor chemical to NPP in the synthesis of ANPP, albeit through a different synthetic process. The resulting ANPP is then used as the immediate precursor chemical in the illicit manufacture of fentanyl.

Recent encounters of precursor chemicals related to 4-anilinopiperidine in chemical structure have occurred. These precursor chemicals contain a halogen atom on the aniline ring of 4-anilinopiperidine. Modifications have included the addition of a fluorine atom, a chlorine atom, or a bromine atom at different positions on the aniline ring of the 4-anilinopiperidine structure. The use of these halogenated 4-anilinopiperidine precursor chemicals in place of 4-anilinopiperidine has resulted in the illicit manufacturing of schedule I fentanyl analogues.

Halogenated 4-anilinopiperidines [26] are commercially available from both domestic and foreign suppliers. DEA is aware of at least 25 domestic suppliers and 14 foreign suppliers. Substituted versions of 4-anilinopiperidine, such as *para*-fluoro 1-boc-4-AP, are attractive to illicit manufacturers because they are readily available from chemical suppliers and the lack of regulations on these substituted precursor chemicals.

[14] 75 FR 37295 (Aug. 30, 2010).

[15] 85 FR 21320 (Apr. 17, 2020).

[16] 60th Session of the CND Dec/60/12 (ANPP) and Dec/60/13 (NPP).

[17] *https://www.dea.gov/press-release/2018/01/05/china-announces-scheduling-controls-two-fentanyl-precursor-chemicals.* Accessed March 9, 2022.

[18] In a letter dated May 27, 2022, the United Nations Office on Drugs and Crime, in accordance with Article 12, paragraph 6 of the 1988 Convention, informed the Permanent Mission of the United States of America to the United Nations (Vienna) that the CND decided to place the chemical 4–AP in Table I of the 1988 Convention (CND Dec/65/4) and the chemical 1-boc-4–AP in Table I of the 1988 Convention (CND Dec/65/5) at its 65th Session on March 16, 2022.

[19] 85 FR 20822 (April 15, 2020).

[20] 87 FR 57852 (Sept. 22, 2022).

[21] 85 FR 20822 (Apr. 15, 2020).

[22] 85 FR 21320 (Apr. 17, 2020).

[23] 72 FR 20039 (Apr. 23, 2007).

[24] 75 FR 37295 (Aug. 30, 2010).

[25] 85 FR 20822 (Apr. 15, 2020).

[26] Chemicals included the folowing: *ortho*-fluoro 4-AP, *ortho*-chloro 4-AP, *ortho*-bromo 4-AP, *meta*-fluoro 4-AP, *meta*-chloro 4-AP, *meta*-bromo 4-AP, *para*-fluoro 4-AP, *para*-chloro 4-AP, *para*-bromo 4-AP, *ortho*-fluoro 1-boc-4-AP, *ortho*-chloro 1-boc-4-AP, *ortho*-bromo 1-boc-4-AP, *meta*-fluoro 1-boc-4-AP, *meta*-chloro 1-boc-4-AP, *meta*-bromo 1-boc-4-AP, *para*-fluoro 1-boc-4–AP, *para*-chloro 1-boc-4-AP, and *para*-bromo 1-boc-4-AP.

*para*-Fluoro 1-boc-4-AP has been identified in law enforcement encounters in the United States. According to NFLIS-Drug, beginning in 2020, there have been at least nine reports of *para*-fluoro 1-boc-4-AP from forensic laboratories in the United States. A query of DEA's STARLiMS [27] database provided 16 reports of *para*-fluoro 1-boc-4-AP from analyses conducted on submitted drug evidence by DEA forensic laboratories. Of these 16 reports, *para*-fluoro 1-boc-4-AP was the only substance reported in nine exhibits (totaling more than 29 kg), suggesting that these seizures were intended to be used as precursor chemicals in the synthesis of fentanyl analogues. Additionally, *para*-fluoro 1-boc-4-AP was reported in combination with *para*-fluorofentanyl in four of the seven exhibits containing a mixture of substances, suggesting that *para*-fluoro 1-boc-4-AP was a precursor chemical involved in the synthesis of *para*-fluorofentanyl, a schedule I substance under the CSA.

As of August 2022, in addition to domestic encounters, the International Narcotics Control Board of the United Nations reported two international transactions of *para*-fluoro 1-boc-4-AP through the Precursors Incident Communication System (PICS) [28] reporting system. These incidents reported to PICS totaled approximately 51 kg and had destinations located in North America.

These recent law enforcement encounters of *para*-fluoro 1-boc-4-AP coincide with the placement of NPP, ANPP, 4-anilinopiperidine, 1-boc-4-AP (*tert*-butyl 4-(phenylamino)piperidine-1-carboxylate), and norfentanyl in Table I of the 1988 Convention, the People's Republic of China regulating NPP and ANPP as of February 1, 2018, and the regulation of benzylfentanyl and proposed control of 4-piperidone as list I chemicals in the United States. The domestic encounters of *para*-fluoro 1-boc-4-AP at ports of entry indicate a change in precursors used in the illicit manufacture of fentanyl to substituted precursor chemicals used in the illicit manufacture of fentanyl analogues in efforts to evade international controls on NPP, ANPP, 4-anilinopiperidine, 1-boc-4-AP, and norfentanyl and additional controls on benzylfentanyl in the United States.

**Regulation of 4-Anilinopiperidine, Including Its Amides, Its Carbamates, Its Halides, Its Salts, and Any Combination Thereof, Whenever the Existence of Such Is Possible, as a List I Chemical**

The CSA, specifically 21 U.S.C. 802(34), and its implementing regulations at 21 CFR 1310.02(c), provide the Attorney General with the authority to specify, by regulation, additional precursor or essential chemicals as listed chemicals if they are used in the manufacture of controlled substances in violation of the CSA. Recent law enforcement encounters indicate halides of 4-anilinopiperidine are being used in the illicit manufacture of schedule I fentanyl analogues. This proposed rule would modify the current regulations that regulate 4-anilinopiperidine, including its amides, its carbamates, and its salts to include halides of 4-anilinopiperidine. DEA finds that 4-anilinopiperidine, including its amides, its carbamates, its halides, its salts, and any combination thereof, whenever the existence of such is possible, is used in the illicit manufacture of controlled substances, such as fentanyl and fentanyl analogues, and is important to the manufacture of these substances because it cannot be replaced by other chemicals in their respective synthetic pathways that are used in the illicit manufacture of fentanyl and fentanyl analogues.

**Chemical Mixtures of 4-Anilinopiperidine**

This proposed rulemaking, if finalized, would modify the current regulations that regulate 4-anilinopiperidine, including its amides, its carbamates, and its salts to include halides of 4-anilinopiperidine. The regulations would specify that chemical mixtures containing halides of 4-anilinopiperidine would not be exempt from regulatory requirements at any concentration, unless an application for exemption of a chemical mixture is submitted by a manufacturer of halides of 4-anilinopiperidine and the application is reviewed and accepted by DEA under 21 CFR 1310.13 (Exemption by Application Process). The control of chemical mixtures containing any amount of halides of 4-anilinopiperidine is necessary to prevent the extraction, isolation, and use of halides of 4-anilinopiperidine in the illicit manufacture of schedule I fentanyl analogues. This proposed rule would modify the Table of Concentration Limits in 21 CFR 1310.12(c) to reflect the fact that chemical mixtures containing any amount of 4-anilinopiperidine, including its amides, its carbamates, its halides, its salts, and any combination thereof, whenever the existence of such is possible, are subject to the CSA chemical control provisions.

**Exemption by Application Process**

DEA has implemented an application process to exempt mixtures from the requirements of the CSA and its implementing regulations.[29] Under the application process, manufacturers may submit an application for exemption for those mixtures that do not qualify for automatic exemption. Exemption status can be granted if DEA determines that the mixture is formulated in such a way that it cannot be easily used in the illicit production of a controlled substance and that the listed chemical cannot be readily recovered.[30]

**Requirements for Handling List I Chemicals**

On May 15, 2020, DEA regulated 4-anilinopiperidine, including its amides, its carbamates, and its salts, as a list I chemical under the CSA. This proposed rule would expand the definitions of 4-anilinopiperidine to include its halides. Halides of 4-anilinopiperidine would become subject to the regulatory provisions of the CSA upon publication of a final rule. Chemicals that meet the current definition of 4-anilinopiperidine [31] have been, and continue to be, subject to the regulatory provisions of the CSA since May 15, 2020.

If this rule is finalized as proposed, halides of 4-anilinopiperidine will be subject to all of the regulatory controls and administrative, civil, and criminal sanctions applicable to the manufacture, distribution, importing, and exporting of list I chemicals, just as 4-anilinopiperidine, including its amides, its carbamates, and its salts are currently regulated. Upon publication of a final rule, persons potentially handling halides of 4-anilinopiperidine, including regulated chemical mixtures containing halides of 4-anilinopiperidine, will be required to comply with list I chemical regulations, including the following:

1. *Registration.* Any person who manufactures, distributes, imports, or exports halides of 4-anilinopiperidine, including chemical mixtures containing halides of 4-anilinopiperidine, or

[27] On October 1, 2014, DEA implemented STARLiMS (a web-based, commercial laboratory information management system) to replace the System to Retrieve Information from Drug Evidence (STRIDE) as its laboratory drug evidence data system of record. STARLiMS data was queried on September 12, 2022.

[28] PICS is a platform that allows governments to exchange operational and investigative intelligence and to generate strategic intelligence on precursors trafficking. PICS reports were collected up to August 23, 2022.

[29] 21 CFR 1310.13.

[30] 21 U.S.C. 802(39)(A)(vi).

[31] 85 FR 20822.

proposes to engage in the manufacture, distribution, importation, or exportation of halides of 4-anilinopiperidine, including chemical mixtures containing halides of 4-anilinopiperidine, must obtain a registration pursuant to 21 U.S.C. 822, 823, 957, and 958. Regulations describing registration for list I chemical handlers are set forth in 21 CFR part 1309. DEA regulations require separate registrations for manufacturing, distributing, importing, and exporting of list I chemicals.[32] Further, a separate registration is required for each principal place of business at one general physical location where list I chemicals are manufactured, distributed, imported, or exported by a person.[33]

DEA notes that under the CSA, ''warehousemen'' are not required to register and may lawfully possess list I chemicals, if the possession of those chemicals is in the usual course of business or employment. Under DEA implementing regulations, the warehouse in question must receive the list I chemical from a DEA registrant and shall only distribute the list I chemical back to the DEA registrant and registered location from which it was received. A warehouse that distributes list I chemicals to persons other than the registrant and registered location from which they were obtained is conducting distribution activities and is required to register as such.

Upon publication of a final rule, any person manufacturing, distributing, importing, or exporting halides of 4-anilinopiperidine or a chemical mixture containing halides of 4-anilinopiperidine would become subject to the registration requirement under the CSA. DEA recognizes, however, that it is not possible for persons who are subject to the registration requirements to immediately complete and submit an application for registration, and for DEA to immediately issue registrations for those activities. Therefore, to allow any continued legitimate commerce in halides of 4-anilinopiperidine or a chemical mixture containing halides of 4-anilinopiperidine, DEA is proposing to update the listing in 21 CFR 1310.09(p), to include the proposed updated definitions of 4-anilinopiperidine to include a temporary exemption from the registration requirement for persons desiring to engage in activities with the proposed updated definitions of halides of 4-anilinopiperidine or a chemical mixture containing halides of 4-anilinopiperidine, provided that DEA receives a properly completed application for registration or application for exemption of a chemical mixture under 21 CFR 1310.13 on or before 30 days after publication of a final rule implementing regulations regarding the proposed updated definitions of 4-anilinopiperidine. The temporary exemption for such persons will remain in effect until DEA takes final action on their application for registration or application for exemption of a chemical mixture.

The temporary exemption applies solely to the registration requirement; all other chemical control requirements, including recordkeeping and reporting, would become effective on the effective date of the final rule. This is necessary because a delay in regulating these transactions could result in increased diversion of chemicals desirable to drug traffickers.

Additionally, the temporary exemption for registration does not suspend applicable Federal criminal laws relating to halides of 4-anilinopiperidine, nor does it supersede State or local laws or regulations. All handlers of halides of 4-anilinopiperidine must comply with applicable State and local requirements in addition to the CSA regulatory controls.

*2. Records and Reports.* Every DEA registrant would be required to maintain records and submit reports with respect to halides of 4-anilinopiperidine pursuant to 21 U.S.C. 830 and in accordance with 21 CFR part 1310.04 and 1310.05. Pursuant to 21 CFR 1310.04, a record must be kept for two years after the date of a transaction involving a listed chemical, provided the transaction is a regulated transaction.

The CSA and its implementing regulations require that each regulated person must report to DEA any regulated transaction involving an extraordinary quantity of a listed chemical, an uncommon method of payment or delivery, or any other circumstance that the regulated person believes may indicate that the listed chemical will be used in violation of subchapter I of the CSA. In addition, regulated persons must report any proposed regulated transaction with a person whose description or other identifying characteristics DEA has previously furnished to the regulated person, any unusual or excessive loss or disappearance of a listed chemical under the control of the regulated person, and any in-transit loss in which the regulated person is the supplier. 21 U.S.C. 830(b); 21 CFR 1310.05(a) and (b).

*3. Importation and Exportation.* All importation and exportation of halides of 4-anilinopiperidine or a chemical mixture containing halides of 4-anilinopiperidine would need to be done in compliance with 21 U.S.C. 957, 958, and 971, and in accordance with 21 CFR part 1313.

*4. Security.* All applicants and registrants would be required to provide effective controls against theft and diversion of list I chemicals in accordance with 21 CFR 1309.71–1309.73.

*5. Administrative Inspection.* Places, including factories, warehouses, or other establishments and conveyances, where registrants or other regulated persons may lawfully hold, manufacture, distribute, or otherwise dispose of a list I chemical or where records relating to those activities are maintained, are controlled premises as defined in 21 U.S.C. 880(a) and 21 CFR 1316.02(c). The CSA allows for administrative inspections of these controlled premises as provided in 21 CFR part 1316, subpart A.[34]

*6. Liability.* Any activity involving halides of 4-anilinopiperidine not authorized by, or in violation of, the CSA, would be unlawful, and would subject the person to administrative, civil, and/or criminal action.

**Solicitation for Information**

As part of this proposed rulemaking, DEA is soliciting information on any possible legitimate uses of halides of 4-anilinopiperidine unrelated to fentanyl production (including industrial uses) in order to assess the potential economic impact of controlling halides of 4-anilinopiperidine as defined in this proposed rule. DEA has searched information in the public domain for legitimate uses of this chemical, and has not documented a legitimate commercial or industrial use for halides of 4-anilinopiperidine. DEA seeks, however, to document any unpublicized use(s) and other proprietary use(s) of halides of 4-anilinopiperidine that are not in the public domain. Therefore, DEA is soliciting comment on the uses of halides of 4-anilinopiperidine in the legitimate marketplace.

DEA is soliciting input from all potentially affected parties regarding: (1) The types of legitimate industries using halides of 4-anilinopiperidine; (2) the legitimate uses of halides of 4-anilinopiperidine, if any; (3) the size of the domestic market for halides of 4-anilinopiperidine; (4) the number of manufacturers of halides of 4-anilinopiperidine; (5) the number of

[32] 21 CFR 1309.21.

[33] 21 U.S.C. 822(e)(1); 21 CFR 1309.23(a).

[34] 21 U.S.C. 880.

distributors of halides of 4-anilinopiperidine; (6) the level of import and export of halides of 4-anilinopiperidine; (7) the potential burden these proposed regulatory controls of halides of 4-anilinopiperidine may have on any legitimate trade; (8) the potential number of individuals/firms that may be adversely affected by these proposed regulatory controls (particularly with respect to the impact on small businesses); and (9) any other information on the manner of manufacturing, distribution, consumption, storage, disposal, and uses of halides of 4-anilinopiperidine by industry and others. DEA invites all interested parties to provide any information on any legitimate uses of halides of 4-anilinopiperidine in industry, commerce, academia, research and development, or other applications. DEA seeks both quantitative and qualitative data.

**Handling of Confidential or Proprietary Information**

Confidential or proprietary information may be submitted as part of a comment regarding this Notice of Proposed Rulemaking. Please see the ''POSTING OF PUBLIC COMMENTS'' section above for a discussion of the identification and redaction of confidential business information and personally identifying information.

**Regulatory Analyses**

*Executive Orders 12866 and 13563, Regulatory Planning and Review, Improving and Regulation and Regulatory Review*

This proposed rule was developed in accordance with the principles of Executive Orders (E.O.) 12866 and 13563. E.O. 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). E.O. 13563 is supplemental to and reaffirms the principles, structures, and definitions governing regulatory review as established in E.O. 12866. E.O. 12866 classifies a ''significant regulatory action,'' requiring review by the Office of Management and Budget (OMB), as any regulatory action that is likely to result in a rule that may: (1) have an annual effect on the economy of $100 million or more 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, or tribal Governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the E.O.

A review of the 25 domestic suppliers of halides of 4-anilinopiperidine indicates that these entities are not registered with DEA to handle list I chemicals. These 25 suppliers are entities that do not also supply 4-anilinopiperidine as these entities would already be registered to handle list I chemicals since 4-anilinopiperidine is currently a list I chemical under the CSA. Therefore, the modified definitions of 4-anilinopiperidine in this proposed rule would potentially affect 25 entities. DEA anticipates that this proposed rule will impose minimal or no economic impact on affected entities; and thus, will not have a significant economic impact on any of the 25 affected small entities. Therefore, DEA concludes this proposed rule is not a significant regulatory action under E.O. 12866. If finalized as proposed, halides of 4-anilinopiperidine will be subject to all of the regulatory controls and administrative, civil, and criminal sanctions applicable to the manufacture, distribution, importing, and exporting of list I chemicals, just as 4-anilinopiperidine, including its amides, its carbamates, and its salts, is currently regulated. 4-Anilinopiperidine is a precursor chemical used in, and is important to, the illicit manufacture of the schedule II controlled substance fentanyl and schedule I fentanyl analogues. The distribution of illicitly manufactured fentanyl and fentanyl analogues has caused an unprecedented outbreak of thousands of fentanyl-related overdoses in the United States in recent years.

DEA has searched information in the public domain for any legitimate uses of halides of 4-anilinopiperidine, and has not documented a use for halides of 4-anilinopiperidine. DEA welcomes any public comment on these quantities and their economic significance.

DEA evaluated the costs and benefits of this proposed action.

Costs

DEA believes the market for halides of 4-anilinopiperidine for the legitimate manufacturing of pharmaceutical fentanyl is minimal because halides of 4-anilinopiperidine are not used to synthesize fentanyl or any schedule II fentanyl analogue currently used in medical practice. As stated above, DEA is not aware of any legitimate uses of halides of 4-anilinopiperidine. Any manufacturer, distributor, importer, or exporter of halides of 4-anilinopiperidine, if they exist at all, would incur costs if this proposed rule were finalized. The primary costs associated with this proposed rule would be the annual registration fees for list I chemicals ($3,699 for manufacturers and $1,850 for distributors, importers, and exporters). However, DEA believes that the cost will be minimal.

DEA has identified 25 domestic suppliers of halides of 4-anilinopiperidine. None of these 25 suppliers are registered to handle list I chemicals. It is difficult to estimate the quantity of distribution of halides of 4-anilinopiperidine by these suppliers. It is common for chemical distributors to have items in their catalog while not actually having any material level of sales. If this proposed rule is finalized, suppliers for the legitimate use of halides of 4-anilinopiperidine are expected to choose the least-cost option, and stop selling the minimal quantities, if any, of halides of 4-anilinopiperidine, rather than incur the registration cost. Because DEA believes the quantities of halides of 4-anilinopiperidine supplied for the legitimate manufacturing of pharmaceutical fentanyl are minimal, DEA estimates that the cost of foregone sales is minimal; thus, the cost of this proposed rule is minimal. DEA welcomes any public comment regarding this estimate.

This analysis excludes consideration of any economic impact to those businesses that facilitate the manufacturing and distribution of halides of 4-anilinopiperidine for the manufacturing of illicit fentanyl and fentanyl analogues. As a law enforcement organization and as a matter of principle, DEA believes considering the economic utility of facilitating the manufacture of illicit fentanyl would be improper.

Benefits

Controlling halides of 4-anilinopiperidine is expected to prevent, curtail, and limit the unlawful manufacture and distribution of fentanyl and fentanyl analogues. As a list I chemical, handling of halides of 4-anilinopiperidine would require registration with DEA and various controls and monitoring as required by the CSA. This proposed rule is also expected to assist preventing the

possible theft or diversion of halides of 4-anilinopiperidine from any legitimate firms. DEA also believes control is necessary to prevent unscrupulous chemists from synthesizing halides of 4-anilinopiperidine and selling them (as unregulated materials) through the internet and other channels, to individuals who may wish to acquire unregulated intermediary chemicals for the purpose of illicitly manufacturing fentanyl and fentanyl analogues.

In summary, DEA conducted a qualitative analysis of costs and benefits. DEA believes this proposed action, if finalized, will minimize the diversion of halides of 4-anilinopiperidine. DEA believes the market for halides of 4-anilinopiperidine for the legitimate manufacturing of fentanyl or schedule II fentanyl analogues currently used in medical practice is minimal since halides of 4-anilinopiperidine are not used to synthesize fentanyl or any schedule II fentanyl analogue currently used in medical practice. Therefore, any potential cost as a result of this regulation is minimal.

*Executive Order 12988, Civil Justice Reform*

This proposed regulation meets the applicable standards set forth in sections 3(a) and 3(b)(2) of E.O. 12988 Civil Justice Reform to eliminate drafting errors and ambiguity, minimize litigation, provide a clear legal standard for affected conduct, and promote simplification and burden reduction.

*Executive Order 13132, Federalism*

This proposed rulemaking does not have federalism implications warranting the application of E.O. 13132. The proposed rule does not have substantial direct effects on the States, on the relationship between the national Government and the States, or the distribution of power and responsibilities among the various levels of government.

*Executive Order 13175, Consultation and Coordination With Indian Tribal Governments*

This proposed rule does not have tribal implications warranting the application of E.O. 13175. This proposed rule does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes.

*Regulatory Flexibility Act*

The Administrator, in accordance with the Regulatory Flexibility Act (5 U.S.C. 601–612), has reviewed this proposed rule and by approving it certifies that it will not have a significant economic impact on a substantial number of small entities. As discussed above, if finalized as proposed, halides of 4-anilinopiperidine or a chemical mixture containing halides of 4-anilinopiperidine will be subject to all of the regulatory controls and administrative, civil, and criminal sanctions applicable to the manufacture, distribution, importing, and exporting of list I chemicals. Halides of 4-anilinopiperidine are precursor chemicals used in, and important to, the illicit manufacture of the schedule I fentanyl analogues. The distribution of illicitly manufactured fentanyl and fentanyl analogues has caused an unprecedented outbreak of thousands of fentanyl-related overdoses in the United States in recent years. DEA has not identified any legitimate industrial use for halides of 4-anilinopiperidine. Therefore, DEA believes the vast majority, if not all, of halides of 4-anilinopiperidine is used for the illicit manufacturing of schedule I fentanyl analogues. The primary costs associated with this proposed rule are the annual registration fees ($3,699 for manufacturers and $1,850 for distributors, importers, and exporters). DEA has identified 25 domestic suppliers of halides of 4-anilinopiperidineall of which are not registered with DEA to handle list I chemicals. All non-registered domestic suppliers are affected and are estimated to be small entities (based on Small Business Administration size standard for chemical distributors and Statistics of U.S. Business data).[35] It is impossible to know how much halides of 4-anilinopiperidine is distributed by these suppliers. It is common for chemical distributors to have items in their catalog while not actually having any material level of sales. Therefore, DEA estimates the cost of this proposed rule on any affected small entity is minimal. DEA welcomes any public comment regarding this estimate. Based on these factors, DEA projects that this proposed rule, if promulgated, will not result in a significant economic impact on a substantial number of small entities.

*Unfunded Mandates Reform Act of 1995*

On the basis of information contained in the ''Regulatory Flexibility Act'' section above, DEA has determined and certifies pursuant to the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1501 *et seq.,* that this action would not result in any Federal mandate that may result ''in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted for inflation) in any one year. . . .'' Therefore, neither a Small Government Agency Plan nor any other action is required under provisions of UMRA.

**List of Subjects in 21 CFR Part 1310**

Administrative practice and procedure, Drug traffic control, Reporting and recordkeeping requirements.

For the reasons set out above, DEA proposes to amend 21 CFR part 1310 as follows:

## PART 1310—RECORDS AND REPORTS OF LISTED CHEMICALS AND CERTAIN MACHINES; IMPORTATION AND EXPORTATION OF CERTAIN MACHINES

■ 1. The authority citation for 21 CFR part 1310 continues to read as follows:

**Authority:** 21 U.S.C. 802, 827(h), 830, 871(b), 890.

■ 2. In § 1310.02, revise paragraph (a)(33) to read as follows:

**§ 1310.02 Substances covered.**

* * * * *

(a) * * *

| | |
|---|---|
| (33) *N*-phenylpiperidin-4-amine (4-anilinopiperidine; *N*-phenyl-4-piperidinamine; 4–AP), its amides, its carbamates, its halides, its salts, and any combination thereof, whenever the existence of such is possible | 8335 |

* * * * *

■ 3. In § 1310.04, revise paragraph (g)(1)(xiii) to read as follows:

**§ 1310.04 Maintenance of records.**

* * * * *

(g) * * *

(1) * * *

(xiii) *N*-phenylpiperidin-4-amine (4-anilinopiperidine; *N*-phenyl-4-

[35] *https://www.sba.gov/sites/default/files/2018-07/NAICS%202017%20Table%20of%20Size%20Standards.pdf.*

piperidinamine; 4–AP), its amides, its carbamates, its halides, its salts, and any combination thereof, whenever the existence of such is possible

* * * * *

■ 4. In § 1310.09, revise paragraph (p) to read as follows:

**§ 1310.09 Temporary exemption from registration.**

* * * * *

(p)(1) Each person required under 21 U.S.C. 822 and 21 U.S.C. 957 to obtain a registration to manufacture, distribute, import, or export regulated *N*-phenylpiperidin-4-amine (4-anilinopiperidine; *N*-phenyl-4-piperidinamine; 4–AP), its amides, its carbamates, its halides, its salts, and any combination thereof, whenever the existence of such is possible, including regulated chemical mixtures pursuant to § 1310.12, is temporarily exempted from the registration requirement, provided that DEA receives a properly completed application for registration or application for exemption for a chemical mixture containing halides of 4-anilinopiperidine pursuant to § 1310.13 on or before 30 days after the publication of a rule finalizing this action. The exemption would remain in effect for each person who has made such application until the Administration has approved or denied that application. This exemption applies only to registration; all other chemical control requirements set forth in the Act and parts 1309, 1310, 1313, and 1316 of this chapter remain in full force and effect.

(2) Any person who manufactures, distributes, imports, or exports a chemical mixture containing *N*-phenylpiperidin-4-amine (4-anilinopiperidine; *N*-phenyl-4-piperidinamine; 4–AP), its amides, its carbamates, its halides, its salts, and any combination thereof, whenever the existence of such is possible, whose application for exemption is subsequently denied by DEA must obtain a registration with DEA. A temporary exemption from the registration requirement will also be provided for those persons whose application for exemption is denied, provided that DEA receives a properly completed application for registration on or before 30 days following the date of official DEA notification that the application for exemption has been denied. The temporary exemption for such persons will remain in effect until DEA takes final action on their registration application.

* * * * *

■ 5. In § 1310.12, in the table in paragraph (c), revise the entry for *N*-phenylpiperidin-4-amine to read as follows:

**§ 1310.12 Exempt chemical mixtures.**

* * * * *

(c) * * *

TABLE OF CONCENTRATION LIMITS

| | DEA chemical code number | Concentration | Special conditions |
|---|---|---|---|
| **List I Chemicals** | | | |
| * * | * * | * | * |
| *N*-phenylpiperidin-4-amine (4-anilinopiperidine; *N*-phenyl-4-piperidinamine; 4–AP), its amides, its carbamates, its halides, its salts, and any combination thereof, whenever the existence of such is possible. | 8335 | Not exempt at any concentration. | Chemical mixtures containing any amount of 4-anilinopiperidine are not exempt. |
| * * | * * | * | * |

* * * * *

**Signing Authority**

This document of the Drug Enforcement Administration was signed on April 3, 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 RegisterLiaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of DEA. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

**Scott Brinks,**

*Federal Register Liaison Officer, Drug Enforcement Administration.*

[FR Doc. 2023–07454 Filed 4–13–23; 8:45 am]

**BILLING CODE 4410–09–P**

## DEPARTMENT OF THE INTERIOR

## National Indian Gaming Commission

## 25 CFR Parts 502, 556, and 558

**RIN 3141–AA32**

## Definitions; Background Investigation for Primary Management Officials and Key Employees; Gaming Licenses for Primary Management Officials and Key Employees

**AGENCY:** National Indian Gaming Commission, Department of the Interior.

**ACTION:** Proposed rule.

**SUMMARY:** In 2022, the Commission issued a proposed rule seeking to amend the ''primary management official'' and ''key employee'' definitions; add definitions for ''Gaming Enterprise'' and ''Tribal Gaming Regulatory Authority'' (TGRA); and establish modern retention requirements for background investigations and licensing applications. The rule proposed vesting revocation hearing rights upon license issuance as well as in accord with tribal law, regulation or policy along with augmenting revocation decision notification and submission requirements. This revised proposed rule results from comments received. It permits tribes to designate and document other gaming enterprise employees as key employees and other employed gaming enterprise management officials as primary management officials, including TGRA personnel. Now such designations may occur by any documentary means. Updates to the key employee definition include custodians of gaming supplies and gaming operation employees authorized by the gaming operation for unescorted access to secure gaming areas, not vendors or other outside parties. The primary management official definition, however, now is narrower with the removal of individuals who have authority to

supervise key employees of the gaming operation.

**DATES:** Written comments on this proposed rule must be received on or before May 30, 2023.

**ADDRESSES:** You may submit comments by any one of the following methods, however, please note that comments sent by electronic mail are strongly encouraged.

- *Federal eRulemaking Portal:* Go to *https://www.regulations.gov.* Follow the instructions for submitting comments.
- *Email comments to: information@nigc.gov.*
- *Mail comments to:* National Indian Gaming Commission, 1849 C Street NW, MS 1621, Washington, DC 20240.
- *Fax comments to:* National Indian Gaming Commission at 202–632–0045.

**FOR FURTHER INFORMATION CONTACT:** Jo-Ann Shyloski by phone at (202) 632–7003, by email *Jo-Ann.Shyloski@nigc.gov,* or by fax (202) 632–7066 (these numbers are not toll free).

**SUPPLEMENTARY INFORMATION:**

## I. Background and Development of the Rule

### *A. Background*

The Indian Gaming Regulatory Act (IGRA or Act), Public Law 100–497, 25 U.S.C. 2701 *et seq.,* was signed into law on October 17, 1988. The Act established the National Indian Gaming Commission (''NIGC'' or ''Commission'') and set out a comprehensive framework for the regulation of gaming on Indian lands. IGRA requires that tribal gaming ordinances provide a system for: background investigations of ''primary management officials and key employees of the gaming enterprise;'' tribal licenses for them; a suitability standard to assess whether they pose a threat to gaming and are not eligible for employment; and notices of background check results to the Commission before the issuance of licenses.

The Commission first defined ''key employee'' and ''primary management official'' in April of 1992, early in its existence. As mandated by IGRA, applicants for key employee and primary management official positions are subject to a background investigation as a condition of licensure. In 2009, the Commission expanded these definitions to permit tribes to designate other persons as key employees or primary management officials (74 FR 36926). The FBI, U.S. Department of Justice, took issue with this expansion, denying the processing of CHRI for the expanded positions' background investigations. The initial proposed rule and this revision rectify this issue in part 502. The revised proposed rule now limits tribal designations to ''[a]ny other employee of the gaming enterprise as documented by the tribe as a key employee'' and ''[a]ny other employed management official of the gaming enterprise documented by the tribe as a primary management official.'' Likewise constricted is the key employee definition in part 502 regarding unescorted access to secured gaming areas. Now, a key employee is ''any *gaming operation employee* authorized by the gaming operation for unescorted access to *secured gaming* areas . . . .'' Similarly constrained is the primary management official definition, because individuals who have authority ''[t]o supervise key employees of the gaming operation'' are no longer included. Lastly, the term *independent* now describes the Tribal Gaming Regulatory Authority (TGRA) definition, aligning with NIGC guidance about TGRAs.

Background investigation and licensing regulations for key employees and primary management officials were initially issued by the Commission in January 1993 (58 FR 5802–01) in parts 556 and 558, respectively. The Commission updated these regulations in 2013 to streamline the submission of documents; to ensure that two notifications are submitted to the Commission in compliance with IGRA; and to clarify the regulations regarding the issuance of temporary and permanent gaming licenses (78 FR 5276–01). As for parts 556 and 558, this revised proposed rule reflects the same changes as the initial proposed rule.

### *B. Development of the Rule*

On, June 9, 2021, the National Indian Gaming Commission sent a Notice of Consultation announcing that the Agency intended to consult on a number of topics, including proposed changes to the key employee and primary management definitions and the backgrounding and licensing regulations. Prior to consultation, the Commission released proposed discussion drafts of the regulations for review. The proposed amendments to these regulations were intended to: address the FBI's concerns regarding the key employee and primary management official definitions; include gaming operation employees with unescorted access to secured areas as key employees; combine certain subsections of the key employee definition; add general managers and similar positions to the primary management official definition; and update licensing application retention requirements. The Commission held two virtual consultation sessions in July of 2021 to receive tribal input on the possible changes.

The Commission reviewed all comments received as part of the consultation process and addressed them in the initial proposed rule, issued on August 10, 2022. Once again, the Commission has thoroughly reviewed comments from the initial proposed rule and responds to them here. First, a commenter asserts that FBI's concerns about CHRI management have almost no connection to the intent of IGRA and should not be the bases for regulatory changes to the key employee and primary management official definitions. The Commission disagrees. The NIGC receives CHRI from the FBI for the purpose of tribes' backgrounding key employees and primary management officials. So, it is the FBI who determines when it is and is not appropriate to share CHRI for that purpose. Given the FBI's authority over CHRI, NIGC consulted with FBI on NIGC's regulatory proposals and considered its views.

Along the same lines, another commenter believes the proposed changes to the key employee and primary management official definitions may impair tribal compliance with the Criminal Justice Information Systems (CJIS) Security Policy, governing CHRI use, storage, and destruction. That will not be the case. The current NIGC-Tribal CHRI Memorandum of Understanding (MOU) explicitly accommodates and applies to new regulatory definitions for key employees and primary management officials. Consequently, when new key employee and primary management official regulatory definitions become effective, the current CHRI MOU applies to them and remains applicable to CJIS compliance, ensuring its continuity.

Beyond the FBI and CJIS Security policy comments, several commenters recommended changes to the initial proposed rule that the Commission accepted. Notably, when tribes designate gaming enterprise employees as key employees or employed gaming enterprise management officials as primary management officials, they no longer have to do so through their gaming ordinances. Instead, tribes must document the designations through different means, such as gaming commission regulations, which presumably are easier to revise and implement. In addition, the primary management official definition no longer includes individuals who have authority ''to supervise a key employee of the gaming operation,'' because, as commenters noted, such a definition

could encompass team leaders and dual-rate employees who possess supervisory duties but not managerial duties.

Commenters also advocated for additions and changes to terminology in the proposed rule. The Commission added custodian of ''gaming supplies'' to the key employee definition, given the importance of these supplies to the integrity of gaming as well as mitigating the risk of tampering by licensing the employees who handle, access, or have custody of them. The Commission modified terms in the key employee definition as well. Specifically, ''any person authorized by the gaming operation for unescorted access to restricted areas'' now reads: ''any *gaming operation employee* authorized by the gaming operation for unescorted access to *secured gaming* areas . . . .'' The Commission removed the term *person,* as a broad interpretation of it could include vendors. Further, changing the term *restricted* to *secured* not only reflects comments received but also aligns with NIGC's minimum internal control standards, where *secured* is utilized in reference to the cage, count room, surveillance room and vault as well as in numerous MICS regulations referencing secure area, secure location and secure access. Lastly, the Commission added the term *independent* to the Tribal Gaming Regulatory Authority (TGRA) definition, as recommended by a commenter and in accord with NIGC guidance. Further, TGRAs come within the Gaming Enterprise definition—as entities through which tribes regulate gaming under IGRA on their Indian lands within their jurisdiction. And if a tribe so chooses, it may designate TGRA personnel as key employees or primary management officials by documenting its designation. There are several regulations in part 558 where commenters recommend that the term *TGRA* supplant the term *Tribe.* The term *Tribe* encompasses *TGRA;* so the Commission did not alter the wording.

In addition, several commenters view the substantive submission requirement associated with a key employee or primary management official's license revocation as onerous and unnecessary. Yet, the required submissions—a copy of the license revocation decision and a summary of the evidence supporting it—allow the NIGC to potentially object when previously revoked licensees apply for a new license. Tribal revocations are not contained in other background checks, including FBI CHRI. Ultimately, these submissions further protect and enhance the integrity of Indian gaming.

Lastly, commenters challenged the Commission's authority to define ''Gaming Enterprise'' and incorporate it into NIGC regulations. The IGRA mandates tribal gaming ordinances possesses ''an adequate system which . . . ensures that background investigations are conducted on the primary management officials and key employees *of the gaming enterprise.*'' Given this plain statutory language, defining the term ''gaming enterprise'' is appropriate and within NIGC's authority.

## II. Regulatory Matters

*Regulatory Flexibility Act*

The rule will not have a significant impact on a substantial number of small entities as defined under the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* Moreover, Indian tribes are not considered to be small entities for the purposes of the Regulatory Flexibility Act.

*Small Business Regulatory Enforcement Fairness Act*

The rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. The rule does not have an effect on the economy of $100 million or more. The rule will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, local government agencies or geographic regions, nor will the proposed rule have a significant adverse effect on competition, employment, investment, productivity, innovation, or the ability of the enterprises, to compete with foreign based enterprises.

*Unfunded Mandate Reform Act*

The Commission, as an independent regulatory agency, is exempt from compliance with the Unfunded Mandates Reform Act, 2 U.S.C. 1502(1); 2 U.S.C. 658(1).

*Takings*

In accordance with Executive Order 12630, the Commission has determined that the rule does not have significant takings implications. A takings implication assessment is not required.

*Civil Justice Reform*

In accordance with Executive Order 12988, the Commission has determined that the rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order.

*National Environmental Policy Act*

The Commission has determined that the rule does not constitute a major federal action significantly affecting the quality of the human environment and that no detailed statement is required pursuant to the National Environmental Policy Act of 1969, 42 U.S.C. 4321, *et seq.*

*Paperwork Reduction Act*

1. Overview

The Paperwork Reduction Act (PRA), 44 U.S.C. 3501, *et seq.,* provides that 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. Collections of information include any request or requirement that persons obtain, maintain, retain, or report information to an agency, or disclose information to a third party or to the public (44 U.S.C. 3502(3) and 5 CFR 1320.3(c)). This proposed rule contains new information collection requirements at 25 CFR 558.3(e) that are subject to review by OMB under the PRA and, accordingly, have been submitted to OMB for review under the PRA, Section 3507(d). OMB previously reviewed and approved information collection relating to 25 CFR 558.3 and assigned OMB control number 3141–0003 (expires 6/30/2023).

Described below are the proposed rule's information collection activities along with estimates of their annual burdens. These activities, along with annual burden estimates, do not include activities that are usual and customary industry practices. The burden estimates comprise the time necessary for Tribes to forward to the NIGC copies of their license revocation decisions and evidence summaries supporting such revocations, unless they already submit such to the NIGC in the usual course of their business. The burden also may include the time necessary for Tribes to summarize the evidence they relied upon for each revocation decision, if such summary does not already exist for tribal purposes and/or the Tribe does not send it to the NIGC as a customary business practice.

The Commission requests comment on all aspects of this information collection, including:

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 estimate of the burden for this collection of information, including the validity of the methodology and assumptions used;

c. Ways to enhance the quality, utility, and clarity of the information to be collected; and

d. How the agency might minimize the burden of the collection of information on those required 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.

2. Summary of Proposed Information Collection Requirements and Burden Estimates

*Title of Collection:* Class II and Class III/Background Investigation Tribal Licenses.

*OMB Control Number:* 3141–0003.

*Form Number:* None.

*Type of Review:* New rule with added collection burden.

*Respondents/Affected Public:* Tribal gaming operations of Indian Tribes that conduct Class II and/or Class III gaming under the Indian Gaming Regulatory Act.

*Respondent's Obligation:* Mandatory.

*Frequency of Collection:* On occasion.

The new rule proposed under 25 CFR 558.3(e) will create the following estimated burdens:

*Total Estimated Number of Annual Responses:* 100

*Estimated Completion Time per Response:* 1 hour.

*Total Estimated Number of Annual Burden Hours:* 100 hours.

*Total Estimated Annual Non-Hour Burden Cost:* None.

3. Written Comments or Additional Information

Written comments and suggestions on the information collection requirements should be submitted by May 30, 2023. Submit comments directly to OMB's Office of Information and Regulatory Affairs, Attn: Policy Analyst/Desk Officer for the National Indian Gaming Commission. Comments also may be emailed to *OIRA_Submission@omb.eop.gov,* by including reference to ''NIGC PRA Renewals'' in the subject line.

To request additional information about this ICR, contact Tim Osumi, Privacy & Records Information Manager, NIGC Information Management Program by email at *tim.osumi@nigc.gov* or by telephone at (202) 264–0676.

*Tribal Consultation*

The National Indian Gaming Commission is committed to fulfilling its tribal consultation obligations—whether directed by statute or administrative action such as Executive Order (E.O.) 13175 (Consultation and Coordination with Indian Tribal Governments)—by adhering to the consultation framework described in its Consultation Policy, published July 15, 2013. The NIGC's consultation policy specifies that it will consult with tribes on Commission Action with Tribal Implications, which is defined as: Any Commission regulation, rulemaking, policy, guidance, legislative proposal, or operational activity that may have a substantial direct effect on an Indian tribe on matters including, but not limited to the ability of an Indian tribe to regulate its Indian gaming; an Indian tribe's formal relationship with the Commission; or the consideration of the Commission's trust responsibilities to Indian tribes.

Pursuant to this policy, on June 9, 2021, the National Indian Gaming Commission sent a Notice of Consultation announcing that the Agency intended to consult on a number of topics, including proposed changes to the key employee and primary management official regulatory definitions as well as the background and licensing regulations. Consultations were held on July 27 and 28, 2021. A proposed rule was issued on August 10, 2022.

**List of Subjects in 25 CFR Parts 502, 556, 558**

Gambling, Indian lands.

Therefore, for reasons stated in the preamble, 25 CFR parts 502, 556, and 558 are proposed to be amended as follows:

## PART 502—DEFINITIONS OF THIS CHAPTER

■ 1. The authority citation for part 502 continues to read as follows:

**Authority:** 25 U.S.C. 2701 *et seq.*

■ 2. Revise § 502.14 to read as follows:

### § 502.14 Key employee.

*Key employee* means:

(a) Any person who performs one or more of the following functions for the gaming operation:

(1) Bingo caller;

(2) Counting room supervisor;

(3) Chief of security;

(4) Floor manager;

(5) Pit boss;

(6) Dealer;

(7) Croupier;

(8) Approver of credit;

(9) Custodian of gaming systems as defined in 25 CFR 547.2 and similar class III systems, gaming cash or gaming cash equivalents, gaming supplies or gaming system records;

(10) Custodian of surveillance systems or surveillance system records.

(b) Any gaming operation employee authorized by the gaming operation for unescorted access to secured gaming areas designated as secured gaming areas by the TGRA;

(c) If not otherwise licensed as a key employee or primary management official, the four persons most highly compensated by the gaming operation;

(d) Any other employee of the gaming enterprise as documented by the tribe as a key employee.

■ 3. Revise § 502.19 to read as follows:

### § 502.19 Primary management official.

*Primary management official means:*

(a) Any person having management responsibility for a management contract;

(b) Any person who has authority:

(1) To hire and fire employees of the gaming operation; or

(2) To establish policy for the gaming operation.

(c) The chief financial officer or a position with duties similar to a chief financial officer.

(d) The general manager or a position with duties similar to a general manager.

(e) Any other employed management official of the gaming enterprise as documented by the tribe as a primary management official.

■ 4. Add §§ 502.25 and 502.26 to read as follows:

### § 502.25 Gaming Enterprise.

*Gaming Enterprise* means the entities through which tribe conducts, regulates, and secures gaming on Indian lands within such tribe's jurisdiction pursuant to the Indian Gaming Regulatory Act.

### § 502.26 Tribal Gaming Regulatory Authority (TGRA).

*Tribal Gaming Regulatory Authority* (TGRA) means the independent governmental entity authorized by tribal law to regulate gaming conducted pursuant to the Indian Gaming Regulatory Act.

## PART 556—BACKGROUND INVESTIGATIONS FOR PRIMARY MANAGEMENT OFFICIALS AND KEY EMPLOYEES

■ 5. The authority citation for part 556 continues to read as follows:

**Authority:** 25 U.S.C. 2706, 2710, 2712.

■ 6. Amend § 556.4 by revising the introductory text to read as follows:

### § 556.4 Background investigations.

A tribe shall perform a background investigation for each primary management official and for each key employee of the gaming enterprise.

* * * * *

■ 7. Amend § 556.6 by revising paragraph (a) to read as follows:

**§ 556.6 Report to the Commission.**

(a) When a tribe licenses a primary management official or a key employee, the tribe shall maintain the information listed under § 556.4(a)(1) through (14).

* * * * *

■ 8. Revise § 556.8 to read as follows:

**§ 556.8 Compliance with this part.**

All tribal gaming ordinances and ordinance amendments approved by the Chair prior to [effective date of final rule] do not need to be amended to comply with this part. All future ordinance submissions, however, must comply.

## PART 558—GAMING LICENSES FOR KEY EMPLOYEES AND PRIMARY MANAGEMENT OFFICIALS

■ 9. The authority citation for part 558 continues to read as follows:

**Authority:** 25 U.S.C. 2706, 2710, 2712.

■ 10. Revise § 558.3 to read as follows:

**§ 558.3 Notification to NIGC of license decisions and retention obligations.**

(a) After a tribe has provided a notice of results of the background check to the Commission, a tribe may license a primary management official or key employee.

(b) Within 30 days after the issuance of the license, a tribe shall notify the Commission of its issuance.

(c) A key employee or primary management official who does not have a license after ninety (90) days shall not be permitted to perform the duties, functions, and/or responsibilities of a key employee or primary management official until so licensed.

(d) If a tribe does not license an applicant—

(1) The tribe shall notify the Commission; and

(2) Shall forward copies of its eligibility determination and notice of results, under § 556.6(b)(2) of this chapter, to the Commission for inclusion in the Indian Gaming Individuals Record System.

(e) If a tribe revokes a key employee or primary management official's license—

(1) The tribe shall notify the Commission; and

(2) Shall forward copies of its license revocation decision and a summary of the evidence it relied upon to the Commission for inclusion in the Indian Gaming Individuals Record System.

(f) A tribe shall retain the following for inspection by the Chair or their designee for no less than three years from the date of termination of employment:

(1) The information listed under § 556.4(a)(1) through (14);

(2) Investigative reports, as defined in § 556.6(b);

(3) Eligibility determinations, as defined in § 556.5;

(4) Privacy Act notice, as defined in § 556.2; and

(5) False Statement notice, as defined in § 556.3.

■ 11. Revise § 558.4 to read as follows:

**§ 558.4 Notice of information impacting eligibility and licensee's right to a hearing.**

(a) If, after the issuance of a gaming license pursuant to § 558.3 of this chapter, the Commission receives reliable information indicating that a key employee or a primary management official is not eligible for a license under § 556.5 of this chapter, the Commission shall notify the issuing tribe of the information.

(b) Upon receipt of such notification under paragraph (a) of this section, a tribe shall immediately suspend the license and shall provide the licensee with written notice of suspension and proposed revocation.

(c) A tribe shall notify the licensee of a time and a place for a hearing on the proposed revocation of a license.

(d) The right to a revocation hearing shall vest upon receipt of a license or at such earlier time as is determined by tribal law, regulation, and/or policy.

(e) After a revocation hearing, a tribe shall decide to revoke or to reinstate a gaming license. A tribe shall notify the Commission of its decision within 45 days of receiving notification from the Commission pursuant to paragraph (a) of this section.

■ 12. Revise § 558.6 to read as follows:

**§ 558.6 Compliance with this part.**

All tribal gaming ordinances and ordinance amendments that have been approved by the Chair prior to [effective date of final rule], and that reference this part do not need to be amended to comply with this section. All future ordinance submissions, however, must comply.

Dated: March 27, 2023.

**Edward Simermeyer,**

*Chairman.*

**Jean Hovland,**

*Vice Chair.*

[FR Doc. 2023–06765 Filed 4–13–23; 8:45 am]

**BILLING CODE 7565–01–P**

## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

### 33 CFR Part 117

**[Docket No. USCG–2023–0038]**

**RIN 1625–AA09**

## Drawbridge Operation Regulation; Drawbridge Operation Regulation; Erie Canal, Part of the New York State Canal System, in Brockport, NY

**AGENCY:** Coast Guard, DHS.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Coast Guard proposes to temporarily change the operating schedule that governs the E–182 Main Street Bridge, mile 278.93, over the Erie Canal, in Brockport, NY to allow contractors to rehabilitate the bridge. The roadway has been closed since last fall and vehicles are unable to cross the bridge until repairs are completed. New York Department of Transportation has made this request to temporarily modify the bridge operations to allow for the required maintenance. We invite your comments on this proposed rulemaking.

**DATES:** Comments and related material must reach the Coast Guard on or before May 1, 2023.

The Coast Guard anticipates that this proposed rule will go final and be effective from midnight on May 31, 2023, through midnight on October 25, 2024.

**ADDRESSES:** You may submit comments identified by docket number USCG–2023–0038 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 proposed rule, call or email: Mr. Lee D. Soule, Bridge Management Specialist, Ninth Coast Guard District; telephone 216–902–6085, email *Lee.D.Soule@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
NYDOT New York Department of Transportation
NPRM Notice of Proposed Rulemaking (Advance, Supplemental)
§ Section
U.S.C. United States Code

## II. Background, Purpose, and Legal Basis

The Erie Canal is 362.9 miles long canal that runs east-west between the Hudson River and Lake Erie. Completed in 1825, the canal was the first navigable waterway connecting the Atlantic Ocean to the Great Lakes. The Erie Canal, to include all land and original structures within 500-feet of the shore, is a registered national historic landmark. The Erie Canal is controlled by 57 locks and 17 lift bridges and can accommodate vessels 300-feet long and over 43-feet wide. The Erie Canal is used primarily by recreational vessels, though it remains served by several commercial barge-towing companies and is open to small craft and some larger vessels from May through November each year. During winter, water is drained from parts of the canal for maintenance.

The Erie Canal does not have a section under 33 CFR part 117, subpart B, and all bridges are required to operate under the general responsibilities for bridge owners.

## III. Discussion of Proposed Rule

The E–182 Main Street Bridge, mile 278.93, over the Erie Canal, provides a horizontal clearance of 116-feet and a vertical clearance of 3-feet in the closed position and 16-feet in the open position based on canal low pool elevation. There is no alternative route for vessels.

The proposed rule will allow snooper type vehicles and other man lift equipment operating above the water to perform required maintenance to the bridge. Spotters will watch for approaching vessels and move the equipment to allow vessels to safely pass the area.

During rehabilitation, the bridge will be locked in the fully open position and will only encroach on the waterway with under bridge type vehicles. This project will place negligible burdens on the vessel operators and impose minimal restrictions on traffic. Vehicular traffic can use one of two bridges in the near vicinity. The rehabilitation project is required to maintain the bridge in serviceable condition for all modes of transportation at this crossing.

The bridge has been closed to vehicle traffic since last fall due to the critical repairs that need to be made. Vehicle detours have been approved by the cognizant NYDOT office.

## IV. Regulatory Analyses

We developed this proposed rule after considering numerous statutes and Executive Orders related to rulemaking. Below we summarize our analyses based on these statutes and Executive Orders.

### *A. Regulatory Planning and Review*

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

This proposed rule is considered to be not significant because there will be no restrictions placed on vessels pacing under the bridge at any time and the published fully open to navigation clearances will be maintained at all times.

### *B. Impact on Small Entities*

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

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

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

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

### *C. Collection of Information*

This proposed rule would call for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520.).

### *D. Federalism and Indian Tribal Governments*

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

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

### *E. Unfunded Mandates Reform Act*

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

### *F. Environment*

We have analyzed this rule under Department of Homeland Security Management Directive 023–01, Rev. 1, associated implementing instructions, and Environmental Planning Policy COMDTINST 5090.1 (series), which guide the Coast Guard in complying

with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f). The Coast Guard has 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 proposed rule promulgates the operating regulations or procedures for drawbridges. Normally such actions are categorically excluded from further review, under paragraph L49, of Chapter 3, Table 3–1 of the U.S. Coast Guard Environmental Planning Implementation Procedures.

Neither a Record of Environmental Consideration nor a Memorandum for the Record are required for this rule. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

## V. Public Participation and Request for Comments

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

*Submitting comments.* We encourage you to submit comments through the Federal Decision Making Portal at *https://www.regulations.gov.* To do so, go to *https://www.regulations.gov,* type USCG–2023–0038 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 proposed rule as being available in the docket, find the docket as described in the previous paragraph, and then select ''Supporting & Related Material'' in the Document Type column. Public comments will also be placed in our online docket and can be viewed by following instructions on the *https://www.regulations.gov* Frequently Asked Questions web page. We review all comments received, but we will only post comments that address the topic of the proposed rule. We may choose not to post off-topic, inappropriate, or duplicate comments that we receive. Additionally, if you go to the online docket and sign up for email alerts, you will be notified when comments are posted, or a final rule is published of any posting or updates to the docket.

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).

**List of Subjects in 33 CFR Part 117**

Bridges.

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 117 as follows:

## PART 117—DRAWBRIDGE OPERATION REGULATIONS

■ 1. The authority citation for part 117 continues to read as follows:

**Authority:** 33 U.S.C. 499; 33 CFR 1.05–1; DHS Delegation No. 0170.1.

■ 2. Revise § 117.783T to read as follows

**§ 117.783T Erie Canal.**

(a) The E–200 North Main Street Bridge, mile 293.15, over the Erie Canal, in Brockport, NY will be rehabilitated with under bridge vehicles. The Bridge will remain in the open to navigation position for the duration of the project. Spotters will warn of approaching vessels and move the man lift to allow vessels to pass. Bridge lighting will be temporarily replaced with steady burning yellow lights on the bottom and four-corners of the bridge where they can best be seen by vessels approaching from upriver or down river of the bridge.

(b) The E–182 Main Street Bridge, mile 278.93, over the Erie Canal, in Brockport, NY will be rehabilitated with under bridge vehicles. The Bridge will remain in the open to navigation position for the duration of the project. Spotters will warn of approaching vessels and move the man lift to allow vessels to pass. Bridge lighting will be temporarily replaced with steady burning yellow lights on the bottom and four-corners of the bridge where they can best be seen by vessels approaching from upriver or down river of the bridge.

**M.J. Johnston,**

*Rear Admiral, U.S. Coast Guard, Commander, Ninth Coast Guard District.*

[FR Doc. 2023–07859 Filed 4–13–23; 8:45 am]

**BILLING CODE 9110–04–P**

## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

### 33 CFR Part 147

**[Docket Number USCG–2021–0676]**

**RIN 1625–AA00**

## Safety Zone; ARGOS Semisubmersible Floating Production Unit Outer Continental Shelf Facility, Green Canyon Block 780, Gulf of Mexico

**AGENCY:** Coast Guard, DHS.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Coast Guard is proposing to establish a safety zone around the ARGOS Semisubmersible Floating Production Unit (FPU), located in Green Canyon Block 780 on the Outer Continental Shelf (OCS) in the Gulf of Mexico. The purpose of this rule is to protect the facility from all vessel traffic operating outside the normal shipping channels and fairways that are not providing service to or working with the facility. Establishing a safety zone around the facility will significantly reduce the threat of allisions, collisions, security breaches, oil spills, releases of natural gas, and thereby protect the safety of life, property, and the environment.

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

**ADDRESSES:** You may submit comments identified by docket number USCG–2021–0676 using the Federal eRulemaking Portal at *https://www.regulations.gov.* See the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section for further instructions on submitting comments.

**FOR FURTHER INFORMATION CONTACT:** If you have questions about this proposed rulemaking, call or email LCDR David Newcomb, District Eight OCS, U.S. Coast Guard; telephone 504–671–2106, *David.T.Newcomb@uscg.mil.*

**SUPPLEMENTARY INFORMATION:**

## I. Table of Abbreviations

CFR Code of Federal Regulations
DHS Department of Homeland Security
FR Federal Register
FPU Floating Production Unit
NPRM Notice of proposed rulemaking
OCS Outer Continental Shelf
§ Section
U.S.C. United States Code

## II. Background, Purpose, and Legal Basis

Under the authority provided in 14 U.S.C. 544, 43 U.S.C. 1333, and Department of Homeland Security Delegation No. 00170.1, Revision No. 01.3, CFR part 147 permits the establishment of safety zones for facilities located on the OCS for the purpose of protecting life and property on the facilities. The protections included in a safety zone established under 33 CFR part 147 are promoting safety of life and property on the facilities as well as their appurtenances and attending vessels and also for the adjacent waters located in and around each facility. Therefore, a safety zone under 33 CFR part 147 may also include provisions to restrict, prevent, or control certain activities, including access by vessels or persons to maintain safety of life, property and the environment. BP Exploration and Production Inc (BP) Petroleum Corporation requested that the Coast Guard establish a safety zone around its facility located in the deepwater area of the Gulf of Mexico on the OCS. Placing a safety zone around this facility will significantly reduce the threat of allisions, oil spills, and releases of natural gas, and thereby protect the safety of life, property, and the environment.

## III. Discussion of Proposed Rule

The safety zone proposed by this rulemaking is on the OCS in the deepwater area of the Gulf of Mexico in Green Canyon 780 at the center point of Latitude N 27°12′36″, Longitude W 90°22′51.6″ (NAD 83). The safety zone would be permanent. For the purpose of safety zones established under 33 CFR part 147, the deepwater area is considered to be waters of 304.8 meters (1,000 feet) or greater depth extending to the limits of the Exclusive Economic Zone (EEZ) contiguous to the territorial sea of the United States and extending to a distance up to 200 nautical miles from the baseline from which the breadth of the sea is measured. Navigation in the vicinity of the safety zone consists of large commercial shipping vessels, fishing vessels, cruise ships, tugs with tows and the occasional recreational vessel. The deepwater area also includes an extensive system of fairways.

Only vessels measuring less than 100 feet in length overall and not engaged in towing, attending vessels as defined in 33 CFR 147.20, or those vessels specifically authorized by the Eighth Coast Guard District Commander or a designated representative are permitted to enter or remain in the safety zone. Public transit into and through the safety zone area would be prohibited unless a vessel is specifically authorized by the District Commander or a designated representative. Requests for entry into the zone will be considered and reviewed on a case-by-case basis. These proposed regulations are consistent with the existing safety zones of other OCS platforms in the Gulf of Mexico. Persons or vessels requiring authorization to enter the safety zone must request permission from the Commander, Eighth Coast Guard District. If permission is granted, all persons and vessels shall comply with the instructions of the Commander or designated representative.

## IV. Regulatory Analyses

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

### *A. Regulatory Planning and Review*

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

Aligning with 33 CFR 147.15, the safety zone established will extend to a maximum distance off 500 meters around the OCS facility measured from each point on its outer edge, but may not interfere with the use of recognized sea lanes essential to navigation. Vessel traffic would be able to safely transit around the proposed safety zone, which would impact a small designated area in the Gulf of Mexico, without significant impediment to their voyage. This safety zone will significantly reduce the threat of allisions, collisions, security breaches, oil spills, releases of natural gas, and thereby protect the safety of life, property, and the environment, in accordance with Coast Guard maritime safety missions.

### *B. Impact on Small Entities*

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

This rule may affect owners or operators of vessels intending to transit or anchor in Green Canyon 780, some of which might be small entities.

This safety zone would not have a significant economic impact on a substantial number of small entities for the following reasons. Vessel traffic could pass safely around the safety zone using an alternate route. Use of an alternate route may cause minimal delay in reaching a final destination, depending on other traffic in the area and vessel speed. Vessels would be able to request deviation from this rule to transit through the safety zone. Such requests will be considered on a case-by-case basis and may be authorized by the Commander, Eighth Coast Guard District or a designated representative. Therefore, the Coast Guard expects any impact of this rulemaking establishing a safety zone around an OCS facilities to be minimal, with no significant economic impact on small entities.

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

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

### *C. Collection of Information*

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

### *D. Federalism and Indian Tribal Governments*

A rule has implications for federalism under Executive Order 13132

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

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

*E. Unfunded Mandates Reform Act*

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

*F. Environment*

We have analyzed this proposed rule under Department of Homeland Security Directive 023–01, Rev. 1, associated implementing instructions, and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have made a preliminary determination that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This proposed rule involves the establishment of a safety zone around an OCS facility to protect life, property, and the marine environment. Normally such actions are categorically excluded from further review under paragraph L60 of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 1. A preliminary Record of Environmental Consideration supporting this determination is available in the docket. For instructions on locating the docket, see the **ADDRESSES** section of this preamble. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule

*G. Protest Activities*

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

**V. Public Participation and Request for Comments**

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

*Submitting comments.* We encourage you to submit comments through the Federal Decision Making Portal at *https://www.regulations.gov.* To do so, go to *https://www.regulations.gov,* type USCG–2021–0676 in the search box and click ''Search.'' Next, look for this document in the Search Results column, and click on it. Then click on the Comment option. If you cannot submit your material by using *https://www.regulations.gov,* call or email the person in the **FOR FURTHER INFORMATION CONTACT** section of this proposed rule for alternate instructions.

*Viewing material in docket.* To view documents mentioned in this proposed rule as being available in the docket, find the docket as described in the previous paragraph, and then select ''Supporting & Related Material'' in the Document Type column. Public comments will also be placed in our online docket and can be viewed by following instructions on the *https://www.regulations.gov* Frequently Asked Questions web page. We review all comments received, but we will only post comments that address the topic of the proposed rule. We may choose not to post off-topic, inappropriate, or duplicate comments that we receive.

*Personal information.* We accept anonymous comments. Comments we post to *https://www.regulations.gov* will include any personal information you have provided. For more about privacy and submissions to the docket in response to this document, see DHS's eRulemaking System of Records notice (85 FR 14226, March 11, 2020).

**List of Subjects in 33 CFR Part 147**

Continental shelf, Marine safety, Navigation (water).

For the reasons discussed in the preamble, the Coast Guard is proposing to amend 33 CFR part 147 as follows:

## PART 147—SAFETY ZONES

■ 1. The authority citation for part 147 continues to read as follows:

**Authority:** 14 U.S.C. 544; 43 U.S.C. 1333; 33 CFR 1.05–1; Department of Homeland Security Delegation No. 00170.1, Revision No. 01.3.

■ 2. Add § 147.881to read as follows:

**§ 147.881 Safety Zone, ARGOS Floating Production Unit (FPU), Outer Continental Shelf Facility, Green Canyon 780, Gulf of Mexico**

(a) *Description.* ARGOS FPU is in the deepwater area of the Gulf of Mexico at Green Canyon 780. The facility is located at: N 27°12′36″, W 90°22′51.6″ (NAD 83) and the area within 500 meters (1640.4 feet) from each point on the facility structure's outer edge is a safety zone.

(b) *Regulation.* No vessel may enter or remain in this safety zone except for the following:

(1) An attending vessel, as defined in 147.20;

(2) A vessel under 100 feet in length overall not engaged in towing; or

(3) A vessel authorized by the Commander, Eighth Coast Guard District or a designated representative.

(c) *Requests for Permission.* Persons or vessels requiring authorization to enter the safety zone must request permission from the Commander, Eighth Coast Guard District or a designated representative. If permission is granted, all persons and vessels shall comply with the instructions of the Commander or designated representative.

Dated: April 4, 2023.

**Richard Timme,**

*RADM, U.S. Coast Guard, Commander, Coast Guard District Eight.*

[FR Doc. 2023–07856 Filed 4–13–23; 8:45 am]

**BILLING CODE 9110–04–P**

**DEPARTMENT OF HOMELAND SECURITY**

**Coast Guard**

**33 CFR Part 147**

**[Docket Number USCG–2022–0982]**

**RIN 1625–AA00**

## Safety Zone; Anchor Floating Production Unit (FPU) Outer Continental Shelf Facility, Green Canyon Block 763, Gulf of Mexico

**AGENCY:** Coast Guard, DHS.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Coast Guard is proposing to establish a safety zone on the navigable waters around the Anchor Floating Production Unit (FPU), located in Green Canyon Block 763 on the Outer Continental Shelf (OCS) in the Gulf of Mexico. The purpose of this proposed rule is to protect the facility from all vessel traffic operating outside the normal shipping channels and fairways that are not providing service to or working with the facility. Establishing a safety zone around the facility will significantly reduce the threat of allisions, collisions, security breaches, oil spills, releases of natural gas, and thereby protect the safety of life, property, and the environment.

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

**ADDRESSES:** You may submit comments identified by docket number USCG–2022–0982 using the Federal eRulemaking Portal at *https://www.regulations.gov.* See the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section for further instructions on submitting comments.

**FOR FURTHER INFORMATION CONTACT:** If you have questions about this proposed rulemaking, call or email LCDR David Newcomb, District Eight OCS, U.S. Coast Guard; telephone 504–671–2106, *David.T.Newcomb@uscg.mil.*

**SUPPLEMENTARY INFORMATION:**

### I. Table of Abbreviations

CFR Code of Federal Regulations
DHS Department of Homeland Security
FR Federal Register
FPU Floating Production Unit
NPRM Notice of proposed rulemaking
OCS Outer Continental Shelf
§ Section
U.S.C. United States Code

### II. Background, Purpose, and Legal Basis

Under the authority provided in 14 U.S.C. 544, 43 U.S.C. 1333, and Department of Homeland Security Delegation No. 00170.1, Revision No. 01.3, 33 CFR part 147 permits the establishment of safety zones for facilities located on the OCS for the purpose of protecting life and property on the facilities. The protections included in a safety zone established under 33 CFR part 147 are promoting safety of life and property on the facilities as well as their appurtenances and attending vessels and also for the adjacent waters located in and around each facility. Therefore, a safety zone under 33 CFR part 147 may also include provisions to restrict, prevent, or control certain activities, including access by vessels or persons to maintain safety of life, property and the environment. Chevron Corporation requested that the Coast Guard establish a safety zone around its facility located in the deepwater area of the Gulf of Mexico on the OCS. Placing a safety zone around this facility will significantly reduce the threat of allisions, oil spills, and releases of natural gas, and thereby protect the safety of life, property, and the environment.

### III. Discussion of Proposed Rule

The safety zone proposed by this rulemaking is on the OCS in the deepwater area of the Gulf of Mexico in Green Canyon 763 at the center point of N 27°12′23.0394″, Longitude W 91°11′53.1594″ (NAD 83). The safety zone would be permanent. For the purpose of safety zones established under 33 CFR part 147, the deepwater area is considered to be waters of 304.8 meters (1,000 feet) or greater depth extending to the limits of the Exclusive Economic Zone (EEZ) contiguous to the territorial sea of the United States and extending to a distance up to 200 nautical miles from the baseline from which the breadth of the sea is measured. Navigation in the vicinity of the safety zone consists of large commercial shipping vessels, fishing vessels, cruise ships, tugs with tows and the occasional recreational vessel. The deepwater area also includes an extensive system of fairways.

Only vessels measuring less than 100 feet in length overall and not engaged in towing, attending vessels as defined in 33 CFR 147.20, or those vessels specifically authorized by the Eighth Coast Guard District Commander or a designated representative are permitted to enter or remain in the safety zone. Public transit into and through the safety zone area would be prohibited unless a vessel is specifically authorized by the District Commander or a designated representative. Requests for entry into the zone will be considered and reviewed on a case-by-case basis. These proposed regulations are consistent with the existing safety zones of other OCS platforms in the Gulf of Mexico.

Persons or vessels requiring authorization to enter the safety zone must request permission from the Commander, Eighth Coast Guard District. If permission is granted, all persons and vessels shall comply with the instructions of the Commander or designated representative.

### IV. Regulatory Analyses

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

#### *A. Regulatory Planning and Review*

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

Aligning with 33 CFR 147.15, the safety zone established will extend to a maximum distance of 500 meters around the OCS facility measured from each point on its outer edge but may not interfere with the use of recognized sea lanes essential to navigation. Vessel traffic would be able to safely transit around the proposed safety zone, which would impact a small designated area in the Gulf of Mexico, without significant impediment to their voyage. This safety zone would reduce the risk of collision with the platform and help protect the environment from potential oil spills, in accordance with Coast Guard maritime safety missions.

#### *B. Impact on Small Entities*

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their

fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities.

This proposed rule may affect owners or operators of vessels intending to transit or anchor in Green Canyon 763, some of which might be small entities.

This safety zone would not have a significant economic impact on a substantial number of small entities for the following reasons. Vessel traffic could pass safely around the safety zone using an alternate route. Use of an alternate route may cause minimal delay in reaching a final destination, depending on other traffic in the area and vessel speed. Vessels would be able to request deviation from this proposed rule to transit through the safety zone. Such requests will be considered on a case-by-case basis and may be authorized by the Commander, Eighth Coast Guard District or a designated representative. Therefore, the Coast Guard expects any impact of this rulemaking establishing a safety zone around an OCS facility to be minimal, with no significant economic impact on small entities.

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

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

*C. Collection of Information*

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

*D. Federalism and Indian Tribal Governments*

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

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

*E. Unfunded Mandates Reform Act*

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

*F. Environment*

We have analyzed this proposed rule under Department of Homeland Security Directive 023–01, Rev. 1, associated implementing instructions, and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have made a preliminary determination that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This proposed rule involves the establishment of a safety zone around an OCS facility to protect life, property, and the marine environment. Normally such actions are categorically excluded from further review under paragraph L60 of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 1. A preliminary Record of Environmental Consideration supporting this determination is available in the docket. For instructions on locating the docket, see the **ADDRESSES** section of this preamble. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

*G. Protest Activities*

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

## V. Public Participation and Request for Comments

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

*Submitting comments.* We encourage you to submit comments through the Federal Decision-Making Portal at *https://www.regulations.gov.* To do so, go to *https://www.regulations.gov,* type USCG–2022–0982 in the search box and click ''Search.'' Next, look for this document in the Search Results column, and click on it. Then click on the Comment option. If you cannot submit your material by using *https://www.regulations.gov,* call or email the person in the **FOR FURTHER INFORMATION CONTACT** section of this proposed rule for alternate instructions.

*Viewing material in docket.* To view documents mentioned in this proposed rule as being available in the docket, find the docket as described in the previous paragraph, and then select ''Supporting & Related Material'' in the Document Type column. Public comments will also be placed in our online docket and can be viewed by following instructions on the *https://www.regulations.gov* Frequently Asked Questions web page. We review all comments received, but we will only post comments that address the topic of the proposed rule. We may choose not to post off-topic, inappropriate, or duplicate comments that we receive.

*Personal information.* We accept anonymous comments. Comments we post to *https://www.regulations.gov* will

include any personal information you have provided. For more about privacy and submissions to the docket in response to this document, see DHS's eRulemaking System of Records notice (85 FR 14226, March 11, 2020).

**List of Subjects in 33 CFR Part 147**

Continental shelf, Marine safety, Navigation (water).

For the reasons discussed in the preamble, the Coast Guard is proposing to amend 33 CFR part 147 as follows:

## PART 147—SAFETY ZONES

■ 1. The authority citation for part 147 continues to read as follows:

**Authority:** 14 U.S.C. 554; 43 U.S.C. 1333; 33 CFR 1.05–1; Department of Homeland Security Delegation No. 00170.1, Revision No. 01.3.

■ 2. Add § 147.883 to read as follows:

**§ 147.883 Safety Zone, ANCHOR Floating Production Unit (FPU), Outer Continental Shelf Facility, Green Canyon 763, Gulf of Mexico.**

(a) *Description.* ANCHOR FPU is in the deepwater area of the Gulf of Mexico at Green Canyon 763. The facility is located at: N 27°12′23.0394″, W 91°11′53.1594″ (NAD 83) and the area within 500 meters (1640.4 feet) from each point on the facility structure's outer edge is a safety zone.

(b) *Regulation.* No vessel may enter or remain in this safety zone except for the following:

(1) An attending vessel, as defined in § 147.20;

(2) A vessel under 100 feet in length overall not engaged in towing; or

(3) A vessel authorized by the Commander, Eighth Coast Guard District or a designated representative.

(c) *Requests for permission.* Persons or vessels requiring authorization to enter the safety zone must request permission from the Commander, Eighth Coast Guard District or a designated representative. If permission is granted, all persons and vessels shall comply with the instructions of the Commander or designated representative.

Dated: April 4, 2023.

**Richard Timme,**

*RADM, U.S. Coast Guard, Commander, Coast Guard District Eight.*

[FR Doc. 2023–07858 Filed 4–13–23; 8:45 am]

**BILLING CODE 9110–04–P**

## POSTAL SERVICE

## 39 CFR Part 111

## New Mailing Standards for Domestic Mailing Services Products

**AGENCY:** Postal Service™.

**ACTION:** Proposed rule.

**SUMMARY:** On April 10, 2023, the Postal Service (USPS®) filed a notice of mailing services price adjustments with the Postal Regulatory Commission (PRC), effective July 9, 2023. This proposed rule contains revisions to *Mailing Standards of the United States Postal Service,* Domestic Mail Manual (DMM®) to coincide with the price adjustments.

**DATES:** Submit comments on or before May 15, 2023.

**ADDRESSES:** Mail or deliver written comments to the Manager, Product Classification, U.S. Postal Service, 475 L'Enfant Plaza SW, Room 4446, Washington, DC 20260–5015. If sending comments by email, include the name and address of the commenter and send to *PCFederalRegister@usps.gov,* with a subject line of ''July 2023 Domestic Mailing Services Proposal.'' Faxed comments are not accepted.

All submitted comments and attachments are part of the public record and subject to disclosure. Do not enclose any material in your comments that you consider to be confidential or inappropriate for public disclosure.

You may inspect and photocopy all written comments, by appointment only, at USPS® Headquarters Library, 475 L'Enfant Plaza SW, 11th Floor North, Washington, DC 20260. These records are available for review on Monday through Friday, 9 a.m.–4 p.m., by calling 202–268–2906.

**FOR FURTHER INFORMATION CONTACT:** Doriane Harley at (202) 268–2537, or Dale Kennedy at (202) 268–6592.

**SUPPLEMENTARY INFORMATION:** Proposed prices will be available under Docket No. R2023–2 on the Postal Regulatory Commission's website at *www.prc.gov*.

The Postal Service's proposed rule includes changes to prices, mail classification updates, product simplification efforts, and minor revisions to the DMM.

**Note:** The Postal Service filed to rebrand First-Class Package Service® as USPS Ground Advantage®. Additional information can be found in the upcoming **Federal Register** Notice, *Domestic Competitive Products Pricing and Mailing Standards Changes.*

**Marketing Mail Flat-Shaped—New Pricing Structure**

Currently, the pricing structure for USPS Marketing Mail flat-shaped pieces uses a two-tier pricing approach. For pieces weighing 4 oz or less, only a per-piece price is charged. For pieces weighing over 4 oz but less than 16 oz, both a per-piece and per-pound rate is charged.

The Postal Service is proposing to change the way USPS Marketing Mail flats are priced. For each presort level, all pieces regardless of their weight will pay a piece price which will differ only by the entry level, *i.e.,* Origin, DNDC, DSCF, and DDU. The pound price would be applicable only to the weight above 4 ounces. For example, if the piece weighs 6 ounces, the pound price will be charged only for the 2 ounces that are above 4 ounces.

**Discount for USPS Marketing Mail Letter-Shaped Pieces on SCF Pallets**

Currently, the Postal Service offers discounts for USPS Marketing Mail flat-shaped pieces on SCF pallets. This discount would now be extended to letter-shaped USPS Marketing Mail pieces on SCF Pallets. This proposed discount will be applicable to Automation and Nonautomation (AADC, 3-Digit and 5-Digit Presort) Letters, Carrier Route Letters, High Density Letters, High Density Plus Letter and Saturation Letters on SCF Pallets regardless of the entry (None, DNDC, and DSCF).

**Registered Mail Service Fees**

The Postal Service is revising the fee structure for Registered Mail® service. Currently, the fee structure includes the combined cost of handling and insurance, which incrementally increases in accordance with an item's declared value, up to $50,000.00—the maximum available amount of insurance reimbursement. For items with declared value over $50,000, there are incrementally increasing handling fees, although the maximum amount of insurance reimbursement remains capped at $50,000. The Postal Service is revising the fee structure to eliminate the additional handling fees for items with declared value over $50,000, and instead have a flat fee that will cover the cost of insurance (which remains capped at a maximum of $50,000, regardless of the declared value) and handling on all items with declared values over $50,000.00.

**USPS Ground Advantage Insurance**

Currently, the Postal Service does not include insurance coverage with USPS Ground Advantage—Retail and USPS

Ground Advantage—Commercial (formerly First-Class Package Service—Retail and First-Class Package Service—Commercial) pieces against loss, damage, or missing contents. Additionally, the Postal Service does not include insurance with USPS Ground Advantage Return service (formerly First-Class Package Return Service) pieces.

The Postal Service is proposing to include insurance, limited to a maximum liability of $100.00, with USPS Ground Advantage—Retail and USPS Ground Advantage—Commercial pieces.

In addition, the Postal Service is proposing to include the $100.00 of insurance with USPS Ground Advantage Return service pieces. This proposal to include the $100.00 of insurance with USPS Ground Advantage Return service pieces, along with Priority Mail Return service which already has insurance included, will eliminate the senders' option to purchase insurance.

**Elimination of Service Type Code Combinations**

The Postal Service is proposing to eliminate certain, service type code (STC)/extra service code (ESC) combinations. The decision was based on those product and extra service code combinations with low use or low demand, and those that do not follow Postal Service compliance with Intelligent Mail package barcode rules. Mailers can speak with a USPS representative for details.

**Marriage Mail 2 oz Incentive Price**

Marriage Mail is a form of marketing mail in which marketing service companies combine advertisements from multiple businesses into a single mailpiece to reduce the cost of the mailing for individual customers.

The Postal Service is proposing to provide marriage mailers an incentive price on Saturation USPS Marketing Mail letters and flats including EDDM (not EDDM Retail) that weigh 2 ounces or less, if they meet certain requirements.

Among the requirements to be eligible to claim the incentive price are that qualifying Marriage Mail pieces must include at least 4 advertisers and must be mailed at minimum 10 times every 12 months (starting with the month of first claiming the incentive price).

Information on the requirements to claim the Marriage Mail Incentive price will be posted on PostalPro at *postalpro.usps.com.*

**2024 Mailing Promotions**

The Postal Service has been incenting mailers to integrate mobile technology and use innovative print techniques in commercial mail since 2012. These promotions have become an integral way for industry to try new things and innovate their mail campaigns. A 2024 Promotions Calendar is planned with opportunities for mailers to receive a postage discount by applying treatments or integrating technology in their mail campaigns.

These proposed revisions will provide consistency within postal products and add value for customers.

Although exempt from the notice and comment requirements of the Administrative Procedure Act (5 U.S.C. 553(b), (c)) regarding proposed rulemaking by 39 U.S.C. 410(a), the Postal Service invites public comments on the following proposed revisions to *Mailing Standards of the United States Postal Service,* Domestic Mail Manual (DMM), incorporated by reference in the Code of Federal Regulations. *See* 39 CFR 111.1.

We will publish an appropriate amendment to 39 CFR part 111 to reflect these changes if our proposal is adopted.

**List of Subjects in 39 CFR Part 111**

Administrative practice and procedure, Postal Service.

Accordingly, 39 CFR part 111 is proposed to be amended as follows:

## PART 111—[AMENDED]

■ 1. The authority citation for 39 CFR part 111 continues to read as follows:

**Authority:** 5 U.S.C. 552(a); 13 U.S.C. 301–307; 18 U.S.C. 1692–1737; 39 U.S.C. 101, 401–404, 414, 416, 3001–3018, 3201–3220, 3401–3406, 3621, 3622, 3626, 3629, 3631–3633, 3641, 3681–3685, and 5001.

■ 2. Revise the following sections of *Mailing Standards of the United States Postal Service,* Domestic Mail Manual (DMM), as follows:

**Mailing Standards of the United States Postal Service, Domestic Mail Manual (DMM)**

* * * * *

**240 Commercial Mail USPS Marketing Mail**

**243 Prices and Eligibility**

**1.0 Prices and Fees**

* * * * *

**1.2 USPS Marketing Mail Prices**

* * * * *

*[Add new item c and renumber current item (c) as (d):]*

c. For USPS Marketing Mail flats that weigh over 4 ounces, the pound price is applicable only to the weight above 4 ounces. For example, if the piece weighs 6 ounces, the pound price will apply only to the 2 ounces that are above 4 ounces.

* * * * *

**1.5 Computing Postage for USPS Marketing Mail**

* * * * *

**1.5.4 Per Piece and Per Pound Charges**

*[Add a sentence at the end of the paragraph to read as follows:]*

* * * For USPS Marketing Mail flats that weigh over 4 ounces, the pound price is applicable only to the weight above 4 ounces.

**1.5.5 Computing Affixed Postage for Piece/Pound Price Mailpieces**

*[Revise the text of 1.5.5 to read as follows:]*

To compute postage to be affixed to each piece/pound price piece, multiply the weight of the piece (in pounds) by the applicable price per pound (For USPS Marketing Mail flats, multiply the weight of the piece that exceeds 4 ounces by the applicable price per pound); add the applicable per piece charge and any surcharge; and round the sum up to the next tenth of a cent. See 244.2.0 for affixing postage.

* * * * *

**4.0 Price Eligibility for USPS Marketing Mail**

* * * * *

**4.3 Piece/Pound Prices**

*[Revise the last sentence of 4.3 to read as follows:]*

Flats that exceed 4 ounces are subject to a two-part piece/pound price that includes a fixed charge per piece and a variable pound charge based on the weight above 4 ounces.

* * * * *

**500 Additional Mailing Services**

**503 Extra Services**

* * * * *

**1.0 Basic Standards for All Extra Services**

* * * * *

**1.4 Eligibility for Extra Services**

* * * * *

**1.4.1 Eligibility—Domestic Mail**

*[Revise the text of 1.4.1 to read as follows:]*

Exhibit 1.4.1 provides the eligibility of each extra service for domestic mail. The exhibit also provides the additional

extra services that may be combined with each extra service. The combined extra services are subject to the eligibility of the mail listed for each extra service. Certain eligible extra service combinations may not be available for purchase (Mailers can speak with a USPS representative for details.). The following extra services or additional extra services may be added at the time of mailing, if available, when the standards for the services are met and the applicable fees are paid.

* * * * *

**Exhibit 1.4.1 Eligibility—Domestic Mail**

EXTRA SERVICE ELIGIBLE MAIL ADDITIONAL COMBINED EXTRA SERVICES

* * * * *

Insurance

Insurance Restricted Delivery

*[Revise the ''Note:'' under ''Insurance'' to read as follows:]*

**Note:** Priority Mail Express, Priority Mail, and USPS Ground Advantage includes $100.00 of insurance; see 503.4.0.

* * * * *

**1.4.3 Eligibility—Domestic Returns**

* * * * *

**Exhibit 1.4.3 Eligibility—Domestic Returns**

* * * * *

*[Delete the </=$500 and >$500 insurance options columns under the ''Eligible Extra Services (Paid by Sender) section of the table.]*

*[Delete footnote #4 in its entirety.]*

* * * * *

**2.0 Registered Mail**

**2.1 Basic Standards**

**2.1.1 Description**

*[Revise the ninth sentence in the introductory text of 2.1.1 to read as follows:]*

* * * Registered Mail articles valued over $50,000.00 are charged a flat fee that includes insurance up to $50,000.00 maximum insurance limit, and the handling cost. * * *

* * * * *

**4.0 Insured Mail**

* * * * *

*[Revise the heading of 4.2 to read as follows:]*

**4.2 Insurance Coverage—Priority Mail, USPS Ground Advantage—Retail and USPS Ground Advantage—Commercial**

*[Revise the introductory text of 4.2 to read as follows:]*

Priority Mail pieces (including Priority Mail Return service) and USPS Ground Advantage—Retail and USPS Ground Advantage—Commercial (including USPS Ground Advantage Return service), are insured against loss, damage, or missing contents, up to a maximum of $100.00, subject to the following:

*[Revise the text of items a through c to read as follows:]*

a. Insurance coverage is provided against loss, damage, or missing contents and is limited to a maximum liability of $100.00 when the pieces bear an Intelligent Mail package barcode (IMpb) or USPS retail tracking barcode (see 4.3.4) and the mailer pays retail or commercial prices.

b. In addition to the insurance coverage under *4.2a,* additional insurance may be purchased up to a maximum coverage of $5,000.00.

c. Pieces meeting the requirements under *4.2,* but not supported by a Shipping Services file must have a full acceptance scan in order to qualify for automatic insurance coverage.

* * * * *

*[Revise the first sentence of item e to read as follows:]*

e. Customers may file claims online for insured domestic items at *www.usps.com/domestic-claims.* * * *

* * * * *

**505 Return Services**

* * * * *

**3.0 USPS Returns Service**

**3.1 Basic Standards**

* * * * *

**3.1.3 Postage and Prices**

Postage and prices are subject to the following:

* * * * *

c. The account holder or mailer may obtain extra and additional services as follows:

*[Revise the text of item c1 to read as follows:]*

1. Insurance is available for USPS Returns service (see *503.4*). Insurance is included with the postage for Priority Mail Return service and USPS Ground Advantage Return service (see 503.4.2). Additional insurance for Priority Mail Return service and USPS Ground Advantage Return service is available to the account holder for a fee on packages that have the applicable STC imbedded into the IMpb on the label, and for which the account holder has provided electronic data that supports the value of the merchandise (see *503.4.3.1a*). Only the account holder may file a claim (see *609*). Mailers returning a USPS Returns service package may not obtain insurance at their own expense.

* * * * *

**705 Advanced Preparation and Special Postage Payment Systems**

* * * * *

**8.0 Preparing Pallets**

* * * * *

**8.10 Pallet Presort and Labeling**

* * * * *

**8.10.3 USPS Marketing Mail or Parcel Select Lightweight—Bundles, Sacks, or Trays**

* * * * *

*[Revise the last two sentences of 8.10.3d to read as follows]*

* * * The SCF Pallet discount applies to 5-digit/5-digit scheme USPS Marketing Mail letter and flat shaped pieces on a SCF pallet entered at an Origin (None), DNDC, or DSCF entry. SCF pallet discount does not apply to USPS Marketing Mail parcels. Labeling:* * *

* * * * *

*[Revise the last two sentences of 8.10.3e to read as follows]*

* * * The SCF Pallet discount applies to 3-digit USPS Marketing Mail letter and flat shaped pieces on a SCF pallet entered at an Origin (None), DNDC, or DSCF entry. SCF pallet discount does not apply to USPS Marketing Mail parcels. Labeling: * * *

* * * * *

*[Revise the last two sentences of 8.10.3f to read as follows]*

* * *The SCF Pallet discount applies to 3-digit, ADC, 5-digit, 5-digit scheme, Carrier Route, High Density, High Density Plus, and Saturation (including EDDM flats—Not Retail) USPS Marketing Mail letter and flat shaped pieces on a SCF pallet entered at an Origin (None), DNDC, or DSCF entry. SCF pallet discount does not apply to USPS Marketing Mail parcels. Labeling: * * *

* * * * *

**Notice 123 (Price List)**

*[Revise prices as applicable.]*

* * * * *

**Sarah Sullivan,**

*Attorney, Ethics and Legal Compliance.*

[FR Doc. 2023–07868 Filed 4–13–23; 8:45 am]

BILLING CODE 7710–12–P

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

**[EPA–R07–OAR–2023–0193; FRL–10815–01–R7]**

## Air Plan Approval; State of Missouri; Restriction of Particulate Matter to the Ambient Air Beyond the Premises of Origin

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is proposing approval of a State Implementation Plan (SIP) revision submitted by the State of Missouri on March 7, 2019. Missouri requests that the EPA approve revisions to a state regulation for the Restriction of Particulate Matter to the Ambient Air Beyond the Premises of Origin. These revisions include adding definitions that are specific to the rule, restructures the rule into the standard rule organization format, and removes unnecessary words. The revisions are administrative in nature and do not impact the stringency of the SIP or air quality. The EPA's proposed approval of this rule revision is in accordance with the requirements of the Clean Air Act (CAA).

**DATES:** Comments must be received on or before May 15, 2023.

**ADDRESSES:** You may send comments, identified by Docket ID No. EPA–R07–OAR–2023–0193 to *www.regulations.gov.* Follow the online instructions for submitting comments.

*Instructions:* All submissions received must include the Docket ID No. for this rulemaking. Comments received will be posted without change to *www.regulations.gov,* including any personal information provided. For detailed instructions on sending comments and additional information on the rulemaking process, see the ''Written Comments'' heading of the **SUPPLEMENTARY INFORMATION** section of this document.

**FOR FURTHER INFORMATION CONTACT:** Steven Brown, Environmental Protection Agency, Region 7 Office, Air Quality Planning Branch, 11201 Renner Boulevard, Lenexa, Kansas 66219; telephone number: (913) 551–7718; email address: *brown.steven@epa.gov*.

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

**Table of Contents**

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

### I. Written Comments

Submit your comments, identified by Docket ID No. EPA–R07–OAR–2023–0193, at *www.regulations.gov.* Once submitted, comments cannot be edited or removed from *Regulations.gov*. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.*, on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *www.epa.gov/dockets/commenting-epa-dockets.*

### II. What is being addressed in this document?

The EPA is proposing to approve a SIP revision submitted by the State of Missouri on March 7, 2019. Missouri requests the EPA approve revisions to their SIP by replacing the existing rule, Title 10, Division 10 of the Code of State Regulations (CSR), (10 CSR 10–6.170) ''Restriction of Particulate Matter to the Ambient Air Beyond the Premises of Origin'', with a revised and restructured version of the same rule. The state has revised the rule to add definitions specific to this rule, organize the rule into state standard rule organizational format, and remove unnecessary words. After review and analysis of the revisions, the EPA concludes that these changes do not have adverse effects on air quality. The full text of these changes can be found in the State's submission, which is included in the docket for this action. The EPA's analysis of the revisions can be found in the technical support document (TSD), also included in the docket.

### III. Have the requirements for approval of a SIP revision been met?

The State submission has met the public notice requirements for SIP submissions in accordance with 40 CFR 51.102. The submission also satisfied the completeness criteria of 40 CFR part 51, appendix V. The State provided public notice on this SIP revision from 8/01/2018 to 8/30/2018 and received a total of eight comments. The comments and responses are summarized herein. *Comment 1:* The EPA commented that they previously recommended that the department add provisions to the rule to make it clear what a ''reasonable degree'' is, which ''techniques'' the director might approve, and how the director might make that determination. *Response*: The state responded saying the necessary measures for determining the origin and nature of particulate matter emissions that travel beyond a property line are handled on a case-by-case basis. In many cases the nature and origin of fugitive particulate matter emissions is obvious and does not require any scientific measurements. After further review, the EPA agrees that this type of review is done on a case-by-case basis and since the rule applies to any operation, process, or activity, specific techniques or scientific methods would not always apply to determine the nature and origins of the particulate matter fugitive emissions. An example an application of this rule may be the evaluation of the handling or transporting of materials that cause dust to be seen in the air or dust residue left on surfaces after this type of activity. In this example, the state air program would investigate and decide on the nature and origin of the particulate matter emissions based on the evidence available. Applying a specific scientific methodology to investigate the origin and nature of the particulate matter is not pertinent in this situation. EPA believes these are the types of case-by-case scenarios that this rule was primarily intended to address. No changes were made to the rule text as a result of this comment. *Comment 2:* The EPA recommended that the department provide regulatory language on what record keeping and reporting requirements would exist for a facility to determine compliance with the rule. *Response:* The state responded that since the rule does not prescribe monitoring or control requirements the department cannot designate record keeping or reporting requirements. Since the rule is not necessarily subject to a facility but to an action or processes, the EPA agrees that recordkeeping and reporting are not required. No changes were made to the rule text as a result of this comment. *Comment 3:* The St. Louis County Department of Public Health commented on a semi colon placed after

the word facility. No changes were made to the rule text as a result of this comment. *Comment 4 and 5:* The St. Louis County Department of Public Health, and Newman, Comley, and Ruth P.C., commented that the rule did not include an upper particle size limit. *Response:* As a result of those comments, the state added an upper size limit to the definition of particulate matter in subsection (2)(F) of this rule that particles greater than one hundred micrometers (100 μm) are not defined as particulate matter. *Comment 6:* Newman, Comley, and Ruth P.C. commented that facilities constructed before November 30, 1990, and located within the city limits of any municipality should be exempt from this rule. *Response:* Since the commenter did not provide justification for this exemption, and the state was not able to justify this exemption, no changes were made to the rule text as a result of the comment. *Comment 7 and 8:* Newman, Comley, and Ruth P.C., and the St. Louis County Department of Public Health commented that removing the word ''shall'' from a rule requirement could be interpreted that the requirement is no longer necessary. The commenter stated that regulations must be clear and concise as to the intent of the regulation. The department should review all instances of deleting the word ''shall'' and consider retaining it. *Response:* As a result of those comments, the state revised the language in paragraphs (3)(A)1. and (3)(A)2. to retain the word ''shall'' in order to clarify the obligation for facilities.

In addition, as explained above and in more detail in the technical support document, which is part of this docket, the revision meets the substantive SIP requirements of the CAA, including section 110 and implementing regulations.

## IV. What action is the EPA taking?

The EPA is proposing to amend the Missouri SIP by approving the State's request to revise 10 CSR 10–6.170 ''Restriction of Particulate Matter to the Ambient Air Beyond the Premises of Origin.'' We are processing this as a proposed action because we are soliciting comments on this proposed action. Final rulemaking will occur after consideration of any comments.

## V. Incorporation by Reference

In this document, the EPA is proposing to include regulatory text in an EPA final rule that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, the EPA is finalizing the incorporation by reference of the Missouri rule 10 CSR 10–6.170 discussed in section II of this preamble and as set forth below in the proposed amendments to 40 CFR part 52. The EPA has made, and will continue to make, these materials generally available through *www.regulations.gov* and at the EPA Region 7 Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information).

## VI. Statutory and Executive Order Reviews

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

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001); and
- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act;

In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where 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.''

Missouri 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 did not perform an EJ analysis and did not consider EJ in this action. Consideration of EJ is not required as part of this action, and there is no information in the record inconsistent with the stated goal of E.O. 12898 of achieving environmental justice for people of color, low-income populations, and Indigenous peoples.

## List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Particulate matter.

Dated: April 6, 2023.

**Meghan A. McCollister,**

*Regional Administrator, Region 7.*

For the reasons stated in the preamble, the EPA proposes to amend 40 CFR part 52 as set forth below:

## PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

### Subpart AA—Missouri

■ 2. In § 52.1320, the table in paragraph (c) is amended by revising the entry ''10–6.170'' to read as follows:

**§ 52.1320 Identification of plan.**

* * * * *

(c) * * *

EPA-APPROVED MISSOURI REGULATIONS

| Missouri citation | Title | State effective date | EPA approval date | Explanation |
|---|---|---|---|---|
| **Missouri Department of Natural Resources** | | | | |
| * | * | * | * | * |
| **Chapter 6—Air Quality Standards, Definitions, Sampling and Reference Methods, and Air Pollution Control Regulations for the State of Missouri** | | | | |
| * | * | * | * | * |
| 10–6.170 | Restriction of Particulate Matter to the Ambient Air Beyond the Premises of Origin. | 3/30/2019 | [Date of publication of the final rule in the **Federal Register**], [**Federal Register** citation of the final rule]. | |
| * | * | * | * | * |

* * * * *

[FR Doc. 2023–07682 Filed 4–13–23; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

**[EPA–R09–OAR–2023–0076; FRL–10663–01–R9]**

## Air Plan Revisions; California; San Joaquin Valley Unified Air Pollution Control District

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is proposing to approve a revision to the San Joaquin Valley Unified Air Pollution Control District (SJVUAPCD) portion of the California State Implementation Plan (SIP). This revision concerns emissions of particulate matter (PM) from wood burning devices. We are proposing to approve a local measure to regulate these emission sources under the Clean Air Act (CAA or the Act). We are taking comments on this proposal and plan to follow with a final action.

**DATES:** Comments must be received on or before May 15, 2023.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA–R09–OAR–2023–0076 at *https://www.regulations.gov.* For comments submitted at *Regulations.gov*, follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov.* The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www.epa.gov/dockets/commenting-epa-dockets.* If you need assistance in a language other than English or if you are a person with a disability who needs a reasonable accommodation at no cost to you, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section.

**FOR FURTHER INFORMATION CONTACT:** Elijah Gordon, EPA Region IX, 75 Hawthorne St., San Francisco, CA 94105. By phone: (415) 972–3158 or by email at *gordon.elijah@epa.gov.*

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

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### I. The State's Submittal

#### *A. What measure did the State submit?*

Table 1 lists the measure addressed by this proposal with the dates that it was adopted by the local air agency and submitted by the California Air Resources Board (CARB). We will refer to this measure as the ''Burn Cleaner Incentive Measure.''

TABLE 1—SUBMITTED MEASURE

| Local Agency | Resolution # | Measure Title | Adopted | Submitted |
|---|---|---|---|---|
| SJVUAPCD ..... | 21–11–7 | Burn Cleaner Fireplace and Woodstove Change-out Incentive Measure (“Burn Cleaner Incentive Measure”). | 11/18/2021 | 03/17/2022 |

On September 17, 2022, pursuant to CAA section 110(k)(1)(B) and 40 CFR part 51, appendix V, the submittal for the Burn Cleaner Incentive Measure was deemed complete by operation of law.

*B. Are there other versions of this measure?*

There are no previous versions of the Burn Cleaner Incentive Measure in the SIP.

*C. What is the purpose of the submitted measure?*

Emissions of PM, including PM equal to or less than 2.5 microns in diameter ($PM_{2.5}$) and PM equal to or less than 10 microns in diameter ($PM_{10}$), contribute to effects that are harmful to human health and the environment, including premature mortality, aggravation of respiratory and cardiovascular disease, decreased lung function, visibility impairment, and damage to vegetation and ecosystems. Section 110(a) of the CAA requires states to submit regulations that control PM emissions.

The SJVUAPCD regulates a $PM_{2.5}$ nonattainment area classified as Serious for the 1997 (24-hour 65 µg/m$^3$ and annual 15 µg/m$^3$ limit), 2006 (24-hour 35 µg/m$^3$ limit), and 2012 (annual 12 µg/m$^3$ limit) $PM_{2.5}$ National Ambient Air Quality Standards (NAAQS). The District adopted the 2018 Plan for the 1997, 2006, and 2012 $PM_{2.5}$ NAAQS (2018 $PM_{2.5}$ Plan) in November 2018 to help bring the District into attainment for these NAAQS.[1] The submitted measure, adopted by the District on November 18, 2021, is an enforceable commitment to achieve direct $PM_{2.5}$ emission reductions using the Burn Cleaner Fireplace and Woodstove Change-out Program, a fireplace and woodstove change-out incentive program that has been implemented within the District since 2006.

The enforceable commitment obligates SJVUAPCD to achieve specific amounts of $PM_{2.5}$ emission reductions through implementation of their fireplace and woodstove change-out program, to submit annual reports to the EPA detailing its implementation of the program and the projected emission reductions, and to adopt and submit substitute measures by specific dates if the EPA determines that this program will not achieve the necessary emission reductions. The EPA's technical support document (TSD) has more information about the measure.

## II. The EPA's Evaluation and Proposed Action

*A. How is the EPA evaluating the measure?*

Generally, SIP control measures must be enforceable (see CAA section 110(a)(2)), must not interfere with applicable requirements concerning attainment and reasonable further progress or other CAA requirements (see CAA section 110(l)), and must not modify certain SIP control requirements in nonattainment areas without ensuring equivalent or greater emission reductions (see CAA section 193).

The CAA explicitly provides for the use of economic incentive programs (EIPs) as one tool for states to use to achieve attainment of the $PM_{2.5}$ NAAQS.[2] EIPs use market-based strategies to encourage the reduction of emissions from stationary, area, and mobile sources in an efficient manner. The EPA has promulgated regulations for statutory EIPs required under section 182(g) of the Act and has issued guidance for discretionary EIPs.[3]

The EPA's guidance documents addressing EIPs and other nontraditional programs provide for some flexibility in meeting established SIP requirements for enforceability and quantification of emission reductions, provided the State takes clear responsibility for ensuring that the emission reductions necessary to meet applicable CAA requirements are achieved. Accordingly, the EPA has consistently stated that nontraditional emission reduction measures submitted to satisfy SIP requirements under the Act must be accompanied by appropriate ‘‘enforceable commitments’’ from the State to monitor emission reductions achieved and to rectify shortfalls in a timely manner.[4] The EPA has also consistently stated that, where a state intends to rely on a nontraditional program to satisfy CAA requirements, the state must demonstrate that the program achieves emission reductions that are quantifiable, surplus, enforceable, and permanent.[5]

Guidance and policy documents that we used to evaluate enforceability, revision/relaxation and rule stringency requirements for the applicable criteria pollutants include the following:

1. ‘‘Guidance on Incorporating Voluntary Mobile Source Emission Reduction Programs in State Implementation Plans (SIPs),’’ Richard D. Wilson, Acting Assistant Administrator for Air and Radiation, October 24, 1997.
2. ‘‘Improving Air Quality with Economic Incentive Programs,’’ EPA–452/R–01–001, OAQPS, January 2001.
3. ‘‘Incorporating Emerging and Voluntary Measure in a State Implementation Plan (SIP),’’ OAQPS, September 2004.
4. ‘‘Guidance on Incorporating Bundled Measures in a State Implementation Plan,’’ Stephen D. Page, OAQPS, and Margo Oge, OTAQ, August 16, 2005.
5. ‘‘Guidance for Quantifying and Using Emission Reductions from Voluntary Woodstove Changeout Programs in State Implementation Plans,’’ EPA–456/B–06–001, OAQPS, January 2006.

*B. Does the measure meet the evaluation criteria?*

The Burn Cleaner Incentive Measure contains clear and mandatory obligations that are enforceable against the SJVUAPCD and ensures that information about the emission reductions achieved through the identified incentive programs will be readily available to the public through SJVUAPCD submission of annual demonstration reports to the EPA. Our approval of the Burn Cleaner Incentive Measure would make these obligations enforceable by the EPA and by citizens

[1] 2018 $PM_{2.5}$ Plan, ES–8.

[2] See, *e.g.,* CAA section 110(a)(2)(A), 172(c)(6), and 183(e)(4).

[3] 59 FR 16690 (April 7, 1994), codified at 40 CFR part 51, subpart U and EPA, ‘‘Improving Air Quality with Economic Incentive Programs,’’ January 2001. A ‘‘discretionary economic incentive program’’ is ‘‘any EIP submitted to the EPA as an implementation plan revision for purposes other than to comply with the statutory requirements of sections 182(g)(3), 182(g)(5), 187(d)(3), or 187(g) of the Act.’’ 40 CFR 51.491.

[4] See, *e.g.,* ‘‘Guidance for Quantifying and Using Emission Reductions from Voluntary Woodstove Changeout Programs in State Implementation Plans,’’ January 2006, page 7.

[5] See, *e.g.,* ‘‘Improving Air Quality with Economic Incentive Programs,’’ January 2001, section 4.1.

under the CAA. The Burn Cleaner Incentive Measure obligates the District to achieve quantifiable, surplus, permanent, and enforceable $PM_{2.5}$ emission reductions through the Burn Cleaner Fireplace and Woodstove Change-out Program, fund projects that achieve these emission reductions, and track the progress of these emission reductions. The Burn Cleaner Incentive Measure does not alter any existing SIP requirements. Our approval of the Burn Cleaner Incentive Measure into the SIP would strengthen the SIP and would not interfere with applicable requirements concerning attainment and reasonable further progress or other CAA requirements, consistent with the requirements of CAA section 110(l). Section 193 of the CAA does not apply to this action because this measure does not modify any SIP control requirement that was in effect before November 15, 1990.

We are proposing to find that the Burn Cleaner Incentive Measure meets CAA requirements for enforceability, SIP revisions, and nontraditional emission reduction programs as interpreted in EPA guidance documents. The TSD has more information on our evaluation.

*C. Public Comment and Proposed Action*

As authorized in section 110(k)(3) of the Act, the EPA proposes to fully approve the submitted measure because it fulfills all relevant requirements. We are proposing to codify this measure as additional material in the Code of Federal Regulations, rather than through incorporation by reference, because, under its terms, the measure contains commitments enforceable only against the District and because the measure is not a substantive rule of general applicability. We will accept comments from the public on this proposal until May 15, 2023. If we take final action to approve the submitted measure, our final action will incorporate this measure into the federally enforceable SIP.

## III. 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 proposed action merely proposes to approve state law as meeting federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this proposed action:

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001); and
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA.

In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

Executive Order 12898 (Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations, 59 FR 7629, Feb. 16, 1994) directs Federal agencies to identify and address ''disproportionately high and adverse human health or environmental effects'' of their actions on minority populations and low-income populations to the greatest extent practicable and permitted by law. 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 State did not evaluate environmental justice considerations as part of its SIP submittal; the CAA and applicable implementing regulations neither prohibit nor require such an evaluation. EPA did not perform an EJ analysis and did not consider EJ in this action. If finalized, due to the nature of the action being taken here, this action is expected to have a neutral to positive impact on the air quality of the affected area. Consideration of EJ is not required as part of this action, and there is no information in the record inconsistent with the stated goal of E.O. 12898 of achieving environmental justice for people of color, low-income populations, and Indigenous peoples.

**List of Subjects in 40 CFR Part 52**

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Particulate matter, Reporting and recordkeeping requirements.

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

Dated: April 6, 2023.

**Kerry Drake,**

*Acting Regional Administrator, Region IX.*

[FR Doc. 2023–07724 Filed 4–13–23; 8:45 am]

**BILLING CODE 6560–50–P**

## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Part 73

**[MB Docket No. 23–126; FCC 23–23; FR ID 134736]**

### In the Matter of Implementation of the Low Power Protection Act

**AGENCY:** Federal Communications Commission.

**ACTION:** Proposed rule.

**SUMMARY:** In this document, the Federal Communications Commission (Commission) implements the Low Power Protection Act (LPPA or Act), as enacted on January 5, 2023. The LPPA provides certain low power television (LPTV) stations with a limited window of opportunity to apply for primary spectrum use status as Class A television stations. The LPPA sets forth eligibility criteria for stations seeking

Class A designation that are similar to the eligibility criteria under the Community Broadcasters Protection Act of 1999 (CBPA), which permitted certain LPTV stations to convert to Class A status. This document seeks comment on how to implement the LPPA consistent with Congressional direction, including, *inter alia,* which stations are eligible to apply for Class A status under the LPPA, the application period and application filing requirements, and ongoing eligibility requirements.

**DATES:** Comments may be filed on or before May 15, 2023, and reply comments may be filed on or before June 13, 2023.

**ADDRESSES:** You may submit comments and reply comments, identified by MB Docket No. 23–126, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Federal Communications Commission's Website: http://fjallfoss.fcc.gov/ecfs2/.* Follow the instructions for submitting comments.
- *Mail:* Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.
- *People With Disabilities:* Contact the FCC to request reasonable accommodations (accessible format documents, sign language interpreters, CART, etc.) by email: *FCC504@fcc.gov* or phone: (202) 418–0530 or TTY: (202) 418–0432.

For detailed instructions for submitting comments and additional information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document.

**FOR FURTHER INFORMATION CONTACT:** Kim Matthews, Media Bureau, Policy Division, at (202) 418–2154, or by email at *Kim.Matthews@fcc.gov,* or Joyce Bernstein, Media Bureau, Video Division, at (202) 418–1647, or by email at *Joyce.Bernstein@fcc.gov.*

**SUPPLEMENTARY INFORMATION:** This is a summary of the Commission's *Notice of Proposed Rulemaking* (*NPRM*), FCC 23–23, adopted on March 29, 2023 and released on March 30, 2023. The full text of this document is available for public inspection and copying during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street SW, Room CY–A257, Washington, DC 20554. The complete text may be purchased from the Commission's copy contractor, 445 12th Street SW, Room CY–B402, Washington, DC 20554. This document will also be available via ECFS at *http://fjallfoss.fcc.gov/ecfs/.* Documents will be available electronically in ASCII, Microsoft Word, and/or Adobe Acrobat. Alternative formats are available for people with disabilities (Braille, large print, electronic files, audio format) by sending an email to *fcc504@fcc.gov* or calling the Commission's Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

## Synopsis

### Background

1. The Commission created the LPTV service in 1982 to bring television service, including local service, to viewers ''otherwise unserved or underserved'' by existing full power service providers. From its creation, the LPTV service has been a secondary service, meaning LPTV stations may not cause interference to, and must accept interference from, full power television stations as well as certain land mobile radio operations and other primary services. As a result of their secondary status, LPTV stations can also be displaced by full power stations that seek to expand their service area, or by new full power stations seeking to enter the same area as the LPTV station.

2. Currently, there are approximately 1,912 licensed LPTV stations. These stations operate in all states and territories, and serve both rural and urban audiences. LPTV stations were required to complete a transition from analog to digital operation in 2021 and all such stations must now operate in digital format. As the name suggests, LPTV stations have lower authorized power levels than full power TV stations. Because they operate at reduced power levels, LPTV stations serve a much smaller geographic region than full power stations and can be fit into areas where a higher power station cannot be accommodated in the Table of TV Allotments.

3. In 2000, the Commission established a Class A television service to implement the Community Broadcasters Protection Act of 1999 (CBPA), codified at 47 US.C 336(f). The CBPA allowed certain qualifying LPTV stations to become Class A stations, which provided those television stations primary status, and thereby a measure of interference protection from full service television stations.

4. Congress sought in the CBPA to provide certain LPTV stations a limited window of opportunity to apply for primary status. Among other matters, the CBPA set out certain certification and application procedures for LPTV licensees seeking Class A designation and prescribed the criteria for eligibility for a Class A license. Specifically, under the CBPA, an LPTV station could qualify for Class A status if, during the 90 days preceding the date of enactment of the statute, the station: (1) broadcast a minimum of 18 hours per day; (2) broadcast an average of at least 3 hours per week of programming produced within the market area served by the station, or the market area served by a group of commonly controlled low-power stations that carry common local programming produced within the market area served by such group; and (3) was in compliance with the Commission's requirements for LPTV stations. In addition, the CBPA required that, from and after the date of its application for a Class A license, the station must be in compliance with the Commission's operating rules for full power television stations. As directed by the CBPA, within 60 days of the date of enactment of the CBPA, stations seeking Class A status were required to submit to the Commission a certification of eligibility based on the applicable qualification requirements. In addition, the Commission required LPTV licensees seeking Class A designation to submit an application to the Commission within 6 months after the effective date of the rules adopted in the Class A proceeding.

5. In addition to these qualifying requirements, the CBPA gave the Commission discretion to determine that the public interest, convenience, and necessity would be served by treating a station as a qualifying LPTV station under the CBPA, or that a station should be considered to qualify for such status for other reasons, even if it did not meet the qualifying requirements in the statute discussed above. In implementing the CBPA, the Commission concluded, however, that it would not accept applications under the CBPA from LPTV stations that did not meet the statutory criteria and that did not file a certification of eligibility by the statutory deadline, absent compelling circumstances.

6. Like the CBPA, the Low Power Protection Act (LPPA), Public Law 117–344, 136 Stat. 6193 (2023), is intended ''to provide low power TV stations with a limited window of opportunity'' to apply for primary status as a Class A television licensee. The Act gives LPTV stations one year to apply for a Class A license, from the date that the Commission's rules become effective.

7. The LPPA sets forth eligibility criteria for stations seeking Class A designation that are similar to the eligibility criteria under the CBPA, as discussed above. Specifically, the statute provides that the Commission ''may approve'' an application submitted by an LPTV station if the station meets the following eligibility criteria:

- during the 90-day period preceding the date of enactment of the LPPA (*i.e.,* between October 7, 2022 and January 5, 2023), the station satisfied the same requirements applicable to stations that qualified for Class A status under the CBPA, ''including the requirements . . . with respect to locally produced programming;''
- the station satisfies the requirements of 47 CFR 73.6001(b) through (d) or any successor regulation;
- the station demonstrates that it will not cause any interference as described in the CBPA;
- during that same 90-day period, the station complied with the Commission's requirements for LPTV stations; and
- as of January 5, 2023, the station operated in a Designated Market Area with not more than 95,000 television households;

Finally, the LPPA requires that a station accorded Class A status must (1) be subject to the same license terms and renewal standards as a license for a full power television broadcast station (except as otherwise expressly provided in the LPPA) and (2) remain in compliance with paragraph (c)(2)(B) of the statute during the term of the license.

**Discussion**

8. In this *Notice of Proposed Rulemaking (NPRM),* we propose rules to provide LPTV stations with a limited opportunity to apply for primary spectrum use status as Class A television stations, consistent with Congress's directive in the LPPA.

*A. Application Period*

9. The LPPA provides LPTV stations a period of one year to apply for Class A status. We tentatively conclude that the application window will be limited to the one year application window specified in the Act. We note that the LPPA provides that the Commission may approve an application for Class A status if the application satisfies § 336(f)(2) of the Communications Act of 1934, as amended (which codifies the CBPA). This provision sets forth the eligibility criteria for stations qualifying for Class A status, and gives the Commission discretion to determine whether a station not satisfying such criteria should otherwise qualify. In the *Class A Order,* the Commission declined either to expand these eligibility criteria or to allow ongoing conversion to Class A status beyond the 6 month window contemplated in the CBPA. The Commission reasoned that the basic purpose of the CBPA was to afford existing LPTV stations a window of opportunity to convert to Class A stations. The Commission also determined that the intent of Congress in enacting the CBPA was to establish the rights of a specific, already-existing group of LPTV stations, and that the public interest would not be served by the ongoing conversion of LPTV stations to Class A status under the CBPA in the future. The Commission noted that LPTV stations were originally licensed on a secondary basis and allowed to convert to Class A status only under limited eligibility criteria established in the CBPA based upon their beneficial past service to the public, and that it was not appropriate to expand generally the group of LPTV stations eligible to convert to Class A beyond that established by Congress. The Commission did, however, state that, where potential applicants ''face circumstances beyond their control that prevent them from filing'' a Class A application within the 6-month time frame that applied to Class A conversions, the Commission ''would examine those instances on a case-by-case basis to determine their eligibility for filing.''

10. Similar to the CBPA, we tentatively find that the purpose of the LPPA is to provide for a one-time conversion of a discrete pool of eligible LPTV stations that meet the specific criteria set forth in the LPPA. We tentatively find that the public interest would not be served by providing for conversion to Class A status beyond the one year period contemplated in the LPPA, nor do we find anything in the LPPA to suggest that Congress intended anything more than a limited window of opportunity. Although we tentatively conclude that the application window will be limited to the one year application window specified in the Act, we propose that if a potential applicant faces circumstances beyond its control that prevents them from filing by the application deadline, we will examine those instances on a case-by-case basis to determine the potential applicant's eligibility for filing. We invite comment on this approach.

*B. Eligibility Requirements*

1. Definition of Low Power TV Station

11. We propose to apply the Commission's recently updated definition of an LPTV station for purposes of determining which stations are eligible for Class A status under the LPPA. The LPPA provides that the term ''low power TV station'' has the meaning given the term ''digital low power TV station'' in § 74.701 of our rules, or any successor regulation. Section 74.701 formerly contained a definition of the term ''digital lower power TV station'' but we recently revised that rule to remove references to digital and analog television service, as all LPTV stations have now ceased analog operations and there is no further need to differentiate between digital and analog in the rules. In place of the prior § 74.701 definition, § 74.701(k) of our current rules defines a low power TV station as: ''[a] station . . . that may retransmit the programs and signals of a television broadcast station, may originate programming in any amount greater than 30 seconds per hour . . . and, subject to a minimum video program service requirement, may offer services of an ancillary or supplementary nature, including subscription-based services.'' We propose to apply this recently updated definition of an LPTV station for purposes of determining which stations are eligible for Class A status under the LPPA. We invite comment on this approach.

12. Consistent with this definition, we tentatively conclude that eligibility for Class A status under the LPPA should be limited to LPTV stations, and that television translator stations should not be eligible. Translator stations ''operate for the purpose of retransmitting the programs and signals of a television broadcast station, without significantly altering any characteristic of the original signal other than its frequency and amplitude,'' and thus, are not permitted to ''originate programming'' as defined in the rules. Given this limitation, for the following reasons we tentatively conclude that ''television broadcast translator stations'' as defined under our rules would not be able to satisfy the locally produced programming eligibility requirement of the LPPA. While the LPPA does not expressly require that the locally produced content aired by a low power station be produced by that station itself, we tentatively conclude that translators would be unlikely to qualify under the locally produced programming provisions of the LPPA due to the manner in which translators operate.

Translator stations are generally located outside their primary station's noise limited contour in order to bring service to remote areas. Thus, while a translator's primary station(s) may be airing programming produced in the primary station's noise limited contour, it is unlikely that programming was locally produced within the noise limited contour of the translator. For similar reasons, the Commission specifically found that translator stations were not eligible for Class A status under the CBPA, and there is no indication that Congress intended to be more inclusive in the LPPA. In addition, we tentatively conclude that the LPPA's inclusion of reference to ''low power'' stations and failure to specifically reference ''translator'' stations can be read as an intentional inclusion of the former and exclusion of the latter and is the best reading of the statute. We invite comment on this tentative conclusion that translator stations should not be eligible for Class A status under the LPPA.

13. We tentatively conclude that LPTV stations that have not completed their digital transition are not eligible to apply for Class A designation. A small number of analog LPTV stations have not yet completed construction of their digital facilities and have been granted additional time to do so. Since analog television operations are no longer permitted, these LPTV stations are silent and must remain silent until such time as they complete construction of their digital facilities. The LPPA requires that, to be eligible to convert to Class A status, an LPTV station must meet the statutory programming requirements for the 90-day period preceding the date of enactment of the LPPA. As any LPTV station that was silent during this period would not meet these requirements, we tentatively conclude that such stations would not be eligible to apply for Class A designation under the LPPA. We invite comment on this interpretation.

2. Eligibility Criteria

14. We propose to codify in our rules the eligibility criteria set forth in the LPPA. As noted above, the LPPA sets forth eligibility criteria for stations seeking Class A designation that are similar to the eligibility criteria under the CBPA. Specifically, the LPPA provides that the Commission ''may approve'' an application submitted by an LPTV station under the LPPA if the station, during the 90-day period preceding the date of enactment of the LPPA, meets the same requirements in 47 U.S.C. 336(f)(2) applicable to stations that qualified for Class A status under the CBPA, ''including the requirements . . . with respect to locally produced programming.'' Thus, to qualify for Class A status in the 90 days preceding the LPPA's January 5, 2023 effective date, an LPTV station must have met the following requirements between October 7, 2022 and January 5, 2023 (the 90 day eligibility period): (1) the station must have broadcast a minimum of 18 hours per day; (2) the station must have broadcast an average of at least 3 hours per week of programming that was produced within the market area served by such station, or the market area served by a group of commonly controlled LPTV stations that carry common local programming produced within the market area served by such group; and (3) the station must have been in compliance with the Commission's requirements applicable to LPTV stations. In addition, from and after the date of its application for a Class A license, the station must be in compliance with the Commission's operating rules for full power television stations.

15. *Locally Produced Programming.* In implementing the LPPA, we propose to define ''locally produced programming'' in the same manner as our rules that apply to stations that converted to Class A status pursuant to the CBPA. As noted above, the LPPA requires that, during the 90 day eligibility period, LPTV stations must have broadcast an average of at least 3 hours per week of programming produced within the market area served by the station. Section 73.6000 of our rules contains a definition of ''locally produced programming'' applicable to Class A stations. In the *Part 73 Amendment NPRM,* the Commission has proposed to update its definition of locally produced programming for Class A stations in § 73.6000 of the rules, as ''programming produced within the predicted noise-limited contour . . . of a Class A station broadcasting the program or within the contiguous predicted noise-limited contours of any of the Class A stations in a commonly owned group.'' We propose to apply the definition in § 73.6000 of the rules, including any future changes, to define ''programming produced within the market area served by the station'' for purposes of determining eligibility for Class A status under section 2(c)(2)(B)(i)(I) of the LPPA and invite comment on this approach.

16. *Operating Requirements.* We tentatively conclude that all applicants seeking to convert to Class A status under the LPPA be required to certify that they have complied with the Commission's requirements for LPTV stations, during the 90 day eligibility period. As noted above, to qualify for Class A status under the LPPA, an LPTV station must have been in compliance with the Commission's requirements for LPTV stations during the 90 day eligibility period. We seek comment on this tentative conclusion.

17. The LPPA requires that a station ''be in compliance with the Commission's operating rules for full-power stations'' beginning on the date of its application for a Class A license and thereafter. In the *Class A Order* that implemented the CBPA, the Commission determined certain part 73 rules would apply to applicants for Class A status and to stations awarded Class A licenses. For example, existing Class A stations must comply with children's programming and online public inspection file regulations. We propose to take this same approach with respect to stations that seek to convert to Class A status pursuant to the LPPA. We propose that applicants for Class A designation pursuant to the LPPA, and Class A stations awarded licenses pursuant to that statute, will be required to comply with the same part 73 rules applied in implementing the CBPA. We invite comment on this approach.

18. We also propose that all stations that receive a Class A license under the LPPA must comply with all Class A regulations. LPPA section (2)(c)(3)(B) provides that a Class A license granted pursuant to the rules established under the LPPA shall ''require the low power TV station to remain in compliance with [§ (2)(c)(2)(B) of the LPPA] during the term of the license.'' This includes, among other things, the requirements to broadcast a minimum of 18 hours per day and to broadcast an average of at least three hours per week of locally produced programming each quarter. Beyond the requirements specified in § (2)(c)(2)(B) of the LPPA, we also tentatively conclude there is no reason to exempt LPTV stations converting to Class A status under the LPPA from other rules applicable to LPTV stations converting to Class A status under the CBPA, given that the service requirements in the LPPA closely track those in the CBPA and that the stations will be converting to Class A status and so it makes sense for Class A rules generally to apply. We seek comment on this approach.

19. We also seek comment on whether the requirement to comply with the Class A eligibility requirements set forth in LPPA section (2)(c)(2)(B) should run from when an LPTV station's application is submitted. To that end, we note that LPPA section 2(c)(2)(B)(i)(II) states that the ''Commission may approve an application [for Class A status] if the

low power TV station *submitting the application—satisfies*—paragraphs (b), (c), and (d) of 73.6001,'' which contains the requirements that Class A stations broadcast a minimum of 18 hours per day and broadcast an average of at least three hours per week of locally produced programming each quarter. We seek comment on how to interpret the statutory language providing that the station ''submitting the application'' must ''satisfy'' these requirements. We note that this requirement is distinct from the separate statutory obligation to meet the eligibility requirements during the 90 day eligibility period of October 7, 2022 to January 5, 2023. Should this language be interpreted to require the applicant for a Class A license to satisfy the requirements of 47 CFR 73.6001(b) through (d) from the time it submits its application? Indeed, because LPPA section (2)(c)(3)(B) applies these requirements after a Class A license is granted, would LPPA section 2(c)(2)(B)(i)(II) be rendered superfluous if we did not interpret it to apply these requirements from the time the Class A application is submitted?

20. *License Application and Documentation.* In order to assist with the orderly processing of all applications received under the LPPA, we propose that an applicant will be required to certify that its station meets the operating and programming requirements of the LPPA. Specifically, with respect to the statutory requirement that stations air 18 hours of programming each day during the 90 day eligibility period, we propose to require applicants to certify that the station was fully operational for at least 18 hours on each day during the 90 day eligibility period. In addition, with respect to the requirement that stations air three hours of locally produced programming, we propose to require an applicant to certify that it was providing such programming during each day during the 90 day eligibility period. We invite comment generally on this approach.

21. We tentatively conclude that an applicant be required to submit, as part of its application, documents to support its certification that it meets the operating and programming requirements of the LPPA. We seek comment on the kind of documentation that we should require stations to submit in support of their application in order to ensure orderly processing. Should we require specific documents or categories of documentation or should we provide examples of the kinds of documentation that stations could provide thereby giving stations more latitude with respect to the types of documentation they may use to support their application? To support its certification that the station was on the air at least 18 hours each day during the eligibility period, a station could, for example, submit electric power bills from a third party vendor that specify the station or station's broadcast facility location for the designated period, and/or copies of any program guides, EAS logs, or agreements to purchase and air programming on the specified station in an amount sufficient to satisfy this programming requirement. If the station was silent during any portion of this period of time, we will require the station to identify any silent periods and the reasons why the station was silent. To support its certification that a station aired three hours of locally produced programming, the station could, for example, submit copies of any agreements to purchase and air such programming and/or identify the producer of any programming it claims is locally produced, the location where the programming was produced, and records of advertisements aired during locally produced programming showing that the programming was in fact aired. We invite commenters to provide examples of other kinds of documentation a station could provide to support its certifications that it meets the eligibility requirements of the LPPA. In order to expedite processing, and ensure the Commission maximizes opportunities for applicants, Commission staff may request additional documentation if necessary during consideration of the application.

22. *Alternative Eligibility Criteria.* As discussed above, the LPPA provides that the Commission may approve an application for Class A status if the application satisfies § 336(f)(2) of the Communications Act of 1934, codified as part of the CBPA. The CBPA provided the Commission with additional discretion in evaluating applicants for Class A status if ''the Commission determines that the public, interest, convenience, and necessity would be served by treating the station as a qualifying low-power television station for purposes of this section, or for other reasons determined by the Commission.'' In the *Class A Order,* the Commission determined that it would allow deviation from the strict statutory eligibility criteria in the CBPA ''only where such deviations are insignificant or when we determine that there are compelling circumstances, and that in light of those compelling circumstances, equity mandates such a deviation.'' The Commission gave as an example of such compelling circumstances ''a natural disaster or interference conflict which forced the station off the air during the 90 day period before enactment of the CBPA.''

23. We tentatively conclude that we should apply this same approach in the context of the LPPA. Accordingly, we propose to allow deviation from the strict statutory eligibility criteria under the LPPA only where deviations are insignificant or where there are compelling circumstances such that equity mandates a deviation. We tentatively conclude that the LPPA provides precise and limited eligibility criteria and, except in very limited circumstances, we are not inclined to expand the specific qualifying criteria beyond that identified in the statute. We invite comment on this approach.

3. Interference Requirements

24. We tentatively conclude that LPTV stations proposing to convert to Class A status under the LPPA must demonstrate compliance with the interference protection standards set forth in § 336(f)(7) of the Communications Act of 1934, with the exception of those provisions that are now obsolete given the transition of all television stations from analog to digital operations. The LPPA provides that the Commission may approve an application by an LPTV station if it ''demonstrates to the Commission that the Class A station for which the license is sought will not cause any interference described in § 336(f)(7) of the Communications Act of 1934 . . . .'' Section 336(f)(7) describes the interference protection requirements for LPTV stations that sought Class A status under the CBPA vis-à-vis full power television, LPTV, TV translator, and land mobile stations. Because the CBPA was adopted in 1999, § 336(f)(7) refers to a number of interference protection standards that are now obsolete.

25. We tentatively conclude that LPTV stations proposing to convert to Class A status must satisfy the requirement in section 2(c)(2)(B)(ii) of the LPPA by demonstrating compliance with the same operating rules and policies, including interference requirements, applicable to existing digital Class A licensees, including requirements that were adopted subsequent to the enactment of § 336(f)(7). When LPTV stations converted to Class A status pursuant to the CBPA in 2000, they began their primary status operations as analog stations. In 2004, the Commission adopted rules and policies to allow LPTV and Class A stations to operate with digital facilities. In 2011, the Commission established a hard deadline

of September 1, 2015 for all Class A stations to terminate analog operations. With very limited exceptions, all existing LPTV stations are now operating in digital format. Our rules applicable to Class A stations set forth the interference protection Class A stations now must provide to digital full power, Class A, LPTV, and TV translator stations, and supersede certain interference requirements referenced in the CBPA, as that statute was adopted prior to the digital transition. We recognize that the LPPA specifically referenced the interference requirements ''described in § 336(f)(7).'' Nonetheless, we tentatively find that this does not evince an intent on the part of Congress to compel applicants, in fulfilling the requirements under the LPPA, to demonstrate compliance with outdated and superseded interference rules referenced in § 336(f)(7). Rather, we tentatively find that by requiring applicants to demonstrate compliance with current interference requirements applicable to Class A stations, we will ensure that the purpose of the statutory provision—*i.e.,* to ensure that a Class A station will not cause interference—will be served because the licensed or previously proposed facilities of full power, low power and TV translator, and land mobile stations will be afforded interference protection when LPTV stations convert to Class A status pursuant to the LPPA. Accordingly, we tentatively conclude that our rules applicable to existing Class A stations, including interference requirements, will apply to stations that convert to Class A status pursuant to the LPPA. We seek comment generally on this analysis and tentative conclusion.

26. *Protection of Full Power Television Stations.* We tentatively conclude that Class A-eligible LPTV stations need not comply with certain CBPA interference showings that are obsolete due to the completion of the digital transition. These obsolete provisions would include the following: (1) prohibition on causing interference to the predicted Grade B contour of an analog full power television station or a modification application filed on or before November 1, 1999; (2) protection of the original DTV Table of Allotments, which has now been superseded and deleted from the Commission's rules; and (3) two additional requirements that are both obsolete due to the passage of time. We seek comment on our tentative conclusion.

27. Further, we tentatively conclude that Class A-eligible stations seeking primary status under the LPPA must demonstrate that they do not cause interference to areas protected under our rules, including any future updates to those rules. Section 336(f)(7)(A)(ii)(II) of the CBPA required LPTV stations to demonstrate that they did not cause interference ''to the areas protected in the Commission's digital television regulations (47 CFR 73.622(e) and (f)).'' We recently proposed updates to these requirements. Accordingly, we tentatively conclude that these rule changes to §§ 73.622(e) and 73.622(f), if adopted, will also apply to Class A-eligible LPTV stations seeking primary status under the LPPA and seek comment on this tentative conclusion.

28. *Protection of Low Power and Television Translator Stations.* We tentatively conclude that an LPTV station that files an application to convert to Class A status under the LPPA will be required to protect LPTV and TV translator stations. The LPPA references the CBPA in requiring the protection of previously authorized LPTV/TV stations, as well as previously filed applications for these facilities. We note that when the CBPA was implemented, the Commission required Class A stations to protect ''the LPTV and TV translator protected contours on the basis of the standards given in § 74.707, *i.e.,* on the basis of compliance with certain desired-to-undesired signal strength ratios of the LPTV rules.'' We recently deleted this provision. The digital-to-digital interference protection standards are now found in §§ 74.792 and 74.793. We tentatively conclude that LPTV stations that file applications to convert to Class A station under the LPPA will be required to make an absence of interference showing using these updated digital-to-digital rules, and seek comment on this tentative conclusion.

29. *Protection of Land Mobile Stations.* We tentatively conclude that an LPTV station that converts to a Class A station under the LPPA will continue to be required to protect land mobile stations. LPTV stations are currently required to protect land mobile stations. Section 336(f)(7)(C) of the CBPA provides that the Commission may not grant a Class A license or modification of license where the Class A station will cause interference within the protected contour of land mobile stations. This protects land mobile radio services which have been allocated the use of TV channels 14–20 in certain urban areas of the country, as well as channel 16 in the New York City metropolitan area. In implementing the CBPA, the Commission implemented these protections in the manner prescribed in § 74.709 of the LPTV rules. These rules have not changed. Thus, we tentatively conclude that LPTV stations that file applications to convert to Class A station under the LPPA will be required to make an absence of interference showing using these land mobile protection rules.

4. Designated Market Area

30. We seek comment on multiple issues involving the LPPA's requirements related to Designated Market Areas (DMAs). The LPPA requires that an LPTV station must demonstrate that as of January 5, 2023, the station ''operates in a Designated Market Area with not more than 95,000 television households.'' The LPPA further states that DMA means ''(A) a [DMA] determined by Nielsen Media Research or any successor entity; or (B) a [DMA] under a system of dividing television broadcast station licensees into local markets using a system that the Commission determines is equivalent to the system established by Nielsen Media Research . . .'' We seek comment on: (1) the meaning of the word ''operates'' in the LPPA, and (2) whether we should adopt the Nielsen Local TV Station Information Report (Local TV Report) for determining DMAs or an equivalent alternative local market system.

31. In limiting eligibility to LPTV stations operating in a DMA or an equivalent with not more than 95,000 television households (a ''qualifying DMA''), Congress apparently intended to convey the benefits of primary Class A status under the LPPA to small market LPTV stations that reach a relatively small number of potential viewers. ''Operate'' in the LPPA could mean that an LPTV station's protected contour extends into the geographic area of a qualifying DMA. It could also mean that the station's transmission facilities, which includes the tower or building on which its antenna is mounted, are located within the qualifying DMA. We tentatively conclude that the LPTV station applying for Class A status under the LPPA must demonstrate that its transmission facilities are located within the qualifying DMA. We believe this interpretation is consistent with the apparent Congressional intent to limit Class A status to stations currently operating in small markets. We also propose that in order to make the necessary demonstration, applicants be required to provide the following information, as it existed as of the enactment date of the LPPA, January 5, 2023: (1) the coordinates of the station's transmission facilities (*i.e.,* the tower or building on which its antenna is mounted); (2) the city/town/village/or other municipality and county in which the transmission facilities are located;

and (3) the qualifying DMA in which the station's transmission facilities are located. We seek comment on this proposal.

32. We propose to use the Nielsen Local TV Station Information Report (Local TV Report) in determining the DMA where the LPTV station's transmission facilities were located as of January 5, 2023 consistent with the Commission's recent *Nielsen DMA Determination Update Order,* and seek comment on this proposal. In November 2022, we adopted Nielsen's monthly Local TV Report as the successor publication to Nielsen's Annual Station Index and Household Estimates and determined that the Local TV Report should be used to define ''local market'' as stated in other statutory provisions and rules relating to carriage, including retransmission consent, distant signals, significantly viewed, and field strength contour. The record in that proceeding indicated that the Local TV Report is the sole source of information regarding DMA determinations and that there is no company currently accredited to determine the local market area of broadcast television stations.

33. As noted above, the LPPA also permits the Commission to adopt an equivalent alternative local market system to Nielsen's DMA. The LPTV Broadcasters' Association (LPTVBA) requests that the Commission use, for purposes of the LPPA, Metropolitan Statistical Areas (MSAs) and Rural Service Areas (RSAs) as defined by the Office of Management and Budget (OMB). The general concept of an MSA is that of a core area containing a substantial population nucleus, together with adjacent communities having a high degree of economic and social integration with that core. The Census Bureau does not actually define ''rural.'' Rather, rural areas include all geographic areas that are not classified as urban. LPTVBA does not specify or explain which areas, which are based on Census Bureau data, it would have us use. We also note that these classifications, which are based on population, appear to have nothing to do with market assignment information or determining television broadcast station markets, unlike Nielsen DMAs. We seek comment on LPTVBA's position and on any alternative means of delineating DMAs using a system of dividing television broadcast station licensees into local markets that is equivalent to the system established by the Nielsen Media Research. Any commenter suggesting an alternative publication to the Nielsen Local TV Report should identify the publication as well as the similarities and differences in assigning stations to television markets, and explain why the alternative publication is preferable.

5. License Standards (Ongoing Eligibility Requirements)

34. The LPPA provides that licenses issued to stations that convert to Class A status are subject to full power television station license terms and renewal standards, with certain exceptions, and that such licensees are required to remain in compliance with the LPPA's eligibility requirements for the term of their Class A license. We propose to implement these provisions as discussed below.

35. As discussed above, we propose to require that converting stations comply with the Commission's operating rules for full power stations. We invite comment on this proposal.

36. Next, we propose to require that these converting stations remain in compliance with eligibility requirements set forth above. As described in section III.B.2. above, such stations must continue, during the term of the Class A license, to: (1) broadcast a minimum of 18 hours of programming per day, and (2) broadcast an average of at least 3 hours per week of ''locally produced programming,'' as defined above. In addition, the station must continue to comply with the interference requirements adopted in this proceeding. We invite comment on this proposal.

37. Finally, we believe that in order to fulfill the continuing compliance mandate, stations that convert to Class A status must continue to operate in DMAs with not more than 95,000 television households in order to maintain their Class A status. We invite comment on this proposed interpretation. Also, under our proposal, a station that converted to Class A pursuant to the LPPA would no longer be eligible to retain Class A status if the population in its DMA later grows to more than 95,000 television households and propose to consider compliance with this element during the license renewal process. We seek comment on this proposal. What if Nielsen or another equivalent entity were to merge a qualifying DMA into another DMA such that the combined DMA has more than 95,000 television households? How likely is this to occur? Should a station affected by a decision of Nielsen to combine DMAs for purposes of the station's Class A eligibility under these proposed rules be allowed to file a complaint with the FCC and if so what procedure should be implemented to consider such challenges? What if the boundaries of a DMA are changed such that the number of TV households in the DMA increases to a number above the 95,000 TV household threshold under the LPPA? Should our interpretation of the LPPA DMA requirement depend on whether the station itself initiates a move to a non-qualifying DMA, or whether the change is beyond the station's control?

*C. Application Process*

38. *Applications for Class A Status.* We propose to evaluate Class A status to eligible LPTV stations as a modification of the station's existing license. We propose that, for purposes of the LPPA, Class A applications be limited to the conversion of existing facilities as they exist at the time of application, without consideration of modifications to those facilities. We tentatively conclude that this approach is consistent with the limited opportunity intended by the LPPA. It will also allow expeditious consideration of all applications, and will eliminate delays that could arise from the possibility of mutual exclusivity between a Class A conversion application and other licensed full power or Class A facilities, were we to entertain license modifications during the application window. A licensed LPTV station holding a construction permit to modify its facilities will either need to license those permitted facilities before applying to convert to Class A status, or may apply for a modification after the Commission has processed the applications from the window. We invite comment on this approach.

39. When implementing the CBPA, the Commission required stations applying for Class A status to provide local public notice of applications for Class A statues ''since the nature of the underlying service is changing from secondary to primary service.'' We tentatively conclude for the same reason that local public notice of applications pursuant to the LPPA should also be required. We seek comment on this tentative conclusion.

40. *Application Form.* We propose that an application for modification of the LPTV station's existing license to convert to Class A status be filed using FCC Form 2100, Schedule F. We propose to require that such applications be filed electronically. Effective March 2, 2023, the filing fee for an application to convert to Class A designation is $425. We invite comment on these matters.

*D. TV Broadcast Incentive Auction, Post-Auction Transition, and Reimbursement*

41. The LPPA provides that it may not affect the Commission's work related to the Broadcast Incentive Auction. In 2012, Congress passed the Spectrum Act that authorized the Commission to reorganize the ultra-high frequency (UHF) band using a two-sided incentive auction that reallocated broadcast television spectrum for mobile broadband services. The post-incentive auction transition period ended on July 13, 2020, by which time full power and Class A television stations that were reassigned to new channels were required to vacate their pre-auction channels. Although LPTV stations were not eligible to participate in the incentive auction, some LPTV stations were displaced as a result of the reorganization of broadcast spectrum, and the Commission held a special displacement window to allow such LPTV stations to request construction permits for new channels in the smaller broadcast television band. The Spectrum Act also requires the Commission to reimburse full power and Class A broadcast television licensees for costs reasonably incurred in relocating to new channels assigned in the repacking process. In 2018, Congress adopted the Reimbursement Expansion Act (REA), directing the Commission also to reimburse costs reasonably incurred by a eligible LPTV stations consistent with authorizations awarded in the special displacement window. Reimbursement of eligible relocation expenses is ongoing.

42. Given that the transition and reimbursement programs have established rules and procedures and that substantial progress has been made toward completion of the reimbursement process, we tentatively conclude that nothing in the LPPA or in implementation of the LPPA with a change in a station's status from LPTV to Class A, or in the proposals herein, can or will affect the Commission's work related to the Broadcast Incentive Auction. We seek comment on this tentative conclusion.

*E. Digital Equity and Inclusion*

43. Finally, the Commission, as part of its continuing effort to advance digital equity for all, including people of color, persons with disabilities, persons who live in rural or Tribal areas, and others who are or have been historically underserved, marginalized, or adversely affected by persistent poverty or inequality, invites comment on any equity-related considerations and benefits (if any) that may be associated with the proposals and issues discussed herein. Specifically, we seek comment on how our proposals may promote or inhibit advances in diversity, equity, inclusion, and accessibility, as well the scope of the Commission's relevant legal authority.

*F. Procedural Matters*

44. *Ex Parte Rules—Permit-But-Disclose.* The proceeding this *NPRM* initiates shall be treated as a ''permit-but-disclose'' proceeding in accordance with the Commission's *ex parte* rules.[1] Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda, or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.,* .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

45. *Filing Requirements—Comments and Replies.* Pursuant to §§ 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS). *See Electronic Filing of Documents in Rulemaking Proceedings,* 63 FR 24121 (1998).

46. *Electronic Filers:* Comments may be filed electronically using the internet by accessing the ECFS: *http://apps.fcc.gov/ecfs/.*

47. *Paper Filers:* Parties who choose to file by paper must file an original and one copy of each filing.

48. Filings can be sent by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

49. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD 20701.

50. U.S. Postal Service first-class, Express, and Priority mail must be addressed to 45 L Street NE, Washington, DC 20554.

51. Effective March 19, 2020, and until further notice, the Commission no longer accepts any hand or messenger delivered filings. This is a temporary measure taken to help protect the health and safety of individuals, and to mitigate the transmission of COVID–19. See FCC Announces Closure of FCC Headquarters Open Window and Change in Hand-Delivery Policy, Public Notice, DA 20–304 (March 19, 2020), *https://www.fcc.gov/document/fcc-closes-headquarters-open-window-and-changes-hand-delivery-policy.*

52. During the time the Commission's building is closed to the general public and until further notice, if more than one docket or rulemaking number appears in the caption of a proceeding, paper filers need not submit two additional copies for each additional docket or rulemaking number; an original and one copy are sufficient.

53. *Regulatory Flexibility Act.* The Regulatory Flexibility Act of 1980, as amended (RFA), requires that an agency prepare a regulatory flexibility analysis for notice and comment rulemakings, unless the agency certifies that ''the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.'' Accordingly, we have prepared an Initial Regulatory Flexibility Analysis (IRFA) concerning the possible impact of potential rule and/or policy changes contained in this *NPRM* on small

[1] 47 CFR 1.1200 et seq.

entities. The IRFA is set forth in Appendix B.

54. *Paperwork Reduction Act.* This document proposes new or modified information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens and pursuant to the Paperwork Reduction Act of 1995, Public Law 104–13, invites the general public and the Office of Management and Budget (OMB) to comment on these information collection requirements. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4), we seek specific comment on how we might further reduce the information collection burden for small business concerns with fewer than 25 employees.

55. *People with Disabilities.* To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an email to *fcc504@fcc.gov* or call the Consumer and Governmental Affairs Bureau at (202) 418–0530.

56. *Additional Information.* For additional information on this proceeding, contact Kim Matthews, *Kim.Matthews@fcc.gov,* of the Policy Division, Media Bureau, (202) 418–2154, or Joyce Bernstein, *Joyce.Bernstein@fcc.gov,* of the Video Division, Media Bureau, (202) 418–1647.

**Initial Regulatory Flexibility Analysis**

As required by the Regulatory Flexibility Act of 1980, as amended (RFA), the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) concerning the possible significant economic impact on small entities by the policies and rules proposed in the *Notice of Proposed Rulemaking* (*NPRM*). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments provided on the first page of the *NPRM.* The Commission will send a copy of the *NPRM,* including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA). In addition, the *NPRM* and IRFA (or summaries thereof) will be published in the **Federal Register**.

*A. Need for, and Objectives of, the Proposed Rules*

The Commission initiates this rulemaking proceeding to implement the Low Power Protection Act (LPPA or Act), as enacted on January 5, 2023. The LPPA provides certain low power television (LPTV) stations with a ''limited window of opportunity'' to apply for primary spectrum use status as Class A television stations. The *NPRM* also seeks comment on how to implement the window consistent with Congressional direction.

We tentatively conclude that the application window will be limited to the one year application window contemplated by the Act, and that an application filed for Class A status must demonstrate that the LPTV station operated in a Designated Market Area (DMA) with not more than 95,000 television households on January 5, 2023. We also tentatively conclude that LPTV stations that convert to Class A status under the LPPA must comply with the interference protection standards set forth in § 336(f)(7) of the Communications Act of 1934, with the exception of those provisions that are now obsolete given the transition of all television stations from analog to digital operations. We propose to apply the Commission's recently updated definition of an LPTV station for purposes of determining which stations are eligible for Class A status under the LPPA and to codify in our rules the eligibility criteria set forth in the LPPA. We also propose to implement provisions of the LPPA which provide that licenses issued to stations that convert to Class A status are subject to full power television station license terms and renewal standards, with certain exceptions, and that such licensees are required to remain in compliance with the LPPA's eligibility requirements for the term of their Class A license. We propose to evaluate Class A status to eligible LPTV stations as a modification of the station's existing license. We seek comment on our tentative conclusion that nothing in the LPPA, or in the proposals in the *NPRM,* affects the Commission's work related to the Broadcast Incentive Auction. Lastly, we seek comment on how our proposals may promote or inhibit advances in diversity, equity, inclusion, and accessibility, as well the scope of the Commission's relevant legal authority.

*B. Legal Basis*

The proposed action is authorized pursuant to §§ 1, 2, 4(i), 4(j), 303, 307, 309, 311, and 336(f) of the Communications Act of 1934, as amended, 47 U.S.C. 151, 152, 154(i), 154(j), 303, 307, 309, 311, 336(f) and the Low Power Protection Act, Pub. L. 117–344, 136 Stat. 6193 (2023).

*C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply*

The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted. The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act. A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA. Below, we provide a description of such small entities, as well as an estimate of the number of such small entities, where feasible.

*Television Broadcasting.* This industry is comprised of ''establishments primarily engaged in broadcasting images together with sound.'' These establishments operate television broadcast studios and facilities for the programming and transmission of programs to the public. These establishments also produce or transmit visual programming to affiliated broadcast television stations, which in turn broadcast the programs to the public on a predetermined schedule. Programming may originate in their own studio, from an affiliated network, or from external sources. The SBA small business size standard for this industry classifies businesses having $41.5 million or less in annual receipts as small. 2017 U.S. Census Bureau data indicate that 744 firms in this industry operated for the entire year. Of that number, 657 firms had revenue of less than $25,000,000. Based on this data we estimate that the majority of television broadcasters are small entities under the SBA small business size standard.

As of December 31, 2022, there were 1,375 licensed commercial television stations. Of this total, 1,282 stations (or 93.2%) had revenues of $41.5 million or less in 2021, according to Commission staff review of the BIAKelsey Media Access Pro Online Television Database (MAPro) on January 13, 2023, and therefore these licensees qualify as small entities under the SBA definition. In addition, the Commission estimates as of December 31, 2022, there were 383 licensed noncommercial educational (NCE) television stations, 383 Class A TV stations, 1,912 LPTV stations, and 3,122 TV translator stations. The Commission, however, does not compile and otherwise does not have access to financial information for these television broadcast stations that would permit it to determine how many of these stations qualify as small entities

under the SBA small business size standard. Nevertheless, given the SBA's large annual receipts threshold for this industry and the nature of these television station licensees, we presume that all of these entities qualify as small entities under the above SBA small business size standard.

*D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities*

In this section, we identify the reporting, recordkeeping, and other compliance requirements proposed in the *NPRM* and consider whether small entities are affected disproportionately by any such requirements. In assessing the cost of compliance for small entities, at this time the Commission cannot quantify the cost of compliance with the proposed rules that may be adopted. Further, the Commission is not in a position to determine whether, if adopted, the proposals and matters upon which we seek comment in the *NPRM* will require small entities to hire professionals to comply. We expect the information we receive in comments, including cost information where requested, to help the Commission identify and evaluate relevant compliance matters for small entities, including compliance costs and other burdens that may result from potential changes discussed in the *NPRM.*

The LPPA requires that, to be eligible for Class A status, during the 90 days preceding the date of enactment of the LPPA an LPTV station must have broadcast a minimum of 18 hours/day and an average of at least 3 hours per week of programming produced within the ''market area'' served by the station and have been in compliance with the Commission's requirements for LPTV stations. We propose to require that small and other applicants seeking to convert to Class A status under the LPPA be required to certify in their application for Class A status that they have complied with these eligibility requirements during the 90 days preceding the January 5, 2023 enactment of the statute. We also propose to require applicants to provide documentation as part of their application supporting their certifications, and we propose that the Commission staff could also request additional documentation if necessary during consideration of the application.

Beginning on the date of its application for a Class A license and thereafter, a station ''must be in compliance with the Commission's operating rules for full-power stations.'' We propose to apply to small and other applicants for Class A status under the LPPA, and to stations that are awarded Class A licenses under that statute, all part 73 regulations except for those that cannot apply for technical or other reasons. For example, Class A stations must comply with the requirements for informational and educational children's programming, the political programming and political file rules, and the public inspection file rule. The *NPRM* invites comment on this proposed approach.

The LPPA requires that a station that converts to Class A status pursuant to the statute continue to meet the eligibility requirements of the LPPA during the term of the station's Class A license. To be eligible under the LPPA, in addition to other eligibility requirements, section 2(c)(2)(B)(iii) of the Act requires an LPTV station must ''as of the date of enactment'' of the LPPA operate in a DMA with not more than 95,000 television households. Section 2(c)(3)(B) of the Act, however, requires that stations that convert to Class A status under the LPPA ''remain in compliance'' with paragraph (2)(B) ''during the term of the license.'' We propose to interpret section 2(c)(3)(B) to require that stations that convert to Class A status, including small entities, remain in DMAs with not more than 95,000 television households in order to maintain their Class A status, and invite comment on this proposed interpretation. In addition, licensed Class A stations must also continue to meet the minimum operating requirements for Class A status. Licensees unable to continue to meet the minimum operating requirements for Class A television stations, or that elect to revert to low power television status, must promptly notify the Commission, in writing, and request a change in status. The *NPRM* also proposes that stations that convert to Class A status pursuant to the LPPA comply with all rules applicable to existing Class A stations, including interference requirements.

The *NPRM* proposes to require small and other stations seeking to convert to Class A designation pursuant to the LPPA to submit an application to the Commission within one year of the effective date of the rules adopted in this proceeding. The *NPRM* invites comment on whether the Commission should continue to accept applications to convert to Class A status under the LPPA beyond the one-year application period set forth in the statute and/or allow deviation from the strict statutory eligibility criteria under the statute.

*E. Steps Taken To Minimize Significant Economic Impact on Small Entities and Significant Alternatives Considered*

The RFA requires an agency to describe any significant, specifically small business, alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): ''(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance, rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities.''

The *NPRM* seeks comment generally on its proposals implementing the LPPA's statutory mandates. In one area that may have a significant impact on small entities, the LPPA gives the Commission discretion to determine that ''the public interest, convenience, and necessity would be served'' by treating a station as a qualifying LPTV station, or that a station should be considered to qualify for such status ''for other reasons determined by the Commission.'' In light of this discretion, the *NPRM* invites comment on whether the Commission should continue to accept applications to convert to Class A status under the LPPA beyond the one-year application period set forth in the statute and/or allow deviation from the strict statutory eligibility criteria set forth in the statute, particularly when potential applicants are not able to file in a timely manner based on circumstances beyond their control. The *NPRM* also considers whether the Commission should require small and other applicants to submit specific documents to support certification or whether we should give stations more latitude with respect to the types of documentation they submit with their application. Providing this flexibility may reduce the economic burden for small entities. Another action we take in the *NPRM* which could reduce the economic impact for small entities is to seek comment on whether the Commission should deviate from our strict statutory eligibility criteria for small and other applicants where deviations of insignificant or compelling circumstance such as equity require a deviation. In determining how an applicant will demonstrate whether they operate within a DMA required by the LPPA, we seek comment on whether we should use the Nielsen Local TV

Station Information Report (Local TV Report) or consider requests to use other reputable alternative data sources to make this determination. In the *NPRM,* we also invite comment on the all the proposed approaches and on any alternatives, which will provide the Commission additional information on possible steps that can be taken to minimize any significant impact on small entities.

*F. Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rules*

None.

57. Accordingly, *it is ordered* that, pursuant to the authority found in §§ 1, 2, 4(i), 4(j), 303, 307, 309, 311, and 336(f) of the Communications Act of 1934, as amended, 47 U.S.C. 151, 152, 154(i), 154(j), 303, 307, 309, 311, 336(f), and the Low Power Protection Act, Pub. L. 117–344, 136 Stat. 6193 (2023), this *Notice of Proposed Rulemaking is adopted.*

58. *It is further ordered* that the Commission's Consumer and Government Affairs Bureau, Reference Information Center, *shall send* a copy of this *Notice of Proposed Rulemaking,* including the Initial Regulatory Flexibility Act Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

**List of Subjects in 47 CFR Part 73**

Television.

Federal Communications Commission.

**Marlene Dortch,**

*Secretary.*

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR part 73 to read as follows:

## PART 73—RADIO BROADCAST SERVICES

■ 1. The Authority citation for part 73 continues to read as follows:

**Authority:** 47 U.S.C. 154, 155, 301, 303, 307, 309, 310, 334, 336, 339.

■ 2. Add § 73.6030 to read as follows:

**§ 73.6030 Low Power Protection Act.**

(a) *Definitions.* For purposes of the Low Power Protection Act, a low power television station's Designated Market Area (DMA) shall be defined as the DMA where its transmission facilities (*i.e.,* the tower or building on which its antenna is mounted) are located. DMAs are determined by Nielsen Media Research and published in the Nielsen Local TV Station Information Report. A low power television station shall be defined in accordance with § 74.701(k).

(b) *Eligibility Requirements.* In order to be eligible for Class A status under the Low Power Television Protection Act, low power television licensees must:

(1) have been operating in a DMA with not more than 95,000 television households as of January 5, 2023;

(2) have been broadcasting a minimum of 18 hours per day between October 7, 2022 and January 5, 2023;

(3) have been broadcasting a minimum of at least three hours per week of locally produced programming between October 7, 2022 and January 5, 2023;

(4) have been operating in compliance with the Commission's requirements applicable to low power television stations between October 7, 2022 and January 5, 2023;

(5) be in compliance with the Commission's operating rules for full-power television stations from and after the date of its application for a Class A license; and

(6) demonstrate that the Class A station for which the license is sought will not cause any interference described in 47 U.S.C. 336(f)(7).

(c) *Application Requirements.* Applications for conversion to Class A status must be submitted using FCC Form 2100, Schedule F within one year beginning on the date on which the Commission issues notice that the rules implementing the Low Power Protection Act takes effect. The licensee will be required to submit, as part of its application, documentation sufficient to support its certification that the licensee meets the eligibility requirements for a Class A license under the Low Power Protection Act.

(d) *Licensing Requirements.* A Class A television broadcast license will only be issued under the Low Power Protection Act to a low power television licensee that files an application for a Class A Television license (FCC Form 2100, Schedule F), which is granted by the Commission.

(e) *Service Requirements.* Stations that convert to Class A status pursuant to the Low Power Protection Act are required to meet the service requirements specified in § 73.6001(b) through (d) of this chapter for the term of their Class A license. In addition, such stations must remain in compliance with the programming and operational standards set forth in the Low Power Protection Act for the term of their Class A license. In addition, such stations must continue to operate in DMAs with not more than 95,000 television households in order to maintain their Class A status.

(f) *Other regulations.* From and after the date of applying for Class A status under the Low Power Protection Act, stations must comply with the requirements applicable to Class A stations specified in §§ 73.6001(b) through (d) and 73.6026 of this chapter for the term of their Class A license.

Except as otherwise provided in this paragraph (§ 73.6030), the regulations in part 73, subpart J of the Commission's rules (§§ 73.6000 through 73.6029) shall apply to stations that apply to convert, and that convert, to Class A status pursuant to the Low Power Protection Act. Stations that convert to Class A status pursuant to the Low Power Protection Act must comply with the requirements applicable to Class A stations specified in § 73.6026 of this chapter for the term of their Class A license.

[FR Doc. 2023–07660 Filed 4–13–23; 8:45 am]

**BILLING CODE 6712–01–P**

## AGENCY FOR INTERNATIONAL DEVELOPMENT

**48 CFR Parts 727, 742, and 752**

**RIN 0412–AA90**

## USAID Acquisition Regulation: United States Agency for International Development (USAID) Acquisition Regulation (AIDAR): Planning, Collection, and Submission of Digital Information as Well as Submission of Activity Monitoring, Evaluation, and Learning Plan to USAID

**AGENCY:** U.S. Agency for International Development.

**ACTION:** Notice of availability of supplemental document; request for comments.

**SUMMARY:** This document advises the public that the U.S. Agency for International Development (USAID) is placing in the public docket a standards document related to USAID's proposed Rulemaking that, in part, proposed to add a new section to the USAID Acquisition Regulations (AIDAR). During the public comment period, USAID received comments requesting public access to the ''USAID Digital Information Technical Guidelines,'' which are referenced in the proposed regulatory language. This document makes those Guidelines available, renames the Guidelines to ''USAID Digital Collection and Submission Standards,'' and solicits public comment.

**DATES:** Comments on this document must be received by May 15, 2023.

**ADDRESSES:** Address all comments concerning this notice to Kelly Miskowski, USAID M/OAA/P, at 202–256–7378 or *policymailbox@usaid.gov.* Submit comments, identified by title of the action and Regulatory Information Number (RIN) through the Federal eRulemaking Portal at *http://www.regulations.gov* by following the instructions for submitting comments. Please include your name, company name (if any), and ''0412–AA90'' on any attachments. If your comment cannot be submitted using *https://www.regulations.gov,* please email the points of contact in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

**FOR FURTHER INFORMATION CONTACT:** Kelly Miskowski, USAID M/OAA/P, at 202–916–2752 or *policymailbox@usaid.gov* for clarification of content or information pertaining to status or publication schedules. All communications regarding this rulemaking must cite AIDAR RIN No. 0412–AA90.

**SUPPLEMENTARY INFORMATION:** In the **Federal Register** of December 15, 2021, (86 FR 71216), the U.S. Agency for International Development (USAID) announced a proposed rule to implement USAID requirements for managing digital information data as a strategic asset to inform the planning, design, implementation, monitoring, and evaluation of the Agency's foreign assistance programs (2021 Digital Information NPRM). Among other changes, the 2021 Digital Information NPRM proposed adding a new section to the USAID Acquisition Regulations (AIDAR) at 48 CFR part 752 (proposed AIDAR 752.227–7x, Planning, Collection, and Submission of Digital Information to USAID). Proposed paragraph (h) refers to ''USAID Digital Information Technical Guidelines'' (proposed AIDAR 752.227–7x(h)) which USAID proposed to publish at *data.usaid.gov/guidelines.* The comment period for the 2021 Digital Information NPRM closed on February 14, 2022. During the comment period, several commenters requested access to these guidelines. In a forthcoming Final Rule for RIN 0412–AA90, USAID will revise the proposed text of AIDAR 752.227–7x(h)to refer to ''USAID Digital Information Technical Standards'' and direct the public to the following website: ''*data.usaid.gov/standards*''. Therefore, USAID will use the term ''standards'' in this document. Through this document, USAID is making the full text of the ''USAID Digital Information Technical Standards'' available in the docket.

USAID is soliciting public comments on these standards, including the proposed text of AIDAR 752.227–7x(h) (86 FR at 71224) that refers to these standards. Comments received as a result of this document will be addressed as part of the forthcoming Final Rule package. The finalized standards will be published as prescribed in the Final Rule. USAID anticipates that future revisions to these standards will be published in the **Federal Register**. USAID expects contractors to comply with the version in effect on the date of the award. Historical versions of the standards will also be available on the website cited in the AIDAR.

**Mark A. Walther,**
*Chief Acquisition Officer.*

### B. Notice of Availability of USAID Digital Collection and Submission Standards

As outlined above, USAID is announcing the availability of the following Digital Collection and Submission Standards:

Version: 1.0
Dated: [DATE OF PUBLICATION IN THE Federal Register]

USAID's Digital Collection and Submission Standards are a compendium of standards for USAID staff and contractors to use in support of USAID programs and operations. The standards in Section A are required. Section B contains recommended standards that represent industry best practices.

### Section A: Required Digital Information Technical Standards

(a) File Format Standards

(1) Acceptable Non-Proprietary Formats
- (i) Text and Documents
- (ii) Portable Document Format (PDF/A is preferred, however .pdf is acceptable)
- (iii) Plain text (.txt)
- (iv) LaTeX documents (.tex)
- (v) Hypertext Markup Language (.html)
- (vi) Open Document Format (.odt)
- (vii) Extensible Markup Language (.xml)
- (viii) JavaScript Object Notation (.json)

(2) Tables, Spreadsheets, and Databases
- (i) Comma-Separated Values (.csv)
- (ii) Tab-separated tables (.txt—sometimes .tsv)
- (iii) Comma-separated tables (.csv or .txt)
- (iv) Other standard delimiter (*e.g.* colon, pipe)
- (v) Fixed-width
- (vi) OpenDocument Spreadsheet (.ods)

(3) Audio Files
- (i) WAVE (.wav)
- (ii) FLAC (.flac)
- (iii) MPEG–3
- (iv) MP3

(4) Image Files
- (i) JPEG (.jpg or .jp2)
- (ii) Portable Network Graphics (.png)
- (iii) TIFF (.tiff or .tif)
- (iv) Portable Document Format (.pdf)

(5) Video Files
- (i) Video File (.mov)
- (ii) MPEG–4 (mp4)
- (iii) JPEG2 2000 (mj2)

(6) Geospatial Files
- (i) QGIS Project (.qgs)
- (ii) ESRI Shapefile (.shp, .shx, .dbf)
- (iii) Annotated TIFF Raster Files (.tif)
- (iv) Keyhole Mark Language (.kml)
- (v) Geographic Data Format based on JSON (.geojson)
- (vi) Google Earth GIS Format (.kml, .kmz)
- (vii) Well Known Text for Spatial Objects (.wkt)
- (viii) Raster GIS File Format
- (ix) Unidata Scientific Data Format

(b) Subject Area Standards

(1) Narrative Text
- (i) Digital narrative text that is written in the English language, including narrative about USAID programs and operations, must comply with the *Plain Writing Act of 2010* and associated guidelines and resources found on the *federal plain language website.* Because USAID may publish a narrative in keeping with the U.S. Government legislative requirements (*e.g.* the *Foreign Aid Transparency and Accountability Act of 2016*) and other transparency commitments (*e.g. International Aid Transparency Initiative; Open Government Partnership*) or Freedom of Information Act requests, the narrative must be clear, thorough, and descriptive to facilitate public understanding.

(2) Geospatial
- (i) The location(s) where an activity is implemented must be collected at the second level administrative boundary (*e.g.* state, district, county, province) or more granular administrative boundary when appropriate. USAID follows the *Geopolitical Entities, Names, and Codes (GENC) Standard* and additional geospatial data standards as outlined in *ADS 579saa* ''Geographic Data Collection and Submission Standards.''

(3) Date
- (i) YYYY–MM–DD

### Section B: Recommended Digital Information Technical Standards

USAID recommends the following standards that have not been formally

adopted as a requirement by the Agency but encouraged and recommended for use to improve the management, quality, and usefulness of the data. USAID recommends the use of the following standards when appropriate and practicable:

(a) Code, Algorithm, and Analytical Files
(1) Javascript (.js)
(2) Java
(3) .NET
(4) Python (.py)
(5) Ruby (.rb)
(6) R (.r)
(7) SQL

(b) *GS1 Standards*—USAID-funded programs beyond Global Health are strongly recommended to adopt GS1 Standards for the supply chain to facilitate product identification, location identification, and product master data of Agency-funded commodities. Additional guidance for implementation of GS1 Standards can be found *here.*

(c) *Statistical Data and Metadata eXchange (SDMX)* for statistical data

(d) *CGIAR Ontologies* for crop and agronomy ontology

(e) *FHIR* for healthcare data exchange

(f) *ISO 8601* for Date, Time, and Time Zone

(g) *Open Geospatial Consortium (OGC) Standards* for geospatial data. The Open Geospatial Consortium (OGC) is an international consortium of more than 500 businesses, government agencies, research organizations, and universities driven to make geospatial (location) information and services FAIR—Findable, Accessible, Interoperable, and Reusable.

(h) *International Aid Transparency Initiative (IATI)*

(i) *FAIR Data Principles*—To the extent possible, USAID-funded data and metadata must align with data principles which are Findable, Accessible, Interoperable, and Reusable.

(j) Metadata Creation Tools:

(1) *USGS TKME*—A Windows platform tool for creating FGDC–CSDGM which can be configured for Biological Data Profile and other extensions. The software program is closely aligned with the Metadata Parser, and can be configured for French and Spanish.

(2) *mdEditor*—Create ISO and FGDC–CSDGM metadata with this web-based tool.

(3) *Data dictionary conversion service*—Convert a data dictionary table to/from metadata format (*instructions*).

(4) *USDA Metavist*—A desktop metadata editor for creating FGDC–CSDGM for geospatial metadata. Includes the Biological Data Profile (version 1.6). Produced and maintained by the USDA Forest Service. Download the *USGS Alaska Science Center (ASC) Metavist User Guide [PDF]* to learn more about the tool and ASC best practices for authors.

(5) *Microsoft XML Notepad*—A simple intuitive user interface for browsing and editing XML files. Does not automatically produce FGDC–CSDGM records but allows easy editing and validation of existing metadata records. See *Advanced Users* to learn how to configure this tool.

[FR Doc. 2023–06998 Filed 4–13–23; 8:45 am]

**BILLING CODE 6116–01–P**

## DEPARTMENT OF HOMELAND SECURITY

### 48 CFR Parts 3015, 3016, and 3052

**[Docket No. DHS–2009–005]**

**RIN 1601–AA43**

### Revision of Department of Homeland Security Acquisition Regulation; Limitations on Subcontracting in Emergency Acquisitions (HSAR Case 2009–005); Withdrawal

**AGENCY:** Office of the Chief Procurement Officer, Department of Homeland Security (DHS).

**ACTION:** Notice of proposed rulemaking; withdrawal.

**SUMMARY:** DHS is withdrawing a proposed rule titled ''Revision of Department of Homeland Security Acquisition Regulation; Limitations on Subcontracting in Emergency Acquisitions (HSAR Case 2009–005)'' and providing notice of its cancellation. The notice of proposed rulemaking proposed to amend the Homeland Security Acquisition Regulation (HSAR) to implement a law that limited the use of subcontractors on cost-reimbursement type contracts entered into by the Department to facilitate the response to or recovery from a natural disaster or act of terrorism or other man-made disaster. DHS is withdrawing this proposed rule because Congress has since repealed this provision. Thus, DHS will not take any further action on this proposal.

**DATES:** The proposed rule published on June 9, 2010 (75 FR 32723), is withdrawn as of April 14, 2023.

**ADDRESSES:** Mail: Department of Homeland Security, Office of the Chief Procurement Officer, Acquisition Policy and Legislation, ATTN: Catherine Benavides, 245 Murray Drive, Bldg. 410 (RDS), Washington, DC 20528.

**FOR FURTHER INFORMATION CONTACT:** Ms. Catherine Benavides, Procurement Analyst, DHS, Office of the Chief Procurement Officer, Acquisition Policy and Legislation at (202) 897–8301 or email *HSAR@hq.dhs.gov.* When using email, include HSAR Case 2009–005 in the ''Subject'' line.

**SUPPLEMENTARY INFORMATION:** On June 9, 2010, DHS proposed to amend the HSAR, 48 CFR parts 3015, 3016, and 3052, to propose regulations to implement Public Law 109–295, Post-Katrina Emergency Management Reform Act (PKERMA), title VI, section 692, Limitations on Tiering of Subcontractors. Subsequently, title VIII, section 866 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 resulted in Government-wide changes to the Federal Acquisition Regulation to prevent excessive subcontracting, making section 692 unnecessary. Subsequently Congress repealed section 692 in Public Law 117–253 (December 20, 2022). Thus, DHS is withdrawing this proposed rule and will not take any further action on this proposal.

**Paul Courtney,**

*Chief Procurement Officer, Department of Homeland Security.*

[FR Doc. 2023–07674 Filed 4–13–23; 8:45 am]

**BILLING CODE P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

### 50 CFR Part 300

**[Docket No. 230410–0095; RTID 0648–XC711]**

### Pacific Halibut Fisheries of the West Coast; Management Measures for the 2023 Area 2A Pacific Halibut Directed Commercial Fishery

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

**ACTION:** Proposed rule.

**SUMMARY:** NMFS proposes to implement harvest specifications and management measures for the 2023 non-tribal directed commercial Pacific halibut fishery that operates south of Point Chehalis, WA (46°53.30′ N lat.) in the International Pacific Halibut Commission's regulatory Area 2A off Washington, Oregon, and California. Specifically, NMFS is proposing the 2023 directed commercial fishing periods and fishing period catch limits

by vessel size class. The proposed action includes two 58-hour fishing periods for the directed commercial fishery. The first fishing period would begin at 0800 hours on June 27 and close at 1800 hours on June 29. The second fishing period would start at 0800 hours on July 11 and close at 1800 hours on July 13. Additionally, NMFS is proposing four catch limit apportionments across eight vessel size classes (A–H) for both fishing periods. These actions are intended to conserve Pacific halibut and provide fishing opportunity where available.

**DATES:** Comments must be received by May 15, 2023.

**ADDRESSES:** You may submit comments on this document, identified by NOAA–NMFS–2023–0006, by any of the following method:

- *Electronic Submissions:* Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to *www.regulations.gov* and enter NOAA–NMFS–2023–0006 in the Search box. Click on the ''Comment'' icon, complete the required fields, and enter or attach your comments.
- *Mail:* Submit written comments to Scott M. Rumsey, Acting Regional Administrator, c/o Katie Davis, West Coast Region, NMFS, 500 W Ocean Blvd., Long Beach, CA 90802.

*Instructions:* NMFS may not consider comments if they are sent by any other method, to any other address or individual, or received after the comment period ends. All comments received are a part of the public record and NMFS will post them for public viewing on *www.regulations.gov* without change. All personal identifying information (*e.g.,* name, address, *etc.*), confidential business information, or otherwise sensitive information submitted voluntarily by the sender is publicly accessible. NMFS will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous).

*Docket:* This rule is accessible via the internet at the Office of the Federal Register website at *https://www.federalregister.gov.* Background information and documents are available at the NMFS West Coast Region website at *https://www.fisheries.noaa.gov/west-coast/sustainable-fisheries/fisheries-management-west-coast* and at the Council's website at *http://www.pcouncil.org.* Other comments received may be accessed through *www.regulations.gov.*

**FOR FURTHER INFORMATION CONTACT:** Katie Davis, West Coast Region, NMFS, (323) 372–2126, *katie.davis@noaa.gov.*

**SUPPLEMENTARY INFORMATION:**

**Background**

The Northern Pacific Halibut Act of 1982 (Halibut Act), 16 U.S.C. 773–773k, gives the Secretary of Commerce (Secretary) general responsibility for implementing the provisions of the Convention between Canada and the United States for the Preservation of the Halibut Fishery of the North Pacific Ocean and Bering Sea (Halibut Convention), signed at Ottawa, Ontario, on March 2, 1953, as amended by a Protocol Amending the Convention (signed at Washington, DC, on March 29, 1979). The Halibut Act requires that the Secretary shall adopt regulations as may be necessary to carry out the purposes and objectives of the Halibut Convention and Halibut Act. 16 U.S.C. 773c. The Assistant Administrator for Fisheries, National Oceanic and Atmospheric Administration (NOAA), on behalf of the IPHC, publishes annual management measures governing the Pacific halibut fishery that have been recommended by the International Pacific Halibut Commission (IPHC) and accepted by the Secretary of State, with concurrence from the Secretary of Commerce. These management measures include coastwide and area-specific mortality limits (also known as allocations and subarea allocations), coastwide season dates, gear restrictions, Pacific halibut size limits for retention, and logbook requirements, among others. The IPHC apportions allocations for the Pacific halibut fishery among regulatory areas: Area 2A (Washington, Oregon, and California), Area 2B (British Columbia), Area 2C (Southeast Alaska), Area 3A (Central Gulf of Alaska), Area 3B (Western Gulf of Alaska), and Area 4 (subdivided into 5 areas, 4A through 4E, in the Bering Sea and Aleutian Islands of Western Alaska).

Additionally, as provided in the Halibut Act, the Regional Fishery Management Councils having authority for the geographic area concerned may develop, and the Secretary of Commerce may implement, regulations governing harvesting privileges among U.S. fishermen in U.S. waters that are in addition to, and not in conflict with, approved IPHC regulations (16 U.S.C. 773c(c)). The Pacific Fishery Management Council (Council) has exercised this authority by developing a catch sharing plan guiding the allocation of halibut across the various sectors and management of fisheries for the IPHC's regulatory Area 2A. At its annual meeting held January 22–27, 2023, the IPHC adopted an Area 2A fishery constant exploitation yield (FCEY) of 1.52 million pounds (689.46 mt) of Pacific halibut. NMFS published this catch limit and fishery allocations in the **Federal Register** on March 7, 2023 (88 FR 14066) after acceptance by the Secretary of State, with concurrence from the Secretary of Commerce, in accordance with 50 CFR 300.62. The FCEY was derived from the total constant exploitation yield (TCEY) of 1.65 million pounds for Area 2A, which includes commercial discards and bycatch estimates calculated using a formula developed by the IPHC. Based on this FCEY for Area 2A and the allocation framework in the Council's catch sharing plan, the IPHC also adopted a non-tribal directed commercial fishing allocation of 257,819 pounds (116.94 mt).

In previous years, the IPHC also issued commercial fishing licenses and promulgated annual management measures that established fishing periods and fishing period catch limits for the non-tribal directed commercial fishery that operates in Area 2A south of Point Chehalis, WA (46°53.30′ N lat.). Fishing period limits were assigned by vessel size class based on the number of permits issued, the allocation, and prior year participation. Between 2017 and 2020, NMFS, the IPHC, and the Council discussed transitioning specific management activities of the Area 2A fishery from IPHC to NMFS as NMFS and the Council were seen as being able to better address the overlap of Pacific halibut management with domestic fisheries (*e.g.,* groundfish and salmon).

Effective January 4, 2023, NMFS published a final rule that transitioned the Area 2A directed commercial fishery permitting and management activities from the IPHC to NMFS (87 FR 74322; December 5, 2022). The rule established the regulatory framework by which NMFS is proposing the following 2023 management measures for the directed commercial fishery.

**2023 Directed Commercial Fishing Periods**

Fishing periods are the time during the annual halibut season when fishing for Pacific halibut is allowed, and may span multiple days. At its November 2022 meeting, the Council discussed the 2023 directed commercial season structure and recommended that NMFS establish fishing periods consistent with their recent years' recommendations to the IPHC; specifically, that the directed commercial fishing season operate as a series of 3-day openings, beginning at 8:00 a.m. on the fourth Tuesday in June, and ending at 6:00 p.m. on Thursday of that week. Based on this recommendation, NMFS is proposing to open the 2023 directed commercial

fishery for 58 hours, beginning on June 27 at 8:00 a.m. and closing on June 29 at 6:00 p.m. The second fishery opening would occur 2 weeks later, beginning on July 11 at 8:00 a.m. and closing on July 13 at 6:00 p.m. Following these two fishing periods, if the fishery has not attained nor is projected to have attained the directed commercial allocation, NMFS may determine that subsequent fishing period(s) are necessary to attain the allocation. Any additional fishing period(s) and applicable fishing period limits will be announced in the **Federal Register** through inseason action.

**2023 Directed Commercial Vessel Limits**

A fishing period limit, or vessel limit, is the maximum amount of Pacific halibut that may be retained and landed by a vessel during one fishing period. Each vessel may retain no more than the current fishing period limit of Pacific halibut for its vessel class, which is determined by vessel length. NMFS is proposing directed commercial fishing period limits based on the allocation for the directed commercial fishery in Area 2A and the number of permits issued by vessel size class, which is similar to the criteria the IPHC used to set fishing periods and fishing period limits. Vessel limits are proposed by vessel size class based on the number and sizes of the vessels for which permits were issued, as well as historical participation, and are intended to ensure that the Area 2A directed commercial fishery does not exceed the directed commercial allocation, while also providing fair and equitable access across participants to an attainable amount of harvest. The 2023 Pacific halibut directed commercial fishery permit application deadline was February 14, 2023. NMFS received 154 applications across eight vessel size classes (A–H). If NMFS determines fishing period(s) in addition to those proposed in this rule is warranted, NMFS will set the fishing period limits equal across all vessel classes. If NMFS determines that the directed commercial fishery has attained its annual allocation or is projected to attain its allocation if additional fishing was to be allowed, the Regional Administrator will take action to close the fishery.

*2023 Non-Tribal Directed Commercial Fishery Management Measures*

The Area 2A non-tribal directed commercial fishery south of Point Chehalis, WA (46°53.30′ N lat.) would open on June 27 at 8:00 a.m. and close on June 29 at 6:00 p.m. and would open July 11 at 8:00 a.m. and close on July 13 at 6:00 p.m. The fishery may be adjusted inseason consistent with 50 CFR 300.63.

TABLE 1—VESSEL LIMITS BY SIZE CLASS FOR THE 2023 FIRST AND SECOND FISHING PERIODS OF THE AREA 2A PACIFIC HALIBUT NON-TRIBAL DIRECTED COMMERCIAL FISHERY

| Vessel class | Length range (feet) | Fishing period limit (pounds) |
|---|---|---|
| A | 1–25 | 2,716 |
| B | 26–30 | 2,716 |
| C | 31–35 | 2,716 |
| D | 36–40 | 4,092 |
| E | 41–45 | 4,092 |
| F | 46–50 | 5,454 |
| G | 51–55 | 5,454 |
| H | 65+ | 6,136 |

**Classification**

Regulations governing the U.S. fisheries for Pacific halibut are developed by the IPHC, the Council, the North Pacific Fishery Management Council, and the Secretary of Commerce. Section 5 of the Halibut Act (16 U.S.C. 773c(c)) allows the Regional Council, having authority for a particular geographical area, to develop regulations governing the allocation and catch of halibut in U.S. Convention waters as long as those regulations do not conflict with IPHC regulations.

This action is exempt from review under E.O. 12866.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities, for the following reasons.

For Regulatory Flexibility Act (RFA) purposes only, NMFS has established a small business size standard for businesses, including their affiliates, whose primary industry is commercial fishing (see 50 CFR 200.2). A business primarily engaged in commercial fishing (North American Industry Classification System (NAICS) code 114111) is classified as a small business if it is independently owned and operated, is not dominant in its field of operation (including its affiliates), and has combined annual receipts not in excess of $25 million for all its affiliated operations worldwide. The entities that would be affected by the proposed action are those vessels that harvest Pacific halibut as part of the non-tribal directed commercial fishery and are all considered small businesses under the above size standards.

This proposed rule, if adopted, would establish the 2023 Area 2A non-tribal directed commercial fishery management measures; specifically, the fishing periods and fishing period limits.

There are no large entities involved in the halibut fisheries off the West Coast. In 2022, the IPHC issued 202 licenses to the commercial fishing fleet for the Area 2A non-tribal directed commercial fishery. Of those 202 vessels that obtained licenses, 39 percent (78 vessels) participated in the fishery. NMFS expects that a similar proportion of vessels will participate in the fishery this year and may be affected by these regulations. Cost data for the harvesting operations of non-tribal commercial halibut vessels is limited or unavailable. However, for 2022, the non-tribal directed allocation was 252,730 pounds (114.6 mt), of which approximately 250,674 pounds (113.7 mt) of halibut were harvested with an estimated ex-vessel value of approximately $1.68 million. Therefore, NMFS considers all vessels affected by this action to be small entities.

Since this action will only impact commercial fishing vessels, which in the Pacific halibut fishery are small entities, none of these changes will have a disproportionately negative effect on small entities versus large entities. Because each affected vessel is a small business, this proposed rule is considered to equally affect all of these small entities in the same manner. Therefore, this rule, if adopted, would not create disproportionate costs between small and large vessels/businesses.

The major effect of halibut management on small entities will be from the Area 2A allocation decided by the IPHC; a decision independent from this proposed action. This action proposes fishing periods and fishing period limits for the 2023 non-tribal directed commercial fishery consistent with recommendations from the Council to provide commercial harvest opportunities under the allocations that result from the Area 2A catch limit determined by the IPHC. NMFS is proposing specifications that were established by the IPHC in previous years; any differences between the IPHC's management measures and those NMFS is proposing are considered minor, with minimal economic effects. Profitability is largely based on the Area 2A allocation decided by the IPHC, with subarea allocations determined based on the allocation formulae in the Council's catch sharing plan. Therefore, the proposed rule, if adopted, is unlikely to

affect the profitability of the commercial fishery.

The Area 2A non-tribal directed commercial fishery allocation for 2023 is 257,819 pounds (116.94 mt) for 2023, which is 2 percent higher than in 2022. This proposed rule, if adopted, is unlikely to affect overall participation in the directed commercial fishery since this action maintains an allocation similar to previous years. Since profitability is dependent on the amount of allocation available and market forces independent of this action, it is highly unlikely that this allocation would limit the fleet's potential profitability from catching halibut compared to last season or recent catch levels. Accordingly, vessel income from fishing is not expected to be altered as a result of this rule as it compares to recent catches in the fishery, including under the previous season's regulations.

Based on the disproportionality and profitability analysis above, the proposed action, if adopted, will not have adverse or disproportional economic impact on these small business entities. As a result, an Initial Regulatory Flexibility Analysis is not required, and none has been prepared.

This action does not contain a collection-of-information requirement for purposes of the Paperwork Reduction Act. There are no relevant Federal rules that may duplicate, overlap, or conflict with the proposed action.

**Authority:** 16 U.S.C. 773–773k.

Dated: April 10, 2023.

**Samuel D. Rauch, III,**

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

[FR Doc. 2023–07860 Filed 4–13–23; 8:45 am]

**BILLING CODE 3510–22–P**

# Notices

Federal Register
Vol. 88, No. 72
Friday, April 14, 2023

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

## DEPARTMENT OF AGRICULTURE

### Food Safety and Inspection Service

**[Docket No. FSIS–2022–0008]**

### Notice of Request for Revision of an Approved Information Collection (Public Health Information System)

**AGENCY:** Food Safety and Inspection Service, USDA.

**ACTION:** Notice and request for comments.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995 and Office of Management and Budget (OMB) regulations, the Food Safety and Inspection Service (FSIS) is announcing its intention to revise the approved information collection regarding its Public Health Information System (PHIS). The Agency has increased the burden estimate by 524 hours to include time for exporters to print meat and poultry export certificates. FSIS is expecting exporters with access to PHIS and a functional printer to print digitally signed export certificates. The approval for this information collection will expire on September 30, 2024.

**DATES:** Submit comments on or before June 13, 2023.

**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–2022–0008. 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)205–0495 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) 720–5627.

**SUPPLEMENTARY INFORMATION:**

*Title:* Public Health Information System.

*OMB Number:* 0583–0153.

*Type of Request:* Request to revise an approved information collection.

*Abstract:* FSIS has been delegated the authority to exercise the functions of the Secretary (7 CFR 2.18, 2.53), as specified in the Federal Meat Inspection Act (FMIA) (21 U.S.C. 601, *et seq.*) and the Poultry Products Inspection Act (PPIA) (21 U.S.C. 451, *et seq.*). These statutes mandate that FSIS protect the public by verifying that meat and poultry products are safe, wholesome, unadulterated, and properly labeled and packaged.

FSIS is requesting a revision of the approved information collection regarding its PHIS. The Agency has increased the burden estimate by 524 hours to include time for exporters to print meat and poultry export certificates. FSIS is expecting exporters with access to PHIS and a functional printer to print digitally signed export certificates. The approval for this information collection will expire on September 30, 2024.

FSIS has made the following estimates based upon a revised information collection assessment that includes 524 additional hours:

*Estimate of burden:* FSIS estimates that it will take each respondent an average of .180 hours per year for this collection of information.

*Estimated total number of respondents:* 6,294.

*Estimated average number of responses per respondent:* 102.

*Estimated annual number of responses:* 644,048.

*Estimated annual burden on respondents:* 116,074 hours.

sAll 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) 720–5627.

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 U.S. Department of Agriculture (USDA) civil rights regulations and policies, the USDA, its Agencies, offices, and 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.

Persons with disabilities who require alternative means of communication for program information (*e.g.,* Braille, large print, audiotape, American Sign Language, etc.) should contact the responsible Agency or USDA's TARGET Center at (202) 720–2600 (voice and TTY) or contact USDA through the Federal Relay Service at (800) 877–8339. Additionally, program information may be made available in languages other than English.

To file a program discrimination complaint, complete the USDA Program Discrimination Complaint Form, AD–3027, found online at *https://www.usda.gov/oascr/how-to-file-a-program-discrimination-complaint* and at any USDA office or write a letter addressed to USDA and provide in the letter all of the information requested in the form. To request a copy of the complaint form, call (866) 632–9992.

Submit your completed form or letter 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: (202) 690–7442; or (3) email: *program.intake@usda.gov.*

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**Paul Kiecker,**

*Administrator.*

[FR Doc. 2023–07854 Filed 4–13–23; 8:45 am]

**BILLING CODE 3410–DM–P**

## DEPARTMENT OF AGRICULTURE

### Food Safety and Inspection Service

**[Docket No. FSIS–2023–0008]**

### Notice of Request To Revise an Approved Information Collection: State Meat and Poultry Inspection Programs

**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 revision of the approved information collection regarding State Meat and Poultry Inspection Programs. FSIS is adding 164 burden hours to the collection due to the addition of new states. The approval for this information collection will expire on July 31, 2023.

**DATES:** Submit comments on or before June 13, 2023.

**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–2023–0008. 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) 937–4272 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) 937–4272.

**SUPPLEMENTARY INFORMATION:**

*Title:* State Meat and Poultry Inspection Programs.

*OMB Number:* 0583–0170.

*Expiration Date of Approval:* July 31, 2023.

*Type of Request:* Renewal of an approved information collection.

*Abstract:* The Federal Meat Inspection Act (FMIA) and the Poultry Products Inspection Act (PPIA) provide for FSIS to cooperate with State agencies in developing and administering their own meat or poultry inspection (MPI) programs (21 U.S.C. 661 and 454). The FMIA and the PPIA restrict each cooperative State MPI program to the inspection and regulation of products that are produced and sold within the State (21 U.S.C. 661(a)(1) and 454(a)(1)). Under section 661 of the FMIA and section 454 of the PPIA, cooperative State MPI programs are required to operate in a manner and with authorities ''at least equal to'' the provisions set out in the FMIA and PPIA (21 U.S.C. 661(a)(1) and 454(a)(1)).

FSIS is announcing its intention to request revision of the approved information collection regarding State MPI programs. FSIS collects information from State MPI programs to ensure that their programs operate in a manner that is at least equal to FSIS' Federal inspection program in the protection of public interest; comply with requirements of Federal civil rights laws and regulations; meet necessary laboratory quality assurance standards and testing frequencies; and have the capability to perform microbiology and food chemistry methods that are ''at least equal to'' methods performed in the FSIS laboratories. FSIS is adding 164 burden hours to the collection due to the addition of new states. The approval for this information collection will expire on July 31, 2023.

Twenty-nine states have MPI programs that operate under a cooperative agreement with FSIS and are subject to the comprehensive review

process. Comprehensive reviews of State MPI programs are conducted by an interdisciplinary team of FSIS Auditors from the Office of Investigation, Enforcement and Audit (OIEA), the Financial Management Division (FMD), the Civil Rights Staff (CRS), and the Laboratory Quality Assurance, Response, and Coordination Staff (LQARCS).

There are nine review components that make up the comprehensive review process. The components are as follows: Component 1—Statutory Authority and Food Safety Regulations; Component 2—Inspection; Component 3—Sampling Programs; Component 4—Staffing, Training, and Supervision; Component 5—Humane Handling; Component 6—Compliance; Component 7—Laboratory Quality Assurance Program and Methods; Component 8—Civil Rights; and Component 9—Financial Accountability.

For each of the first six components, State MPI programs submit annual self-assessment documentation to FSIS to demonstrate that the State MPI program is meeting the ''at least equal to'' Federal inspection requirements. Each component of the annual self-assessment includes a written narrative statement and documentation demonstrating that the program continuously meets the criteria to be ''at least equal to'' the Federal inspection program. State MPI programs also submit sufficient documentation to demonstrate that the program either follows current FSIS statutes, regulations, applicable directives and notices, and has implemented any changes necessary to maintain the ''at least equal to'' status or that the State MPI program has an effective, analogous program that would also be ''at least equal to'' the Federal inspection program. All State MPI programs need to demonstrate they operate in a manner that protects the health and welfare of consumers by ensuring that the meat and poultry products distributed by the establishments in the program are wholesome, not adulterated, and properly marked, labeled, and packaged.

The annual self-assessment submission also includes one or more narratives describing the internal controls used by the State MPI program that: (1) Provide assurances and can measure the effectiveness of the program under the ''at least equal to'' criteria; (2) demonstrate how non-conformances will be addressed by corrective actions; and (3) demonstrate how the State MPI program will be maintained throughout the next 12 months.

For Component 7 of the comprehensive State review process, states submit documentation of their laboratory quality assurance programs and methods. States document their laboratory quality assurance program activities on the FSIS Form 5720–14, *State Meat and Poultry Inspection Program Laboratory Quality Management System Checklist.* States submit copies of new or revised laboratory analytical methods accompanied by a FSIS Form 5720–15, *Laboratory Method Notification Form.*

For Component 8 of the comprehensive review process, states submit documentation of their Civil Rights compliance. States receive FSIS monies to operate their MPI programs, and as such, are subject to the nondiscrimination provisions of Title VI, Title IX, Section 504 of the Rehabilitation Act of 1973 and the Age Discrimination Act of 1975. To assess the 29 states' compliance with these provisions, FSIS requests information on the states' civil rights programs and controls on FSIS Form 1520.1, *Civil Rights Compliance of State Inspection Programs.* This form requests information regarding nine areas of civil rights compliance, which include: (1) Civil Rights Assurances; (2) State Infrastructure and Program Accountability; (3) Public Notification; (4) Racial and Ethnic Data Collection; (5) Civil Rights Complaints of Discrimination; (6) Civil Rights Training; (7) Disability Compliance; (8) Limited English Proficiency; and (9) Compliance with the Age Discrimination Act of 1975. The form allows states to: (1) Document management controls they have implemented and maintained with regard to these nine categories; and (2) document how their overall civil rights program constitutes a civil rights program ''at least equal to'' the FSIS Federal program.

FSIS requests documentation concerning all components of the self-assessment and completion of these forms annually. Submission of the completed forms is due by November 1 each year to the Coordinators from OIEA, FMD, CRS, and LQARCS. In each submission, states respond to all questions and report on programs and activities implemented and maintained during the prior fiscal year (October 1 through September 30).

In addition to the annual self-assessment submission, State MPI programs are subject to an on-site review at a minimum frequency of once every three years to verify the accuracy and implementation of the self-assessment submissions. In the year that a State MPI program is scheduled for an on-site review, FSIS closely examines records from the State MPI program to determine annually whether the program is ''at least equal to'' the Federal inspection program.

FSIS has made the following estimates for the revised information collection.

*Estimate of Burden:* FSIS estimates that it will take each respondent an average of 243.137 hours to complete the forms and narratives.

*Respondents:* State MPI Directors, Program Managers, and/or Human Resources Officials.

*Estimated No. of Respondents:* 29 respondents.

*Estimated No. of Annual Responses per Respondent:* 1.

*Estimated Total Annual Burden on Respondents:* 7,051 hours.

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) 937–4272.

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.ocio.usda.gov/document/ad-3027,* 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. 2023–07857 Filed 4–13–23; 8:45 am]

**BILLING CODE 3410–DM–P**

## DEPARTMENT OF AGRICULTURE

### Forest Service

### Ashley National Forest; Utah and Wyoming; Revision of the Land Management Plan for the Ashley National Forest

**AGENCY:** Forest Service, Agriculture (USDA).

**ACTION:** Notice of opportunity to object to the revised Land Management Plan and the Regional Forester's list of species of conservation concern for the Ashley National Forest.

**SUMMARY:** The Forest Service, U.S. Department of Agriculture, is revising the Ashley National Forest's Land Management Plan (Plan). The Forest Service has prepared a Final Environmental Impact Statement (FEIS) for its revised Plan and a draft Record of Decision (ROD). This notice is to inform the public that the Ashley National Forest is initiating a 60-day period where individuals or entities with specific concerns about the Ashley National Forest's revised Plan and the associated FEIS may file objections for Forest Service review prior to the approval of the revised Plan. This is also an opportunity to object to the Regional Forester's list of species of conservation concern for the Ashley National Forest.

**DATES:** The publication date of the legal notice in the Ashley National Forest's newspaper of record, the *Vernal Express* (Vernal, Utah), initiates the 60-day objection period and is the exclusive means for calculating the time to file an objection (36 CFR 219.52(c)(5)). An electronic scan of the legal notice with the publication date will be posted at *https://www.fs.usda.gov/main/ashley/landmanagement/planning.*

**ADDRESSES:** The Ashley National Forest's revised Plan, FEIS, draft ROD, and Regional Forester's list of species of conservation concern and other supporting information will be available for review at *https://www.fs.usda.gov/main/ashley/landmanagement/planning* or at the following office: Ashley National Forest, 355 North Vernal Ave., Vernal, UT 84078, phone: (435) 781–5118.

Objections must be submitted to the Objection Reviewing Officer by one of the following methods:

- *Electronically to the Objection Reviewing Officer*: Electronic comments are preferred and may be submitted through the project web page at *https://www.fs.usda.gov/project/?project=49606;* click ''Comment/Object on Project.'' Electronic submissions (including all attachments) must be submitted in one of the following formats: MS Word (*.docx), Rich Text Format (*.rtf), or Adobe PDF (*.pdf) and must be readable and searchable with optical character recognition software. An automated response will confirm your electronic objection has been received.
- *Via regular mail, carrier, or hand delivery to the following address:* USDA Forest Service Intermountain Region, ATTN: Objection Reviewing Officer, 324 25th Street, Ogden, UT 84401. Office hours are Monday through Friday, 8:00 a.m. to 4:30 p.m., excluding Federal holidays. Please be explicit as to whether the objection is for the ''Ashley National Forest Plan'' or the ''Ashley Species of Conservation Concern'' for the Ashley National Forest. Please coordinate any hand-delivered objections with the objections and litigation staff directly through email (*objections-intermtn-regional-office@usda.gov*) in order to ensure the objection is properly documented and a receipt provided.
- *By Fax*: To the Objection Reviewing Officer at 801–625–5365. Faxes must be addressed to ''Objection Reviewing Officer.'' The fax coversheet should include a subject line with ''Ashley National Forest Plan Revision Objection'' or ''Ashley Species of Conservation Concern'' and specify the number of pages being submitted.

**FOR FURTHER INFORMATION CONTACT:** Ashley National Forest Planner, Anastasia Allen, at (406) 270–9241 or *anastasia.allen@usda.gov.*

Individuals who use telecommunication devices for the deaf or hard of hearing (TDD) may call the Federal Relay Service (FRS) at 1–800–

877–8339, 24 hours a day, every day of the year, including holidays.

**SUPPLEMENTARY INFORMATION:** The decision to approve the revised Plan for the Ashley National Forest and the Regional Forester's list of species of conservation concern for the Ashley National Forest will be subject to the objection process identified in 36 CFR part 219 Subpart B (219.50 to 219.62). Per 36 CFR 219.53 only individuals and entities who have submitted substantive formal comments related to a plan revision during the opportunities for public comment that are attributable to the objector may file an objection unless the objection concerns an issue that arose after the opportunities for formal comment.

**How To File an Objection**

Objections must be submitted to the Reviewing Officer at the address shown in the **ADDRESSES** section of this notice. An objection must include the following (36 CFR 219.54(c)):

(1) The objector's name and address along with a telephone number or email address if available. In cases where no identifiable name is attached to an objection, the Forest Service will attempt to verify the identity of the objector to confirm objection eligibility;

(2) Signature or other verification of authorship upon request (a scanned signature for electronic mail may be filed with the objection);

(3) Identification of the lead objector when multiple names are listed on an objection. The Forest Service will communicate to all parties to an objection through the lead objector. Verification of the identity of the lead objector must also be provided if requested;

(4) The name of the plan revision being objected to and the name and title of the responsible official;

(5) A statement of the issues and/or parts of the plan revision to which the objection applies;

(6) A concise statement explaining the objection and suggesting how the proposed plan decision may be improved. If the objector believes that the plan revision is inconsistent with law, regulation, or policy, an explanation should be included;

(7) A statement that demonstrates the link between the objector's prior substantive formal comments and the content of the objection, unless the objection concerns an issue that arose after the opportunities for formal comment; and

(8) All documents referenced in the objection (a bibliography is not sufficient), except the following need not be provided:

a. All or any part of a Federal law or regulation,

b. Forest Service Directive System documents and land management plans or other published Forest Service documents,

c. Documents referenced by the Forest Service in the planning documentation related to the proposal subject to objection, and

d. Formal comments previously provided to the Forest Service by the objector during the proposed plan, plan amendment, or plan revision comment period.

It is the responsibility of the objector to ensure that the Objection Reviewing Officer receives the objection in a timely manner. The regulations generally prohibit extending the length of the objection filing period (36 CFR 219.56(d)). However, when the time period expires on a Saturday, Sunday, or a Federal holiday, the time is extended to the end of the next Federal working day (11:59 p.m. for objections filed by electronic means such as email or facsimile machine) (36 CFR 219.56).

*Responsible Official:* The responsible official who will approve the ROD for the Ashley National Forest revised Plan is Susan Eickhoff, Forest Supervisor for the Ashley National Forest, 350 North Vernal Ave., Vernal, UT 84078, (435) 781–5101. The responsible official for the identification of the species of conservation concern for the Ashley National Forest is Mary Farnsworth, Intermountain Region Regional Forester, 324 25th Street, Ogden, UT 84401.

The Regional Forester is the reviewing officer for the revised Plan since the Forest Supervisor is the deciding official (36 CFR 219.56(e)). Objection review of the list of species of conservation concern will be subject to a separate objection process from the Plan revision. The Chief of the Forest Service is the reviewing officer for the list of species of conservation concern as the Regional Forester is the responsible official (36 CFR 219.56(e)(2)). This authority may be delegated to an individual Deputy Chief or Associate Deputy Chief for National Forest System, consistent with delegations of authority provided in the Forest Service Manual at sections 1235.4 and 1235.5.

Dated: April 7, 2023.

**Jacqueline Emanuel,**

*Associate Deputy Chief, National Forest System.*

[FR Doc. 2023–07892 Filed 4–13–23; 8:45 am]

**BILLING CODE 3411–15–P**

## COMMISSION ON CIVIL RIGHTS

### Notice of Public Meeting of the Puerto Rico Advisory Committee to the U.S. Commission on Civil Rights

**AGENCY:** Commission on Civil Rights.

**ACTION:** Announcement of meeting.

**SUMMARY:** Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission), and the Federal Advisory Committee Act (FACA), that a meeting of the Puerto Rico Advisory Committee to the Commission will convene by virtual web conference on Thursday, April 27, 2023, at 1:30 p.m. Atlantic Time/Eastern Time. The purpose is to continue discussion on their in-person briefing for their project on the civil rights impacts of the Insular Cases in Puerto Rico.

**DATES:** April 27, 2023, Thursday, at 1:30 p.m. (AT and ET):

**ADDRESSES:** Meeting will be held via Zoom.

*Registration Link (Audio/Visual): https://tinyurl.com/2wpr23j5*

*Join by Phone (Audio Only):* 1–551–285–1373; Meeting ID: 161 947 8851#

**FOR FURTHER INFORMATION CONTACT:** Email Victoria Moreno, Designated Federal Officer at *vmoreno@usccr.gov,* or by phone at 434–515–0204.

**SUPPLEMENTARY INFORMATION:** This committee meeting is available to the public through the registration link above. Any interested member of the public may listen to the meeting. An open comment period will be provided to allow members of the public to make a statement as time allows. Per the Federal Advisory Committee Act, public minutes of the meeting will include a list of persons who are present at the meeting. If joining via phone, callers can expect to incur regular charges for calls they initiate over wireless lines, according to their wireless plan. The Commission will not refund any incurred charges. Callers will incur no charge for calls they initiate over land-line connections to the toll-free telephone number. Closed captioning will be available for individuals who are deaf, hard of hearing, or who have certain cognitive or learning impairments. To request additional accommodations, please email *ebohor@usccr.gov* at least 10 business days prior to the meeting.

Members of the public are entitled to submit written comments; the comments must be received in the regional office within 30 days following the meeting. Written comments may be

emailed to Victoria Moreno at *vmoreno@usccr.gov.* Persons who desire additional information may contact the Regional Programs Coordination Unit at 1–312–353–8311.

Records generated from this meeting may be inspected and reproduced at the Regional Programs Coordination Unit Office, as they become available, both before and after the meeting. Records of the meetings will be available via *www.facadatabase.gov* under the Commission on Civil Rights, Puerto Rico Advisory Committee link. Persons interested in the work of this Committee are directed to the Commission's website, *http://www.usccr.gov,* or may contact the Regional Programs Coordination Unit at *ebohor@usccr.gov.*

**Agenda**

1. Welcome & Roll Call
2. Continue Committee Discussion on Project Regarding the Civil Rights Impacts of the Insular Cases in Puerto Rico
3. Next Steps
4. Public Comment
5. Other Business
6. Adjourn

Dated: April 10, 2023.

**David Mussatt,**

*Supervisory Chief, Regional Programs Unit.*

[FR Doc. 2023–07884 Filed 4–13–23; 8:45 am]

**BILLING CODE P**

## DEPARTMENT OF COMMERCE

### Bureau of Industry and Security

### Technical Advisory Committees; Notice of Recruitment of Members

The Bureau of Industry and Security (BIS), Department of Commerce is announcing its recruitment of candidates to serve on one of its six Technical Advisory Committees (''TACs'' or ''Committees''). TAC members advise the Department of Commerce on the technical parameters for export controls applicable to dual-use items (commodities, software, and technology) and on the administration of those controls. The TACs are composed of representatives from industry, academia, and the U.S. Government and reflect diverse points of view on the concerns of the exporting community. Industry representatives are selected from firms producing a broad range of items currently controlled for national security, non-proliferation, foreign policy, and short supply reasons or that are proposed for such controls. Representation from the private sector is balanced to the extent possible among large and small firms.

Six TACs are responsible for advising the Department of Commerce on the technical parameters for export controls and the administration of those controls within specified areas: Information Systems TAC: Control List Categories 3 (electronics), 4 (computers), and 5 (telecommunications and information security); Materials and Equipment TAC: Control List Categories 1 (materials, chemicals, microorganisms, and toxins) and 2 (materials processing); Sensors and Instrumentation TAC: Control List Category 6 (sensors and lasers); Transportation and Related Equipment TAC: Control List Categories 7 (navigation and avionics), 8 (marine), and 9 (propulsion systems, space vehicles, and related equipment); and the Emerging Technology TAC (identification of emerging and foundational technologies that may be developed over a period of five to ten years with potential dual-use applications). The sixth TAC, the Regulations and Procedures TAC, focuses on the Export Administration Regulations (EAR) and procedures for implementing the EAR.

TAC members are appointed by the Secretary of Commerce and serve terms of not more than four consecutive years. TAC members must obtain secret-level clearances prior to their appointment. These clearances are necessary so that members may be permitted access to classified information that may be needed to formulate recommendations to the Department of Commerce. Applicants are strongly encouraged to review materials and information on each Committee website, including the Committee's charter, to gain an understanding of each Committee's responsibilities, matters on which the Committee will provide recommendations, and expectations for members. Members of any of the six TACs may not be registered as foreign agents under the Foreign Agents Registration Act. No TAC member may represent a company that is majority owned or controlled by a foreign government entity (or foreign government entities). TAC members will not be compensated for their services or reimbursed for their travel expenses.

If you are interested in becoming a TAC member, please provide the following information: 1. Name of applicant; 2. affirmation of U.S. citizenship; 3. organizational affiliation and title, as appropriate; 4. mailing address; 5. work telephone number; 6. email address; 7. summary of qualifications for membership; 8. An affirmative statement that the candidate will be able to meet the expected commitments of Committee work. Committee work includes: (a) attending in-person/teleconference Committee meetings roughly four times per year (lasting 1–2 days each); (b) undertaking additional work outside of full Committee meetings including subcommittee conference calls or meetings as needed, and (c) frequently drafting, preparing or commenting on proposed recommendations to be evaluated at Committee meetings. Finally, candidates must provide an affirmative statement that they meet all Committee eligibility requirements.

The Department of Commerce is committed to equal opportunity in the workplace and seeks diverse Advisory Committee membership.

To respond to this recruitment notice, please send a copy of your resume to Ms. Yvette Springer at *Yvette.Springer@bis.doc.gov.*

*Deadline:* This Notice of Recruitment will be open for 60 days from its date of publication in the **Federal Register**.

For further information contact, Ms. Yvette Springer via email.

**Yvette Springer,**

*Committee Liaison Officer.*

[FR Doc. 2023–07924 Filed 4–13–23; 8:45 am]

**BILLING CODE 3510–JT–P**

## DEPARTMENT OF COMMERCE

### Bureau of Industry and Security

### Information Systems Technical Advisory Committee; Notice of Partially Closed Meeting

The Information Systems Technical Advisory Committee (ISTAC) will meet on May 3 and 4, 2023, 9:00 a.m., Eastern Daylight Time, in the Herbert C. Hoover Building, Room 3884, 1401 Constitution Avenue NW, Washington, DC (enter through Main Entrance on 14th Street between Constitution and Pennsylvania Avenues). The Committee advises the Office of the Assistant Secretary for Export Administration on technical questions that affect the level of export controls applicable to information systems equipment and technology.

**Wednesday, May 3**

*Open Session*

1. Welcome and Introductions
2. Industry presentation: Energy Density Threshold for Next Generation Secondary Cells (3A001.e.1.b)
3. Industry presentation: Analysis of Chinese military access to AI hardware
4. Industry presentation: Analysis of Chinese technological import dependencies

5. Presentation: Laser Communications

**Thursday, May 4**

*Closed Session*

6. Discussion of matters determined to be exempt from the open meeting and public participation requirements found in sections 1009(a)(1) and 1009(a)(3) of the Federal Advisory Committee Act (FACA) (5 U.S.C. 1001–1014). The exemption is authorized by section 1009(d) of the FACA, which permits the closure of advisory committee meetings, or portions thereof, if the head of the agency to which the advisory committee reports determines such meetings may be closed to the public in accordance with subsection (c) of the Government in the Sunshine Act (5 U.S.C. 552b(c)). In this case, the applicable provisions of 5 U.S.C. 552b(c) are subsection 552b(c)(4), which permits closure to protect trade secrets and commercial or financial information that is privileged or confidential, and subsection 552b(c)(9)(B), which permits closure to protect information that would be likely to significantly frustrate implementation of a proposed agency action were it to be disclosed prematurely. The closed session of the meeting will involve committee discussions and guidance regarding U.S. Government strategies and policies.

The open session will be accessible via teleconference. To join the conference, submit inquiries to Ms. Yvette Springer at 202–482–2813, no later than April 26, 2023.

A limited number of seats will be available for the public session. Reservations are not accepted. To the extent time permits, members of the public may present oral statements to the Committee. The public may submit written statements at any time before or after the meeting. However, to facilitate distribution of public presentation materials to Committee members, the Committee suggests that presenters forward the public presentation materials prior to the meeting to Ms. Springer.

The Assistant Secretary for Administration, with the concurrence of the delegate of the General Counsel, formally determined on January 3, 2023, pursuant to 5 U.S.C. 1009(d) of the FACA, that the portion of the meeting dealing with pre-decisional changes to the Commerce Control List and the U.S. export control policies shall be exempt from the provisions relating to public meetings found in 5 U.S.C. 1009(a)(1) and 1009(a)(3). The remaining portions of the meeting will be open to the public.

For more information, contact Ms. Springer.

**Yvette Springer,**

*Committee Liaison Officer.*

[FR Doc. 2023–07922 Filed 4–13–23; 8:45 am]

**BILLING CODE 3510–JT–P**

## DEPARTMENT OF COMMERCE

### Bureau of Industry and Security

### Sensors and Instrumentation Technical Advisory Committee; Notice of Partially Closed Meeting—Revised

The Sensors and Instrumentation Technical Advisory Committee (SITAC) will meet on Tuesday, April 25, 2023, 1:00 p.m. Eastern Daylight Time. This meeting will be virtual. The Committee advises the Office of the Assistant Secretary for Export Administration on technical questions that affect the level of export controls applicable to sensors and instrumentation equipment and technology.

**Agenda**

*Open Session*

1. Welcome and Introductions.
2. Remarks from the Bureau of Industry and Security Management.
3. Industry Presentations.
4. New Business.

*Closed Session*

5. Discussion of matters determined to be exempt from the open meeting and public participation requirements found in sections 1009(a)(1) and 1009(a)(3) of the Federal Advisory Committee Act (FACA) (5 U.S.C. 1001–1014). The exemption is authorized by section 1009(d) of the FACA, which permits the closure of advisory committee meetings, or portions thereof, if the head of the agency to which the advisory committee reports determines such meetings may be closed to the public in accordance with subsection (c) of the Government in the Sunshine Act (5 U.S.C. 552b(c)). In this case, the applicable provisions of 5 U.S.C. 552b(c) are subsection 552b(c)(4), which permits closure to protect trade secrets and commercial or financial information that is privileged or confidential, and subsection 552b(c)(9)(B), which permits closure to protect information that would be likely to significantly frustrate implementation of a proposed agency action were it to be disclosed prematurely. The closed session of the meeting will involve committee discussions and guidance regarding U.S. Government strategies and policies.

The open session will be accessible via teleconference. To join the conference, submit inquiries to Ms. Yvette Springer at 202–482–2813, no later than April 18, 2023.

A limited number of seats will be available for the public session. Reservations are not accepted. To the extent time permits, members of the public may present oral statements to the Committee. The public may submit written statements at any time before or after the meeting. However, to facilitate distribution of public presentation materials to Committee members, the Committee suggests that presenters forward the public presentation materials prior to the meeting to Ms. Springer.

The Assistant Secretary for Administration, with the concurrence of the delegate of the General Counsel, formally determined on January 3, 2023, pursuant to 5 U.S.C. 1009(d) of the FACA, that the portion of the meeting dealing with pre-decisional changes to the Commerce Control List and the U.S. export control policies shall be exempt from the provisions relating to public meetings found in 5 U.S.C. 1009(a)(1) and 1009(a)(3). The remaining portions of the meeting will be open to the public.

For more information, contact Ms. Springer.

**Yvette Springer,**

*Committee Liaison Officer.*

[FR Doc. 2023–07925 Filed 4–13–23; 8:45 am]

**BILLING CODE 3510–JT–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**[RTID 0648–XC907]**

### Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Port San Luis Breakwater Repairs in Avila Beach, California

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

**ACTION:** Notice; request for comments on proposed renewal incidental harassment authorization (IHA).

**SUMMARY:** NMFS received a request from the U.S. Army Corps of Engineers (ACOE) for the renewal of their recently expired incidental harassment authorization (IHA) to take marine mammals incidental to Port San Luis breakwater repairs in Avila Beach, California. These activities consist of activities that are covered by the initial

authorization but were not completed prior to its expiration. Pursuant to the Marine Mammal Protection Act, prior to issuing the initial IHA, NMFS requested comments on both the proposed IHA and the potential for renewing the initial authorization if certain requirements were satisfied. The renewal requirements have been satisfied, and NMFS is now providing an additional 15-day comment period to allow for any additional comments on the proposed renewal not previously provided during the initial 30-day comment period.

**DATES:** Comments and information must be received no later than May 1, 2023.

**ADDRESSES:** Comments should be addressed to Jolie Harrison, Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service, and should be submitted via email to *ITP.harlacher@noaa.gov.*

*Instructions:* NMFS is not responsible for comments sent by any other method, to any other address or individual, or received after the end of the comment period. Comments, including all attachments, must not exceed a 25-megabyte file size. Attachments to comments will be accepted in Microsoft Word or Excel or Adobe PDF file formats only. All comments received are a part of the public record and will generally be posted online at *https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act* without change. All personal identifying information (*e.g.,* name, address) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information.

**FOR FURTHER INFORMATION CONTACT:** Jenna Harlacher, Office of Protected Resources, NMFS, (301) 427–8401. Electronic copies of the original application, renewal request, and supporting documents (including NMFS **Federal Register** notices of the original proposed and final authorizations, and the previous IHA), as well as a list of the references cited in this document, may be obtained online at: *https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act.* In case of problems accessing these documents, please call the contact listed above.

**SUPPLEMENTARY INFORMATION:**

## Background

The Marine Mammal Protection Act (MMPA) prohibits the ''take'' of marine mammals, with certain exceptions. Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (as delegated to NMFS) to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, an incidental harassment authorization is issued.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for taking for subsistence uses (where relevant). Further, NMFS must prescribe the permissible methods of taking and other ''means of effecting the least practicable adverse impact'' on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stocks for taking for certain subsistence uses (referred to here as ''mitigation measures''). Monitoring and reporting of such takings are also required. The meaning of key terms such as ''take,'' ''harassment,'' and ''negligible impact'' can be found in section 3 of the MMPA (16 U.S.C. 1362) and the agency's regulations at 50 CFR 216.103.

NMFS' regulations implementing the MMPA at 50 CFR 216.107(e) indicate that IHAs may be renewed for additional periods of time not to exceed 1 year for each reauthorization. In the notice of proposed IHA for the initial authorization, NMFS described the circumstances under which we would consider issuing a renewal for this activity, and requested public comment on a potential renewal under those circumstances. Specifically, on a case-by-case basis, NMFS may issue a one-time 1-year renewal IHA following notice to the public providing an additional 15 days for public comments when (1) up to another year of identical, or nearly identical, activities as described in the Detailed Description of Specified Activities section of the initial IHA issuance notice is planned or (2) the activities as described in the Description of the Specified Activities and Anticipated Impacts section of the initial IHA issuance notice would not be completed by the time the initial IHA expires and a renewal would allow for completion of the activities beyond that described in the **DATES** section of the notice of issuance of the initial IHA, provided all of the following conditions are met:

1. A request for renewal is received no later than 60 days prior to the needed renewal IHA effective date (recognizing that the renewal IHA expiration date cannot extend beyond 1 year from expiration of the initial IHA).

2. The request for renewal must include the following:

- An explanation that the activities to be conducted under the requested renewal IHA are identical to the activities analyzed under the initial IHA, are a subset of the activities, or include changes so minor (*e.g.,* reduction in pile size) that the changes do not affect the previous analyses, mitigation and monitoring requirements, or take estimates (with the exception of reducing the type or amount of take).
- A preliminary monitoring report showing the results of the required monitoring to date and an explanation showing that the monitoring results do not indicate impacts of a scale or nature not previously analyzed or authorized.

3. Upon review of the request for renewal, the status of the affected species or stocks, and any other pertinent information, NMFS determines that there are no more than minor changes in the activities, the mitigation and monitoring measures will remain the same and appropriate, and the findings in the initial IHA remain valid.

An additional public comment period of 15 days (for a total of 45 days), with direct notice by email, phone, or postal service to commenters on the initial IHA, is provided to allow for any additional comments on the proposed renewal. A description of the renewal process may be found on our website at: *www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-harassment-authorization-renewals.* Any comments received on the potential renewal, along with relevant comments on the initial IHA, have been considered in the development of this proposed IHA renewal, and a summary of agency responses to applicable comments is included in this notice. NMFS will consider any additional public comments prior to making any final decision on the issuance of the requested renewal, and agency responses will be summarized in the final notice of our decision.

## National Environmental Policy Act

To comply with the National Environmental Policy Act of 1969 (NEPA; 42 U.S.C. 4321 *et seq.*) and NOAA Administrative Order (NAO) 216–6A, NMFS must review our

proposed action (*i.e.,* the issuance of an IHA renewal) with respect to potential impacts on the human environment.

This action is consistent with categories of activities identified in Categorical Exclusion B4 (incidental take authorizations with no anticipated serious injury or mortality) of the Companion Manual for NOAA Administrative Order 216–6A, which do not individually or cumulatively have the potential for significant impacts on the quality of the human environment and for which we have not identified any extraordinary circumstances that would preclude this categorical exclusion. Accordingly, NMFS determined that the issuance of the initial IHA qualified to be categorically excluded from further NEPA review. NMFS has preliminarily determined that the application of this categorical exclusion remains appropriate for this renewal IHA.

**History of Request**

On April 27, 2021, NMFS issued an IHA to the ACOE to take marine mammals incidental to Port San Luis breakwater repairs in Avila Beach, California (86 FR 22151, April 27, 2021), effective from April 1, 2022 through March 31, 2023. On March 28, 2023, NMFS received an application for the renewal of that initial IHA. As described in the application for renewal IHA, the activities for which incidental take is requested consist of activities that are covered by the initial authorization but were not completed prior to its expiration. As required, the applicant also provided a preliminary monitoring report, which confirms that the applicant has implemented the required mitigation and monitoring, and which also shows that no impacts of a scale or nature not previously analyzed or authorized have occurred as a result of the activities conducted.

**Description of the Specified Activities and Anticipated Impacts**

Port San Luis breakwater is approximately 2,400 feet (730 m) long and 20 feet (6 m) wide. Repair identified in the initial IHA was designed to focus on the most heavily damaged 1,420 feet (430 m) at the seaward end of the breakwater. The footprint of the breakwater would not be changed, but the crest elevation would be raised 3 feet (1 m) from +13 feet Mean Lower Low Water (MLLW) to +16 feet MLLW for hydraulic stability, to accommodate larger armor stone, to meet design criteria, and to account for sea level rise. Repair work could potentially extend to the seabed to ensure a stable slope and structural stability is maintained.

The project was initially described as consisting of the repair of a deteriorating breakwater at Port San Luis, California. The project is required to protect Port San Luis Harbor and maintain safe navigability within the port. Repair work includes minor excavation of shoaled sediment (~15,000 cubic yards (11,470 cubic meters)) adjacent to the leeward side of the breakwater to create adequate depths for barges and support boats to access the breakwater for the repair. Approximately 29,000 tons (26,310 metric tons) of existing stone would need to be reset and 60,000 tons (54,430 metric tons) of new stone (stones range from 5 to 20 tons (4.5–18.1 metric tons) each) would be placed to restore the most heavily damaged portion of the breakwater. The project was expected to take no more than 174 work days over 7 months.

Due to a combination of contracting and weather delays only a subset of the activities in the initial IHA were completed. Specifically, under the initial IHA, the ACOE has completed: (1) excavation of shoaled sediment adjacent to the leeward side of the breakwater to create adequate depths for barges and other vessels to access the breakwater for the repair work, (2) repair of 450 feet (137.2 meters) of the breakwater. This renewal request is to cover the subset of the activities covered in the initial IHA that will not be completed during the effective IHA period due to project delays. The remaining breakwater repair work under the renewal IHA would involve completing the remaining 970 feet (295.7 meters) of repairs of the breakwater and is expected to take no more than 162 workdays.

The likely or possible impacts of the ACOE's proposed activity on marine mammals could involve both non-acoustic and acoustic stressors and is unchanged from the impacts described in the initial IHA. Potential non-acoustic stressors could result from the physical and visual presence of the equipment, vessels, and personnel. Acoustic stressors include effects of heavy equipment operation, rock setting, and sediment movement. The effects of underwater and in-air noise and visual disturbance from the ACOE's proposed activities have the potential to result in Level B harassment of marine mammals in the action area.

*Detailed Description of the Activity*

A detailed description of the construction activities for which take is proposed here may be found in the notices of the proposed and final IHAs for the initial authorization (86 FR 14579, March 17, 2021; 86 FR 22151, April 27, 2021). As previously mentioned, this request is for a subset of the activities authorized in the initial IHA that would not be completed prior to its expiration due to project delays. The location, timing, and nature of the activities, including the types of equipment planned for use, are identical to those described in the previous notice for the initial IHA. The proposed renewal IHA would be effective from May 1, 2023 through March 31, 2024.

*Description of Marine Mammals*

A description of the marine mammals in the area of the activities for which authorization of take is proposed here, including information on abundance, status, distribution, and hearing, may be found in the notice of the proposed IHA for the initial authorization (86 FR 14579, March 17, 2021). NMFS has reviewed the monitoring data from the initial IHA, recent draft Stock Assessment Reports, information on relevant Unusual Mortality Events, and other scientific literature, and determined that neither this nor any other new information affects which species or stocks have the potential to be affected or the pertinent information in the Description of the Marine Mammals in the Area of Specified Activities contained in the supporting documents for the initial IHA (86 FR 14579, March 17, 2021).

*Potential Effects on Marine Mammals and Their Habitat*

A description of the potential effects of the specified activity on marine mammals and their habitat for the activities for which the authorization of take is proposed here may be found in the notice of the proposed IHA for the initial authorization (86 FR 14579, March 17, 2021). NMFS has reviewed the monitoring data from the initial IHA, recent draft Stock Assessment Reports, information on relevant Unusual Mortality Events, and other scientific literature, and determined that neither this nor any other new information affects our initial analysis of impacts on marine mammals and their habitat.

*Estimated Take*

A detailed description of the methods and inputs used to estimate take for the specified activity are found in the notices of the proposed and final IHAs for the initial authorization (86 FR 14579, March 17, 2021; 86 FR 22151, April 27, 2021). Specifically, days of operation, area or space within which harassment is likely to occur, and marine mammal occurrence data applicable to this authorization remain

unchanged from the previously issued IHA. Similarly, the stocks taken, methods of take, daily take estimates and types of take remain unchanged from the previously issued IHA. The number of takes proposed for authorization in this renewal are a subset of the initial authorized takes that better represent the amount of activity left to complete. These takes, which reflect the lower number of remaining days of work (162), are indicated below in Table 1.

TABLE 1—PROPOSED AMOUNT OF TAKING, BY LEVEL B HARASSMENT, BY SPECIES AND STOCK AND PERCENT OF TAKE BY STOCK

| Species | Stock | Proposed take | Percent of stock |
|---|---|---|---|
| Harbor seal | California | 1,674 | 5.4 |
| Steller sea lions | Eastern DPS | 3,124 | 7.2 |
| California sea lion | U.S | 48,933 | 19 |

*Description of Proposed Mitigation, Monitoring and Reporting Measures*

The proposed mitigation, monitoring, and reporting measures included as requirements in this authorization are identical to those included in the FR notice announcing the issuance of the initial IHA, and the discussion of the least practicable adverse impact included in that document remains accurate (86 FR 22151, April 27, 2021). The following mitigation, monitoring, and reporting measures are proposed for this renewal:

- Monitoring must take place from 30 minutes prior to initiation of construction activity (*i.e.,* pre-start clearance monitoring) through 30 minutes post-completion of construction activity.
- The ACOE must avoid direct physical interaction with marine mammals during construction activity. If a marine mammal comes within 10 m of such activity, operations must cease and vessels must reduce speed to the minimum level required to maintain steerage and safe working conditions, as necessary to avoid direct physical interaction.
- Pre-start clearance monitoring must be conducted during periods of visibility sufficient for the lead Protected Species Observer (PSO) to determine the shutdown zones clear of marine mammals. Construction may commence when the determination is made.
- If construction is delayed or halted due to the presence of a marine mammal, the activity may not commence or resume until either the animal has voluntarily exited and been visually confirmed beyond the shutdown zone or 15 minutes have passed without re-detection of the animal.
- The Holder must use soft start techniques. Soft start requires contractors and equipment to slowly approach the work site creating a visual disturbance allowing animals in close proximity to construction activities a chance to leave the area prior to stone resetting or new stone placement. Contractors shall avoid walking or driving equipment through the seal haulout. A soft start must be implemented at the start of each day's construction activity and at any time following cessation of activity for a period of 30 minutes or longer.
- Vessels would approach the breakwater perpendicular to the area they need to be as much as is feasible to minimize interactions with pinnipeds on or near the breakwater.
- The Holder must ensure that construction supervisors and crews, the monitoring team, and relevant ACOE staff are trained prior to the start of construction activity subject to this IHA, so that responsibilities, communication procedures, monitoring protocols, and operational procedures are clearly understood. New personnel joining during the project must be trained prior to commencing work.
- Construction activity must be halted upon observation of either a species for which incidental take is not authorized or a species for which incidental take has been authorized but the authorized number of takes has been met, entering or within a 200 m Level B harassment zone.
- Construction work will start at the landward end of the breakwater as much as feasible.
- The ACOE must employ one protected species observers (PSOs) to monitor the shutdown and Level B harassment zones.
- Monitoring will be conducted 30 minutes before, during, and 30 minutes after construction activities. In addition, observers shall record all incidents of marine mammal occurrence, regardless of distance from activity, and shall document any behavioral reactions in concert with distance from construction activity.
- The ACOE must submit a draft report detailing all monitoring within 90 calendar days of the completion of marine mammal monitoring or 60 days prior to the issuance of any subsequent IHA for this project, whichever comes first.
- The ACOE must prepare and submit final report within 30 days following resolution of comments on the draft report from NMFS.
- The ACOE must submit all PSO datasheets and/or raw sighting data (in a separate file from the Final Report referenced immediately above).
- The ACOE must report injured or dead marine mammals.

**Comments and Responses**

As noted previously, NMFS published a notice of a proposed IHA (86 FR 14579, March 17, 2021) and solicited public comments on both our proposal to issue the initial IHA for Port San Luis breakwater repairs and on the potential for a renewal IHA, should certain requirements be met. During the 30-day public comment period, NMFS received no comments on either the proposal to issue the initial IHA for the ACOE's construction activities or on the potential for a renewal IHA.

**Preliminary Determinations**

The proposed renewal request consists of a subset of activities analyzed through the initial authorization described above. In analyzing the effects of the activities for the initial IHA, NMFS determined that the ACOE's activities would have a negligible impact on the affected species or stocks and that authorized take numbers of each species or stock were small relative to the relevant stocks (*e.g.,* less than one-third the abundance of all stocks). The mitigation measures and monitoring and reporting requirements as described above are identical to the initial IHA.

NMFS has preliminarily concluded that there is no new information suggesting that our analysis or findings should change from those reached for

the initial IHA. Based on the information and analysis contained here and in the referenced documents, NMFS has determined the following: (1) the required mitigation measures will effect the least practicable impact on marine mammal species or stocks and their habitat; (2) the authorized takes will have a negligible impact on the affected marine mammal species or stocks; (3) the authorized takes represent small numbers of marine mammals relative to the affected stock abundances; (4) ACOE's activities will not have an unmitigable adverse impact on taking for subsistence purposes as no relevant subsistence uses of marine mammals are implicated by this action; and (5) appropriate monitoring and reporting requirements are included.

**Endangered Species Act**

No incidental take of ESA-listed species is authorized or expected to result from this activity. Therefore, NMFS has determined that formal consultation under section 7 of the ESA is not required for this action.

**Proposed Renewal IHA and Request for Public Comment**

As a result of these preliminary determinations, NMFS proposes to issue a renewal IHA to the ACOE for conducting Port San Luis breakwater repairs in Avila Beach, Ca, from May 1, 2023 through November 31, 2023, provided the previously described mitigation, monitoring, and reporting requirements are incorporated. A draft of the proposed and final initial IHA can be found at *https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act.* We request comment on our analyses, the proposed renewal IHA, and any other aspect of this notice. Please include with your comments any supporting data or literature citations to help inform our final decision on the request for MMPA authorization.

Dated: April 10, 2023.

**Kimberly Damon-Randall,**

*Director, Office of Protected Resources, National Marine Fisheries Service.*

[FR Doc. 2023–07862 Filed 4–13–23; 8:45 am]

**BILLING CODE 3510–22–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**[RTID 0648–XC912]**

### Caribbean Fishery Management Council; Public Meetings

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

**ACTION:** Notice of joint hybrid public meeting.

**SUMMARY:** The Caribbean Fishery Management Council's (Council) Scientific and Statistic Committee (SSC) and the Ecosystem-Based Fishery Management Technical Advisory Panel (EBFM TAP) will hold a two-day joint hybrid meeting.

**DATES:** The two-day joint hybrid meeting will be held on Monday, May 1, 2023, from 1 p.m. to 5 p.m., Atlantic Standard Time (AST) and Tuesday, May 2, 2023, from 9 a.m. to 5 p.m. (AST).

**ADDRESSES:** The joint hybrid meeting will be held at Courtyard Isla Verde Beach Resort, 7012 Boca de Cangrejos Avenue, Carolina, Puerto Rico.

You may join the EBFM TAB joint hybrid meeting via Zoom from a computer, tablet or smartphone by entering the following address: *https://us02web.zoom.us/j/81971396940?pwd=ZjA0cDNpeFNQOFJ4ZlV2eDNuQmpydz09*

*Meeting ID:* 819 7139 6940.
*Passcode:* 295041.
*One tap mobile*:
+17879451488,,81971396940#,,,,*295041# Puerto Rico
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*Dial by your location*:
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+1 309 205 3325 U.S.
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*Meeting ID:* 819 7139 6940.
*Passcode:* 295041.
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In case of problems with ZOOM please join the meeting via GoToMeeting:

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**FOR FURTHER INFORMATION CONTACT:** Liajay Rivera-Garcia, Caribbean Fishery Management Council, 270 Muñoz Rivera Avenue, Suite 401, San Juan, Puerto Rico 00918–1903, telephone: (787) 766–5926.

**SUPPLEMENTARY INFORMATION:** The following items included in the tentative agenda will be discussed:

**May 1, 2023**

*1 p.m.–5 p.m.*

—Roll Call
—Adoption of Agenda
—Approval of Verbatim Transcriptions (SSC and TAP)
—EBFM TAP Chair Introduction—Sennai Habtes
—SSC Chair Introduction—Vance Vicente
—New Fishery Ecosystem Plan (FEP) Draft Outline—Review, Discussion, Edits and Approval—Orian Tzadik
—Introduction and Explanation of Technical Writing Consultants for FEP Development—Sennai Habtes
—Overview of FEP Development Working Groups—Review Priorities & Objectives, Update and Identify New Membership, Discuss Process for Developing Framework and Content of FEP for Technical Writers—Sennai Habtes
—Other Business

**May 2, 2023**

*9 a.m.–9:30 a.m.*

—Roll Call
—Overview of Progress to Date—Sennai Habtes

*9:30 a.m.–10:30 a.m.*

—Using Ecosystem Information in the Stock Assessment and Advice Process—Sarah Gaichas

*10:30 a.m.–10:40 a.m.*

—Break

*10:40 a.m.–11:10 a.m.*

—Progress Towards Informing an Ecosystem-Based Approach for Fisheries Management in the Caribbean—Juan J. Cruz-Motta

*11:10 a.m.–12 p.m.*

—Ecosystem Status Report: Ecosystem Indicators—Adyan Rios, Southeast Fishery Science Center (SEFSC)

—Risk Assessment Update—Tauna Rankin, NOAA Fisheries Office of Habitat Conservation

*12 p.m.–1 p.m.*

—Lunch Break

*1 p.m.–2 p.m.*

—Island-Based Fishery Management Plans Update—María López-Mercer, Sarah Stephenson, Southeast Regional Office (SERO)

—SEAMAP Caribbean Gold Copy Update—Juan J. Cruz-Motta

—General Public Use and Accessibility of SEAMAP Caribbean Gold Copy—Martha Prada/Juan J. Cruz-Motta

*2 p.m.–3 p.m.*

—Caribbean Fishery Management Council Geographic Information System (GIS) Platform Update—Martha Prada

*3 p.m.–3:15 p.m.*

—Break

*3:15 p.m.–5 p.m.*

—Community Social Vulnerability Indicators Efforts in the Caribbean—Tarsila Seara

—SEFSC Data Triage Work—Kevin McCarthy

—Other Business

The order of business may be adjusted as necessary to accommodate the completion of agenda items. The meeting will begin on May 1, 2023, at 1 p.m. AST, and will end on May 2, 2023, at 5 p.m. AST. Other than the start time, interested parties should be aware that discussions may start earlier or later than indicated, at the discretion of the Chair.

**Special Accommodations**

For any additional information, please contact Liajay Rivera-Garcia, Caribbean Fishery Management Council, 270 Muñoz Rivera Avenue, Suite 401, San Juan, Puerto Rico, 00918–1903, telephone: (787) 766–5926.

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

Dated: April 11, 2023.

**Rey Israel Marquez,**

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

[FR Doc. 2023–07897 Filed 4–13–23; 8:45 am]

BILLING CODE 3510–22–P

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**[RTID 0648–XC901]**

### Permanent Advisory Committee To Advise the U.S. Commissioners to the Western and Central Pacific Fisheries Commission; Meeting Announcement

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

**ACTION:** Notice of public meeting.

**SUMMARY:** NMFS announces a public meeting of the Permanent Advisory Committee (PAC) to advise the U.S. Commissioners to the Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (WCPFC) on May 22, 2023. Meeting topics are provided under the **SUPPLEMENTARY INFORMATION** section of this notice.

**DATES:** The meeting of the PAC will be held via web conference on May 22, 2023, from 10 a.m. to 12:30 p.m. Hawaii Standard Time (HST) (or until business is concluded). Members of the public may submit written comments on meeting topics or materials; comments must be received by May 15, 2023.

**ADDRESSES:** The public meeting will be conducted via web conference. For details on how to call in to the web conference or to submit comments, please contact Emily Reynolds, NMFS Pacific Islands Regional Office; telephone: 808–725–5039; email: *emily.reynolds@noaa.gov.* Documents to be considered by the PAC will be sent out via email in advance of the conference call. Please submit contact information to Emily Reynolds at least 3 days in advance of the call to receive documents via email. The audio portion of this meeting may be recorded for the purposes of generating notes of the meeting. As public comments will be made publicly available, participants and public commenters are urged not to provide personally identifiable information (PII) at this meeting. Participation in the meeting by web conference, or by telephone, constitutes consent to the audio recording.

**FOR FURTHER INFORMATION CONTACT:** Emily Reynolds, NMFS Pacific Islands Regional Office; 1845 Wasp Blvd., Bldg. 176, Honolulu, HI 96818; telephone: 808–725–5039; facsimile: 808–725–5215; email: *emily.reynolds@noaa.gov.*

**SUPPLEMENTARY INFORMATION:** In accordance with the Western and Central Pacific Fisheries Convention Implementation Act (16 U.S.C. 6901 *et seq.*), the PAC has been formed to advise the U.S. Commissioners to the WCPFC. The PAC is composed of: (i) not less than 15 nor more than 20 individuals appointed by the Secretary of Commerce in consultation with the U.S. Commissioners to the WCPFC; (ii) the chair of the Western Pacific Fishery Management Council's Advisory Committee (or the chair's designee); and (iii) officials from the fisheries management authorities of American Samoa, Guam, and the Northern Mariana Islands (or their designees). The PAC supports the work of the U.S. National Section to the WCPFC in an advisory capacity. The U.S. National Section is made up of the U.S. Commissioners and the Department of State. NMFS Pacific Islands Regional Office provides administrative and technical support to the PAC in cooperation with the Department of State. More information on the WCPFC, established under the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, can be found on the WCPFC website: *http://www.wcpfc.int.*

**Meeting Topics**

The purpose of the May 22, 2023 meeting is to discuss U.S. priorities leading up to the 2023 Northern Committee meeting (NC19; July 6–7, 2023) and regular session of the WCPFC (WCPFC20; December 4–8, 2023) including potential management measures for tunas and other issues of interest.

**Special Accommodations**

The web conference is accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Emily Reynolds at 808–725–5039 by May 8, 2023.

*Authority:* 16 U.S.C. 6902 *et seq.*

Dated: April 10, 2023.

**Jennifer M. Wallace,**

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

[FR Doc. 2023–07879 Filed 4–13–23; 8:45 am]

BILLING CODE 3510–22–P

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**[RTID 0648–XC914]**

### Gulf of Mexico Fishery Management Council; Public Meeting

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

**ACTION:** Notice of a public meeting.

**SUMMARY:** The Gulf of Mexico Fishery Management Council (Council) will hold a three-day in-person meeting of its Standing, Reef Fish, Socioeconomic, and Ecosystem Scientific and Statistical Committees (SSC).

**DATES:** The meeting will be held Tuesday, May 2 through Thursday, May 4, 2023, from 8:30 a.m. to 5 p.m., EDT on Tuesday and Wednesday and 8:30 a.m. to 1 p.m., EDT on Thursday.

**ADDRESSES:** The meeting will take place at the Gulf Council office. Registration information will be available on the Council's website by visiting *www.gulfcouncil.org* and clicking on the ''meeting tab''.

*Council address:* Gulf of Mexico Fishery Management Council, 4107 W. Spruce Street, Suite 200, Tampa, FL 33607; telephone: (813) 348–1630.

**FOR FURTHER INFORMATION CONTACT:** Mr. Ryan Rindone, Lead Fishery Biologist, Gulf of Mexico Fishery Management Council; *ryan.rindone@gulfcouncil.org,* telephone: (813) 348–1630.

**SUPPLEMENTARY INFORMATION:**

**Tuesday, May 2, 2023; 8:30 a.m.–5 p.m., EDT**

The meeting will begin with Introductions and Adoption of Agenda, Approval of Verbatim Minutes and Meeting Summary from the March 7–9, 2023, meeting, and a review of the Scope of Work. The Committees will select an SSC Representative for the June 5–8, 2023, Gulf Council meeting in Mobile, AL.

Following, the Committees will receive a report from the Marine Recreational Information Program (MRIP) Transition Team on *Red Snapper* and Other Species in Gulf State Supplements Surveys; evaluate the Interim Analysis Process; and, review *Queen Snapper, Silk Snapper* and *Blackfin Snapper* landings and consider revised catch limits. Presentations and other background materials will be provided to support SSC discussion.

The Committees will then review *Black Grouper* and *Yellowfin Grouper* landings and consider revised catch limits, and review a Gulf of Mexico Ecosystem Model (GoMEM) to Support Fisheries Management; presentations and background documentation and references will be provided to support SSC discussion. Public comment will be heard at the end of the day.

**Wednesday, May 3, 2023; 8:30 a.m.–5 p.m., EDT**

The Committees will hold a Management Strategy Evaluation (MSE) Workshop all day; reviewing a Primer, Techniques and Considerations; Flavors of MSE; South Atlantic Fishery Management Council (SAFMC) MSE approach; Southeast Fishery Science Center's MSE Approach and Interim Analyses; an international MSE approach with the International Commission for the Conservations of Atlantic Tunas for *Bluefin Tuna;* and, the Magnuson-Stevens Act, MSE, and the Possible Role of the SSC. The Committees will then receive public comment at the end of the day, if any.

**Thursday, May 4, 2023; 8:30 a.m.–1 p.m., EDT**

The Committees will discuss the previous day's Management Strategy Evaluation Workshop, review the SHELF Fish Egg Monitoring Program, and then the Scope of Work for the upcoming Gray Triggerfish Stock Assessment; background materials will be provided for these items to support SSC Discussion.

The Committees will receive public comment before addressing any items under Other Business.

—Meeting Adjourns

The meeting will also be broadcast via webinar. You may register for the webinar by visiting *www.gulfcouncil.org* and clicking on the SSC meeting on the calendar.

The Agenda is subject to change, and the latest version along with other meeting materials will be posted on *www.gulfcouncil.org* as they become available.

Although other non-emergency issues not on the agenda may come before the Scientific and Statistical Committees for discussion, in accordance with the Magnuson-Stevens Fishery Conservation and Management Act, those issues may not be the subject of formal action during this meeting. Actions of the Scientific and Statistical Committee will be restricted to those issues specifically identified in the agenda and any issues arising after publication of this notice that require emergency action under Section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take-action to address the emergency.

**Special Accommodations**

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aid should be directed to Kathy Pereira, (813) 348–1630, at least 5 days prior to the meeting date.

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

Dated: April 11, 2023.

**Rey Israel Marquez,**

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

[FR Doc. 2023–07898 Filed 4–13–23; 8:45 am]

**BILLING CODE 3510–22–P**

## DEPARTMENT OF COMMERCE

### Patent and Trademark Office

### Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Secrecy and License To Export

The United States Patent and Trademark Office (USPTO) will submit the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995, on or after the date of publication of this notice. The USPTO invites comment on this information collection renewal, which helps the USPTO assess the impact of its information collection requirements and minimize the public's reporting burden. Public comments were previously requested via the **Federal Register** on December 27, 2022 during a 60-day comment period. This notice allows for an additional 30 days for public comments.

*Agency:* United States Patent and Trademark Office, Department of Commerce.

*Title:* Secrecy and License to Export.

*OMB Control Number:* 0651–0034.

*Needs and Uses:* In the interest of national security, patent laws and regulations place certain limitations on the disclosure of information contained in patents and patent applications and on the filing of applications for patents in foreign countries.

**A. Secrecy Orders**

Whenever the publication or disclosure of an invention by the publication of an application or by the granting of a patent is, in the opinion of

the head of an interested Government agency, determined to be detrimental to national security, the Commissioner for Patents at the United States Patent and Trademark Office (USPTO) must issue a secrecy order and withhold the publication of a patent application and the grant of a patent for such period as the national interest requires. A patent will not be issued on the application, nor will the application be published, as long as the secrecy order is in force. If a secrecy order is applied to an international application, the application will not be forwarded to the International Bureau as long as the secrecy order is in effect.

The Commissioner for Patents can issue three types of secrecy orders, each of a different scope. The first type, Secrecy Order and Permit for Foreign Filing in Certain Countries, is intended to permit the widest utilization of the technical data in the patent application while still controlling any publication or disclosure that would result in an unlawful exportation. The second type, the Secrecy Order and Permit for Disclosing Classified Information, is to treat classified technical data presented in a patent application in the same manner as any other classified material. The third type of secrecy order is used where the other types of orders do not apply, including orders issued by direction of agencies other than the Department of Defense.

Under the provision of 35 U.S.C. 181, a secrecy order remains in effect for a period of one year from its date of issuance. A secrecy order may be renewed for additional periods of not more than one year upon notice by a government agency that the national interest continues to so require. The applicant is notified of such renewal.

When the USPTO places a secrecy order on a patent application, the regulations authorize the applicant to petition the USPTO for permits to allow disclosure, modification, or rescission of the secrecy order, or to obtain a general or group permit. In each of these circumstances, the petition is forwarded to the appropriate defense agency for decision. Also, the Commissioner for Patents at the USPTO may rescind any order upon notification by the heads of the departments and the chief officers of the agencies who caused the order to be issued that the disclosure of the invention is no longer deemed detrimental to the national security.

Unless expressly ordered otherwise, action on the application and prosecution by the applicant will proceed during the time the application is under secrecy order to the point indicated in 37 CFR 5.3. See the Manual of Patent Examining Procedure (MPEP) Section 130 (9th ed., rev. 10.2019, June 2020). For example, prosecution of a national application under secrecy order may proceed only to the point where it is found to be in condition for allowance. See 37 CFR 5.3(c). Prosecution of international applications under secrecy order, on the other hand, will proceed only to the point before record and search copies would be transmitted to the international authorities or the applicant. See 37 CFR 5.3(d). National applications under secrecy order that come to a final rejection must be appealed or otherwise prosecuted to avoid abandonment. See 37 CFR 5.3(a). Appeals in such cases must be completed by the applicant. Unless specifically ordered by the Commissioner for Patents, these appeals will not be set for hearing until the secrecy order is removed. See id.

**B. Foreign Filing License**

In addition, this information collection covers information gathered with respect to foreign filing licenses. The filing of a patent application is considered a request for a foreign filing license. However, in some instances an applicant may need a license for filing patent applications in foreign countries prior to a filing in the USPTO or sooner than the anticipated licensing of a pending patent application.

For such circumstances, this information collection covers petitions for a foreign filing license either with or without a corresponding United States application. In addition, this information collection covers petitions to change the scope of a license and petitions for a retroactive license for instances when a patent application is filed through error in a foreign country without the appropriate filing license.

This information collection includes the information needed by the USPTO to review the various types of petitions regarding secrecy orders and foreign filing licenses. This collection of information is required by 35 U.S.C. 181–183 and 184–186 and administered by the USPTO through 37 CFR 5.1–5.5, 5.11–5.15, and 5.18–5.25.

The 60-day notice was published on December 27, 2022. Since that time, two adjustments have been made in the information collection. In response to the Unleashing American Innovators Act of 2022, USPTO reduced eight fees included within this information collection. This reduction was submitted to OMB and approved on 3/28/2023. These fee adjustments are included in the non-hourly cost burdens reflected in the 30-day notice, resulting in a reduction in the *Estimated Total Annual Respondent Non-Hourly Cost Burden* than what appeared in the 60-day notice. Additionally, the two respondent types published in the 60-day notice have been combined into only the private sector; which provides a more accurate estimate of the filers associated with this information collection.

*Form Number(s):* None.

*Type of Review:* Extension and revision of a currently approved information collection.

*Affected Public:* Private sector.

*Respondent's Obligation:* Required to obtain or retain benefits.

*Frequency:* On occasion.

*Estimated Number of Annual Respondents:* 7,524 respondents.

*Estimated Number of Annual Responses:* 7,524 responses.

*Estimated Time per Response:* The USPTO estimates that the responses in this information collection will take respondents approximately between 30 minutes (0.5 hours) and 4 hours to complete. This includes the time to gather the necessary information, create the document, and submit the completed request to the USPTO.

*Estimated Total Annual Respondent Burden Hours:* 4,503 hours.

*Estimated Total Annual Respondent Non-Hourly Cost Burden:* $1,446,446.

This information collection request may be viewed at *www.reginfo.gov.* Follow the instructions to view Department of Commerce, USPTO information collections currently under review by OMB.

Written comments and recommendations for this information collection should be submitted within 30 days of the publication of this notice on the following website *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function and entering either the title of the information collection or the OMB Control Number 0651–0034.

Further information can be obtained by:

- *Email: InformationCollection@uspto.gov.* Include ''0651–0034 information request'' in the subject line of the message.
- *Mail:* Justin Isaac, Office of the Chief Administrative Officer, United States Patent and Trademark Office,

P.O. Box 1450, Alexandria, VA 22313–1450.

**Justin Isaac,**

*Information Collections Officer, Office of the Chief Administrative Officer, United States Patent and Trademark Office.*

[FR Doc. 2023–07881 Filed 4–13–23; 8:45 am]

**BILLING CODE 3510–16–P**

## DEPARTMENT OF COMMERCE

### Patent and Trademark Office

**[Docket No. PTO–C–2021–0016]**

### New Implementation Date for Patent Practitioner Registration Statement

**AGENCY:** United States Patent and Trademark Office, Department of Commerce.

**ACTION:** Notice of revised implementation date.

**SUMMARY:** The United States Patent and Trademark Office (USPTO or Office) is delaying the implementation of the biennial mandatory registration statement required from registered patent practitioners and individuals granted limited recognition to practice before the USPTO in patent matters indefinitely.

**DATES:** *Delayed Implementation Date:* The USPTO anticipates that the collection of the registration statement will not start until approximately 2025. The USPTO will provide a six months advance notice prior to the collection of the registration statement.

**FOR FURTHER INFORMATION CONTACT:** Will Covey, Deputy General Counsel and OED Director, at 571–272–4097 or at *oed@uspto.gov*. Please direct media inquiries to the USPTO's Office of the Chief Communications Officer at 571–272–8400.

**SUPPLEMENTARY INFORMATION:** Pursuant to the final rule, Setting and Adjusting Patent Fees During Fiscal Year 2020, 85 FR 46932 (August 3, 2020), registered patent practitioners and individuals granted limited recognition to practice before the USPTO in patent matters may be required to biennially submit a mandatory registration statement. *See* 37 CFR 11.11(a)(2). In the final rule, the USPTO anticipated that practitioners would be required to submit a registration statement in the spring of 2022, and that patent practitioners would make the voluntary Continuing Legal Education (CLE) certification when submitting the registration statement. 85 FR 46932, at 46948.

On October 9, 2020, the USPTO published a request for comments (RFC) seeking public input on proposed CLE guidelines. 85 FR 64128. The RFC provided that pursuant to the final rule published on August 3, 2020, registered patent practitioners and individuals granted limited recognition to practice before the USPTO in patent matters will be required to biennially submit a mandatory registration statement beginning on March 1, 2022. The comment period closed on January 7, 2021. The USPTO received 26 comments, addressing both the proposed CLE guidelines and the provisions of the final patent fee rule which establish the biennial electronic registration statement.

After considering numerous factors, on June 10, 2021, the USPTO issued a notice of revised implementation date which stated that the USPTO has decided to delay the implementation of the registration statement. 86 FR 30920. The decision to delay was based on the USPTO's consideration of public comments received regarding the registration statement in response to the RFC on the proposed CLE guidelines. The USPTO's decision was also based on a close analysis of operational priorities and budget. The USPTO noted that delaying implementation of the registration statement will allow the Office to conserve resources by integrating the registration statement with other USPTO information systems. Therefore, the USPTO anticipated that the collection of the registration statement would begin on November 1, 2024.

The USPTO has decided to delay the implementation of the registration statement. The decision to delay is based on a close analysis of operational priorities and budget. The USPTO notes that delaying implementation of the registration statement will allow the Office to conserve resources by integrating the registration statement with other USPTO information systems. Therefore, the USPTO anticipates that the collection of the registration statement will not start until approximately 2025.

Once a new date for collection of the registration statement is certain, the public will be given a six months advance notice.

**Katherine K. Vidal,**

*Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.*

[FR Doc. 2023–07887 Filed 4–13–23; 8:45 am]

**BILLING CODE 3510–16–P**

## COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

### Procurement List; Additions and Deletions

**AGENCY:** Committee for Purchase From People Who Are Blind or Severely Disabled.

**ACTION:** Additions to the Procurement List.

**SUMMARY:** This action adds a service(s) to the Procurement List that will be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities.

**DATES:** *Date added to the Procurement List:* May 14, 2023.

**ADDRESSES:** Committee for Purchase From People Who Are Blind or Severely Disabled, 355 E Street SW, Suite 325, Washington, DC 20024.

**FOR FURTHER INFORMATION CONTACT:** Michael R. Jurkowski, Telephone: (703) 785–6404, or email *CMTEFedReg@AbilityOne.gov.*

**SUPPLEMENTARY INFORMATION:**

#### Additions

On 1/13/2023 the Committee for Purchase From People Who Are Blind or Severely Disabled published notice of proposed additions to the Procurement List. This notice is published pursuant to 41 U.S.C. 8503 (a)(2) and 41 CFR 51–2.3.

After consideration of the material presented to it concerning capability of qualified nonprofit agencies to provide the service(s) and impact of the additions on the current or most recent contractors, the Committee has determined that the p service(s) listed below are suitable for procurement by the Federal Government under 41 U.S.C. 8501–8506 and 41 CFR 51–2.4.

#### Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organizations that will furnish the product(s) and service(s) to the Government.

2. The action will result in authorizing small entities to furnish the product(s) and service(s) to the Government.

3. There are no known regulatory alternatives which would accomplish

the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 8501–8506) in connection with the and service(s) proposed for addition to the Procurement List.

**End of Certification**

Accordingly, the following service(s) are added to the Procurement List:

*Service(s)*

*Service Type:* Custodial Services.
*Mandatory for:* Department of Homeland Security, FEMA, Fort Shafter, HI.
*Designated Source of Supply:* Work Now Hawaii, Honolulu, HI.
*Contracting Activity:* FEDERAL EMERGENCY MANAGEMENT AGENCY, REGION 9: EMERGENCY PREPAREDNESS AN.

**Michael R. Jurkowski,**

*Acting Director, Business Operations.*

[FR Doc. 2023–07906 Filed 4–13–23; 8:45 am]

**BILLING CODE 6353–01–P**

## COMMODITY FUTURES TRADING COMMISSION

### Agency Information Collection Activities: Notice of Intent To Extend Collection 3038–0090: Adaptation of Regulations To Incorporate Swaps-Records of Transactions; Exclusion of Utility Operations Related Swaps With Utility Special Entities From De Minimis Threshold for Swaps With Special Entities

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Notice.

**SUMMARY:** The Commodity Futures Trading Commission (CFTC or Commission) is announcing an opportunity for public comment on the proposed renewal of a collection of certain information by the agency. Under the Paperwork Reduction Act (PRA), Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including proposed extension of an existing collection of information, and to allow 60 days for public comment. This notice solicits comments on the recordkeeping obligations set forth in certain aspects of certain Commission regulations.

**DATES:** Comments must be submitted on or before June 13, 2023.

**ADDRESSES:** You may submit comments, identified by ''OMB Control No. 3038–0090'' by any of the following methods:

- The Agency's website, at *https://comments.cftc.gov/.* Follow the instructions for submitting comments through the website.
- *Mail:* Christopher Kirkpatrick, Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW, Washington, DC 20581.
- *Hand Delivery/Courier:* Same as Mail above.

Please submit your comments using only one method. All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received to *https://www.cftc.gov.*

**FOR FURTHER INFORMATION CONTACT:** Andrew Chapin, Associate Chief Counsel, Market Participants Division, Commodity Futures Trading Commission, (202) 418–5465, email: *achapin@cftc.gov.*

**SUPPLEMENTARY INFORMATION:** Under the PRA, 44 U.S.C. 3501 *et seq.,* Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of Information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3 and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA, 44 U.S.C. 3506(c)(2)(A), requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, the CFTC is publishing notice of the collection of information listed below. 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.

*Title:* Adaptation of Regulations to Incorporate Swaps-Records of Transactions; Exclusion of Utility Operations Related Swaps with Utility Special Entities from De Minimis Threshold for Swaps with Special Entities (OMB Control No. 3038–0090). This is a request for extension of a currently approved information collection.

*Abstract:* Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act, Pub. L. No. 111–203, 124 Stat. 1376 (2010)) amended the Commodity Exchange Act (CEA) to establish a comprehensive new statutory framework for swaps. These amendments required the Commodity Futures Trading Commission to amend several of its regulations to implement the new framework.

The information collection obligations imposed by the ''Adaptation of Regulations to Incorporate Swaps'' final regulations [1] are necessary to implement section 721 of the Dodd-Frank Act, which amended the definitions of futures commission merchant (FCM) and introducing broker (IB) to permit these intermediaries to trade swaps on behalf of customers. They also are necessary to implement section 733 of the Dodd-Frank Act which introduced swap execution facilities (SEFs) as a new trading platform for swaps. As a result of the enactment of sections 721 and 733, the Commission needed to amend certain recordkeeping regulations (1.31, 1.33, 1.35, 1.37, and 1.39) so that records of swap transactions are maintained analogously to how futures transactions are maintained.

Further, the ''Exclusion of Utility Operations-Related Swaps with Utility Special Entities From De Minimis Threshold for Swaps with Special Entities'' [2] regulation amended the Commission's swap dealer definition to permit a person to exclude ''utility operations-related swaps'' with ''utility special entities'' in their de minimis threshold calculations. The regulation requires a person claiming the exclusion to maintain in accordance with Commission regulation 1.31 any written representations that the person receives form utility special entities related to this exclusion.

The information collection burdens associated with these regulations (collectively, the ''Swap Recordkeeping Requirements'') are restricted to the costs associated with the recordkeeping and reporting requirements that these regulations impose upon affected registrants, registered entities, those registered entities' members, and other respondents covered by the final rules.

With respect to the collection of information, the CFTC invites comments on:

- Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have a practical use;
- The accuracy of the Commission's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

[1] Adaptation of Regulations to Incorporate Swaps, 77 FR 66288 (Nov. 2, 2012).

[2] Exclusion of Utility Operations-Related Swaps With Utility Special Entities From De Minimis Threshold for Swaps With Special Entities, 79 FR 57767 (Sept. 26, 2014).

• Ways to enhance the quality, usefulness, and clarity of the information to be collected; and

• Ways to minimize the burden of 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.

You should submit only information that you wish to make available publicly. If you wish the Commission to consider information that you believe is exempt from disclosure under the Freedom of Information Act, a petition for confidential treatment of the exempt information may be submitted according to the procedures established in § 145.9 of the Commission's regulations.[3]

The Commission reserves the right, but shall have no obligation, to review, pre-screen, filter, redact, refuse or remove any or all of your submission from *https://www.cftc.gov* that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of the ICR will be retained in the public comment file and will be considered as required under the Administrative Procedure Act and other applicable laws, and may be accessible under the Freedom of Information Act.

*Burden Statement:* The Commission is revising its estimate of the burden for this collection for futures commission merchants, retail foreign exchange dealers, introducing brokers, and members of designated contract markets and swap execution facilities. The respondent burden for this collection is estimated to be as follows: [4]

*Estimated Number of Respondents:* 13,598.

*Estimated Annual Burden Hours per Respondent:* 148.

*Estimated Total Annual Burden Hours:* 2,018,728.

*Frequency of Collection:* As needed.

There are no capital costs or operating and maintenance costs associated with this collection.

(Authority: 44 U.S.C. 3501 *et seq.*)

[3] 17 CFR 145.9.

[4] These estimates represent the aggregate burden for all data associated with the Swap Recordkeeping Requirements in the collection, namely Swap Recordkeeping (Regulation 1.35), Swap Confirmations (Regulation 1.33), and Utility Special Entities (Regulation 1.3). Please refer to the supporting statement for further explanation of burdens associated with each regulatory requirement.

Dated: April 11, 2023.

**Robert Sidman,**

*Deputy Secretary of the Commission.*

[FR Doc. 2023–07912 Filed 4–13–23; 8:45 am]

**BILLING CODE 6351–01–P**

## CONSUMER PRODUCT SAFETY COMMISSION

### Sunshine Act Meetings

**TIME AND DATE:** Wednesday, April 19, 2023—10 a.m.–12:30 p.m. (See **MATTERS TO BE CONSIDERED** for each meeting).

**PLACE:** The meetings will be held remotely, and in person at 4330 East West Highway, Bethesda, Maryland, 20814.

**STATUS:** Commission Meetings—Open to the Public/Closed to the Public.

**MATTERS TO BE CONSIDERED:**

*Decisional Matter (10 a.m.):* Implementation of STURDY § 201(d): Determination Regarding ASTM F2057–23 and Draft Direct Final Rule.

To attend virtually, please use the following link: *https://cpsc.webex.com/weblink/register/r516dc11f6e2a58f88b4766cd72784884.*

*Briefing Matter (10:30 a.m.):* FY 2023 Proposed Operating Plan Alignment and Midyear Review. To attend virtually, please use the following link: *https://cpsc.webex.com/weblink/register/r35b8f931ed4ef99dc9e086a008180362.*

*Briefing Matter: (11:30 a.m.)* Enforcement matter. Closed to the Public.

**CONTACT PERSON FOR MORE INFORMATION:** Alberta E. Mills, Office of the Secretary, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814, 301–504–7479 (Office) or 240–863–8938 (Cell).

Dated: April 12, 2023.

**Alberta E. Mills,**

*Commission Secretary.*

[FR Doc. 2023–07989 Filed 4–12–23; 11:15 am]

**BILLING CODE P**

## DEPARTMENT OF EDUCATION

### Applications for New Awards; Developing Hispanic-Serving Institutions Program

**AGENCY:** Office of Postsecondary Education, Department of Education.

**ACTION:** Notice.

**SUMMARY:** The Department of Education (Department) is issuing a notice inviting applications for new awards for fiscal year (FY) 2023 for the Developing Hispanic-Serving Institutions (DHSI) Program, Assistance Listing Number (ALN) 84.031S. This notice relates to the approved information collection under OMB control number 1840–0745.

**DATES:**

*Applications Available:* April 14, 2023.

*Deadline for Transmittal of Applications:* June 13, 2023.

*Deadline for Intergovernmental Review:* August 14, 2023.

**ADDRESSES:** For the addresses for obtaining and submitting an application, please refer to our Common Instructions for Applicants to Department of Education Discretionary Grant Programs, published in the **Federal Register** on December 7, 2022 (87 FR 75045), and available at *www.federalregister.gov/d/2022-26554.* Please note that these Common Instructions supersede the version published on December 27, 2021.

**FOR FURTHER INFORMATION CONTACT:** Njeri Clark, U.S. Department of Education, 400 Maryland Avenue SW, Room 2B186, Washington, DC 20202–4260. Telephone: (202) 453–6224. Email: *Njeri.Clark@ed.gov.*

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

**SUPPLEMENTARY INFORMATION:**

**Full Text of Announcement**

**I. Funding Opportunity Description**

*Purpose of Program:* The DHSI Program provides grants to assist Hispanic-Serving Institutions (HSIs) with expanding educational opportunities for, and improving the academic attainment of, Hispanic students. DHSI Program grants enable HSIs to expand and enhance the academic offerings, program quality, faculty quality, and institutional stability of colleges and universities that are educating the largest enrollment of Hispanic college students and help large numbers of Hispanic students and other low-income individuals complete postsecondary degrees.

*Background:* In a February 2022 article published in the Chronicle of Higher Education titled, ''The Missing Hispanic Students: Higher ed's future and the economy depends on their coming back to college,'' the author highlights how the COVID–19 pandemic threatened the progress made in postsecondary enrollment of Hispanic students over the last decade and calls attention to the negative impact on institutions and communities from the

loss of Hispanic students.[1] According to the National Student Clearinghouse Research Center, Hispanic undergraduate enrollment fell 7 percent from 2019 to 2021.[2] To address this decline, the re-engagement and retention of students, especially Hispanic students, will require targeted supports, including those that leverage technology, and holistic wraparound services.

Through leadership, practice, and data that support evidence-based decision-making, HSIs can foster a strong sense of belonging and implement robust academic programs that focus on student learning through high-impact practices. In FY 2022, the Department's Hispanic-Serving Institutions Division held a listening session with institutions recognized for their leadership in serving Hispanic students. In the listening session, these institutions identified a number of practices that, when implemented intentionally, may contribute to student success. The institutions identified academic offerings such as undergraduate research experiences and support services such as advising and mentoring that promote retention and degree completion. Additionally, these institutions noted the importance of having leadership that is committed both to promoting access to the institution, but also to providing the necessary academic, social, and emotional supports needed to promote student success.

To this end, this competition includes two competitive preference priorities and one invitational priority that are designed to support students holistically and promote continual success.

*Priorities:* This notice contains two competitive preference priorities and one invitational priority. The competitive preference priorities are from the Secretary's Supplemental Priorities and Definitions for Discretionary Grant Programs, published in the **Federal Register** on December 10, 2021 (86 FR 70612) (Supplemental Priorities).

*Competitive Preference Priorities:* For FY 2023 and any subsequent year in which we make awards from the list of unfunded applications from this competition, these priorities are competitive preference priorities. Under 34 CFR 75.105(c)(2)(i), we award up to an additional 5 points to an application for each priority, depending on how well the application meets each of these priorities. Applicants may respond to one or both priorities, for a total of up to 10 additional points.

These priorities are:

*Competitive Preference Priority 1: Meeting Student Social, Emotional, and Academic Needs* (up to 5 points).

Projects that are designed to improve students' social, emotional, academic, and career development, with a focus on underserved students by creating a positive, inclusive, and identity-safe climate at institutions of higher education through one or more of the following activities:

(a) Fostering a sense of belonging and inclusion for underserved students.

(b) Implementing evidence-based practices for advancing student success for underserved students.

(c) Providing evidence-based professional development opportunities designed to build asset-based mindsets for faculty and staff on campus and that are inclusive with regard to race, ethnicity, culture, language, and disability status.

*Competitive Preference Priority 2: Increasing Postsecondary Education Access, Affordability, Completion, and Post-Enrollment Success* (up to 5 points).

Projects that are designed to increase postsecondary access, affordability, completion, and success for underserved students by addressing one or more of the following priority areas:

(a) Increasing postsecondary education access and reducing the cost of college by creating clearer pathways for students between institutions and making transfer of course credits more seamless and transparent.

(b) Increasing the number and proportion of underserved students who enroll in and complete postsecondary education programs, which may include strategies related to college preparation, awareness, application, selection, advising, counseling, and enrollment.

(c) Establishing a system of high-quality data collection and analysis, such as data on persistence, retention, completion, and post-college outcomes, for transparency, accountability, and institutional improvement.

(d) Supporting the development and implementation of student success programs that integrate multiple comprehensive and evidence-based services or initiatives, such as academic advising, structured/guided pathways, career services, credit-bearing academic undergraduate courses focused on career, and programs to meet basic needs, such as housing, childcare and transportation, student financial aid, and access to technological devices.

*Invitational Priority:* For FY 2023 and any subsequent year in which we make awards from the list of unfunded applications from this competition, this priority is an invitational priority. Under 34 CFR 75.105(c)(1), we do not give an application that meets this invitational priority a competitive or absolute preference over other applications.

This priority is:

*Addressing the Impact of COVID–19 on Students, Educators, and Faculty.*

Projects that are designed to address the impacts of the COVID–19 pandemic, including impacts that extend beyond the duration of the pandemic itself, on the students most impacted by the pandemic, with a focus on underserved students and the educators who serve them, through one or more of the following priority areas:

(a) Providing resources and supports to meet the basic, fundamental, health and safety needs of students and educators.

(b) Addressing educator, faculty, and staff well-being.

(c) Using evidence-based instructional approaches or supports to assist individuals who did not enroll in, withdrew from, or reduced course loads in postsecondary education or training programs due to COVID–19 to enroll in, remain enrolled in, and complete credit-bearing coursework and earn recognized postsecondary credentials.

*Definitions:* The following definitions are from 34 CFR 77.1 and the Supplemental Priorities and apply to the priorities and selection criteria in this notice:

*Baseline* means the starting point from which performance is measured and targets are set.

*Budget period* means an interval of time into which a project period is divided for budgetary purposes.

*Demonstrates a rationale* means a key project component included in the project's logic model is informed by research or evaluation findings that suggest the project component is likely to improve relevant outcomes.

*Department* means the U.S. Department of Education.

*Disconnected youth* means an individual, between the ages 14 and 24, who may be from a low-income background, experiences homelessness, is in foster care, is involved in the justice system, or is not working or not enrolled in (or at risk of dropping out of) an educational institution.

*English learner* means an individual who is an English learner as defined in section 8101(20) of the Elementary and Secondary Education Act of 1965, as amended, or an individual who is an

[1] *www.chronicle.com/article/the-missing-hispanic-students.*

[2] *https://nscresearchcenter.org/stay-informed/.*

English language learner as defined in section 203(7) of the Workforce Innovation and Opportunity Act.

*Evidence-based* means the proposed project component is supported by promising evidence or evidence that demonstrates a rationale.

*Experimental study* means a study that is designed to compare outcomes between two groups of individuals (such as students) that are otherwise equivalent except for their assignment to either a treatment group receiving a project component or a control group that does not. Randomized controlled trials, regression discontinuity design studies, and single-case design studies are the specific types of experimental studies that, depending on their design and implementation (*e.g.,* sample attrition in randomized controlled trials and regression discontinuity design studies), can meet What Works Clearinghouse (WWC) standards without reservations as described in the WWC Handbooks:

(i) A randomized controlled trial employs random assignment of, for example, students, teachers, classrooms, or schools to receive the project component being evaluated (the treatment group) or not to receive the project component (the control group).

(ii) A regression discontinuity design study assigns the project component being evaluated using a measured variable (*e.g.,* assigning students reading below a cutoff score to tutoring or developmental education classes) and controls for that variable in the analysis of outcomes.

(iii) A single-case design study uses observations of a single case (*e.g.,* a student eligible for a behavioral intervention) over time in the absence and presence of a controlled treatment manipulation to determine whether the outcome is systematically related to the treatment.

*Fiscal year* means the Federal fiscal year—a period beginning on October 1 and ending on the following September 30.

*Grant period* means the period for which funds have been awarded.

*Grantee* means the legal entity to which a grant is awarded and that is accountable to the Federal Government for the use of the funds provided. The grantee is the entire legal entity even if only a particular component of the entity is designated in the grant award notice (GAN). For example, a GAN may name as the grantee one school or campus of a university. In this case, the granting agency usually intends, or actually intends, that the named component assume primary or sole responsibility for administering the grant-assisted project or program. Nevertheless, the naming of a component of a legal entity as the grantee in a grant award document shall not be construed as relieving the whole legal entity from accountability to the Federal Government for the use of the funds provided. (This definition is not intended to affect the eligibility provision of grant programs in which eligibility is limited to organizations that may be only components of a legal entity.) The term ''grantee'' does not include any secondary recipients, such as subgrantees and contractors, that may receive funds from a grantee pursuant to a subgrant or contract.

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

*Note:* In developing logic models, applicants may want to use resources such as the Pacific Education Laboratory's Logic Model Application (*www.ies.ed.gov/ncee/edlabs/regions/pacific/elm.asp*).

*Performance measure* means any quantitative indicator, statistic, or metric used to gauge program or project performance.

*Performance target* means a level of performance that an applicant would seek to meet during the course of a project or as a result of a project.

*Project component* means an activity, strategy, intervention, process, product, practice, or policy included in a project. Evidence may pertain to an individual project component or to a combination of project components (*e.g.,* training teachers on instructional practices for English learners and follow-on coaching for these teachers).

*Promising evidence* means that there is evidence of the effectiveness of a key project component in improving a relevant outcome, based on a relevant finding from one of the following:

(i) A practice guide prepared by WWC reporting a ''strong evidence base'' or ''moderate evidence base'' for the corresponding practice guide recommendation;

(ii) An intervention report prepared by the WWC reporting a ''positive effect'' or ''potentially positive effect'' on a relevant outcome with no reporting of a ''negative effect'' or ''potentially negative effect'' on a relevant outcome; or

(iii) A single study assessed by the Department, as appropriate, that—

(A) Is an experimental study, a quasi-experimental design study, or a well-designed and well-implemented correlational study with statistical controls for selection bias (*e.g.,* a study using regression methods to account for differences between a treatment group and a comparison group); and

(B) Includes at least one statistically significant and positive (*i.e.,* favorable) effect on a relevant outcome.

*Quasi-experimental design study* means a study using a design that attempts to approximate an experimental study by identifying a comparison group that is similar to the treatment group in important respects. This type of study, depending on design and implementation (*e.g.,* establishment of baseline equivalence of the groups being compared), can meet WWC standards with reservations, but cannot meet WWC standards without reservations, as described in the WWC Handbooks.

*Relevant outcome* means the student outcome(s) or other outcome(s) the key project component is designed to improve, consistent with the specific goals of the program.

*Subgrant* means an award of financial assistance in the form of money, or property in lieu of money, made under a grant by a grantee to an eligible subgrantee. The term includes financial assistance when provided by contractual or any other form of legal agreement, but does not include procurement purchases, nor does it include any form of assistance that is excluded from the definition of ''grant or award'' in this part (See 2 CFR 200.92, ''Subaward'').

*Underserved student* means a student in postsecondary education in one or more of the following subgroups:

(a) A student who is living in poverty or is served by schools with high concentrations of students living in poverty.

(b) A student of color.

(c) An English learner.

(d) A disconnected youth.

(e) A technologically unconnected youth.

(f) A migrant student.

(g) A student experiencing homelessness or housing insecurity.

(h) A student without documentation of immigration status.

(i) A student who is the first in their family to attend postsecondary education.

(j) A student enrolling in or seeking to enroll in postsecondary education for the first time at the age of 20 or older.

(k) A student who is working full-time while enrolled in postsecondary education.

(l) A student who is enrolled in or is seeking to enroll in postsecondary education who is eligible for a Pell Grant.

(m) An adult student in need of improving their basic skills or an adult student with limited English proficiency.

*What Works Clearinghouse Handbooks (WWC Handbooks)* means the standards and procedures set forth in the WWC Standards Handbook, Versions 4.0 or 4.1, and WWC Procedures Handbook, Versions 4.0 or 4.1, or in the WWC Procedures and Standards Handbook, Version 3.0 or Version 2.1 (all incorporated by reference, see 34 CFR 77.2). Study findings eligible for review under WWC standards can meet WWC standards without reservations, meet WWC standards with reservations, or not meet WWC standards. WWC practice guides and intervention reports include findings from systematic reviews of evidence as described in the WWC Handbooks documentation.

*Program Authority:* 20 U.S.C. 1101–1101d and 1103–1103g.

*Note:* Projects will be awarded and must be operated in a manner consistent with the nondiscrimination requirements contained in Federal civil rights laws.

*Applicable Regulations:* (a) The Education Department General Administrative Regulations in 34 CFR parts 75, 77, 79, 82, 84, 86, 97, 98, and 99. (b) The Office of Management and Budget Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement) in 2 CFR part 180, as adopted and amended as regulations of the Department in 2 CFR part 3485. (c) The Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards in 2 CFR part 200, as adopted and amended as regulations of the Department in 2 CFR part 3474. (d) The regulations for this program in 34 CFR part 606. (e) The Supplemental Priorities.

## II. Award Information

*Type of Award:* Discretionary grants. Five-year Individual Development Grants only. Cooperative Arrangement Grants and Planning Grants will not be awarded in FY 2023.

*Estimated Available Funds:* $38,048,815.

Contingent upon the availability of funds and the quality of applications, we may make additional awards in subsequent years from the list of unfunded applications from this competition.

*Estimated Range of Awards:* $500,000–$600,000.

*Estimated Average Size of Awards:* $575,000.

*Maximum Awards:* We will not make an award exceeding $600,000 for a single budget period of 12 months.

*Estimated Number of Awards:* 65.

*Note:* The Department is not bound by any estimates in this notice.

*Project Period:* Up to 60 months.

## III. Eligibility Information and Supplemental Requirements

1. *Eligible Applicants:* (a) Institutions of higher education (IHEs) that qualify as eligible HSIs are eligible to apply for new Individual Development Grants under the DHSI Program. To be an eligible HSI, an IHE must—

(i) Have an enrollment of needy students, as defined in section 502(b) of the HEA (section 502(a)(2)(A)(i) of the HEA; 20 U.S.C. 1101a(a)(2)(A)(i));

(ii) Have, except as provided in section 522(b) of the HEA, average education and general expenditures that are low, per full-time equivalent (FTE) undergraduate student, in comparison with the average education and general expenditures per FTE undergraduate student of institutions that offer similar instruction (section 502(a)(2)(A)(ii) of the HEA; 20 U.S.C. 1101a(a)(2)(A)(ii));

*Note:* To demonstrate an enrollment of needy students and low average education and general expenditures per FTE undergraduate student, an IHE must be designated as an ''eligible institution'' in accordance with 34 CFR 606.2 through 606.5 and the notice inviting applications for designation as an eligible institution for the fiscal year for which the grant competition is being conducted.

*Note:* The notice announcing the FY 2023 process for designation of eligible institutions, and inviting applications for waiver of eligibility requirements, was published in the **Federal Register** on January 17, 2023 (88 FR 2611). Only institutions that the Department determines are eligible, or are granted a waiver, may apply for a grant in this program.

(iii) Be accredited by a nationally recognized accrediting agency or association that the Secretary has determined to be a reliable authority as to the quality of education or training offered, or making reasonable progress toward accreditation, according to such an agency or association (section 502(a)(2)(A)(iv) of the HEA; 20 U.S.C. 1101a(a)(2)(A)(iv));

(iv) Be legally authorized to provide, and provides within the State, an education program for which the institution awards a bachelor's degree (section 502(a)(2)(A)(iii) of the HEA; 20 U.S.C. 1101a(a)(2)(A)(iii)), or be a junior or community college (section 502(a)(2)(A)(iii) of the HEA; 20 U.S.C. 1101a(a)(2)(A)(iii));

(v) Have an enrollment of undergraduate FTE students that is at least 25 percent Hispanic students at the end of the award year immediately preceding the date of application (section 502(a)(5)(B) of the HEA; 20 U.S.C. 1101a(a)(5)(B)); and

(vi) Provide, as an attachment to the application, the documentation the IHE relied upon in determining that at least 25 percent of the IHE's undergraduate FTE students are Hispanic. The 25 percent requirement applies only to undergraduate Hispanic students and is calculated based upon FTE students as defined in section 502(a)(4) of the HEA. Instructions for formatting and submitting the verification documentation to *Grants.gov* are in the application package for this competition.

(b) For this program, the ''end of the award year immediately preceding the date of application'' refers to the end of the fiscal year prior to the application due date. For purposes of this competition, the data that we will use to determine percent enrollment is for academic year 2021–2022.

(c) In considering applications for grants under this program, the Department will compare the data and documentation the institution relied on in its application with data reported to the Department's Integrated Postsecondary Education Data System (IPEDS), the IHE's State-reported enrollment data, and the institutional annual report. If different percentages or data are reported in these various sources, the institution must, as part of the 25 percent assurance verification, explain the reason for the differences. If the IPEDS data show that less than 25 percent of the institution's undergraduate FTE students are Hispanic, the burden is on the institution to show that the IPEDS data are inaccurate. If the IPEDS data indicate that the institution has an undergraduate FTE less than 25 percent, and the institution fails to demonstrate that the IPEDS data are inaccurate, the institution will be considered ineligible.

(d) A grantee under the DHSI Program, which is authorized by title V of the HEA, may not receive a grant under any HEA, title III, part A or part B program (section 505 of the HEA; 20 U.S.C. 1101d). The title III, part A programs include the Strengthening Institutions Program, the American Indian Tribally Controlled Colleges and Universities Program, the Alaska Native

and Native Hawaiian-Serving Institutions Programs, the Asian American and Native American Pacific Islander-Serving Institutions Program, the Predominantly Black Institutions Program, and the Native American-Serving Non-Tribal Institutions Program. Furthermore, a current DHSI Program grantee may not give up its HSI grant in order to receive a grant under any title III, part A program (34 CFR 606.2(c)(1)).

(e) An eligible HSI may only submit one Individual Development Grant application.

(f) Nothing in this notice alters a grantee's obligations to comply with nondiscrimination requirements in Federal civil rights laws, including nondiscrimination on the basis of race, color, or national origin, among others.

2. a. *Cost Sharing or Matching:* This program does not require cost sharing or matching unless the grantee uses a portion of its grant for establishing or improving an endowment fund. If a grantee uses a portion of its grant for endowment fund purposes, it must match or exceed those grant funds with non-Federal funds (section 503(c)(2) of the HEA; 20 U.S.C. 1101b(c)(2)).

b. *Supplement-Not-Supplant:* This program involves supplement-not-supplant funding requirements. Grant funds must be used so that they supplement and, to the extent practical, increase the funds that would otherwise be available for the activities to be carried out under the grant and in no case supplant those funds. (34 CFR 606.30(b)).

c. *Indirect Cost Rate Information:* A grantee may not use an indirect cost rate to determine allowable costs under its grant.

d. *Administrative Cost Limitation:* This program does not include any program-specific limitation on administrative expenses. All administrative expenses must be reasonable and necessary and conform to Cost Principles described in 2 CFR part 200 subpart E of the Uniform Guidance.

3. *Subgrantees:* Under 34 CFR 75.708(b) and (c), a grantee under this competition may award subgrants—to directly carry out project activities described in its application—to the following types of entities: local educational agencies; State educational agencies; IHEs; nonprofit organizations. The grantee may award subgrants to entities it has identified in an approved application or that it selects through a competition under procedures established by the grantee.

## IV. Application and Submission Information

1. *Application Submission Instructions:* Applicants are required to follow the Common Instructions for Applicants to Department of Education Discretionary Grant Programs, published in the **Federal Register** on December 7, 2022 (87 FR 75045), and available at *www.federalregister.gov/d/2022–26554,* which contain requirements and information on how to submit an application. Please note that these Common Instructions supersede the version published on December 27, 2021.

2. *Submission of Proprietary Information:* Given the types of projects that may be proposed in applications for the DHSI Program, your application may include business information that you consider proprietary. In 34 CFR 5.11 we define ''business information'' and describe the process we use in determining whether any of that information is proprietary and, thus, protected from disclosure under Exemption 4 of the Freedom of Information Act (5 U.S.C. 552, as amended).

Because we plan to make successful applications available to the public, you may wish to request confidentiality of business information.

Consistent with Executive Order 12600, please designate in your application any information that you believe is exempt from disclosure under Exemption 4. In the appropriate Appendix section of your application, under ''Other Attachments Form,'' please list the page number or numbers on which we can find this information. For additional information please see 34 CFR 5.11(c).

3. *Intergovernmental Review:* This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this program.

4. *Funding Restrictions:* We specify unallowable costs in 34 CFR 606.10(c). We reference additional regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

5. *Recommended Page Limit:* The application narrative is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. We recommend that you (1) limit the application narrative to no more than 55 pages and (2) use the following standards:

- A ''page'' is 8.5″ × 11″, on one side only, with 1″ margins at the top, bottom, and both sides.
- Double-space (no more than three lines per vertical inch) all text in the application narrative, including titles, headings, footnotes, quotations, references, and captions, as well as all text in charts, tables, figures, and graphs.
- Use a font that is either 12 point or larger, and no smaller than 10 pitch (characters per inch).
- Use one of the following fonts: Times New Roman, Courier, Courier New, or Arial.

The recommended page limit applies to the Project Narrative, which is your complete response to the selection criteria, and any responses to the priorities, if applicable. However, the page limit does not apply to the Application for Federal Assistance form (SF–424); the ED SF–424 Supplement form; the Budget Information—Non-Construction Programs form (ED 524); the assurances and certifications; or the one-page project abstract, the program profile form, and supporting narrative.

6. *Notice of Intent To Apply:* The Department will be able to review grant applications more efficiently if we know the approximate number of applicants that intend to apply. Therefore, we strongly encourage each potential applicant to notify us of their intent to submit an application. To do so, please email the program contact person listed under **FOR FURTHER INFORMATION CONTACT** with the subject line ''Intent to Apply,'' and include the applicant's name and a contact person's name and email address. Applicants that do not submit a notice of intent to apply may still apply for funding; applicants that do submit a notice of intent to apply are not bound to apply or bound by the information provided.

## V. Application Review Information

1. *Selection Criteria:* The selection criteria for this competition are from 34 CFR 75.210, 606.8, and 606.22. Applicants should address each of the following selection criteria separately for each proposed activity. We will award up to 100 points to an application under the selection criteria and up to 10 additional points to an application under the competitive preference priorities, for a total score of up to 110 points. The maximum score for each criterion is noted in parentheses.

(a) *Quality of the applicant's comprehensive development plan.* (Up to 25 points)

The Secretary evaluates each application for a development grant based on the extent to which—

(1) The strengths, weaknesses, and significant problems of the institution's academic programs, institutional management, and fiscal stability are clearly and comprehensively analyzed and result from a process that involved major constituencies of the institution (Up to 5 points);

(2) The goals for the institution's academic programs, institutional management, and fiscal stability are realistic and based on comprehensive analysis (Up to 5 points);

(3) The objectives stated in the plan are measurable, related to institutional goals, and, if achieved, will contribute to the growth and self-sufficiency of the institution (Up to 5 points);

(4) The plan clearly and comprehensively describes the methods and resources the institution will use to institutionalize practice and improvements developed under the proposed project, including, in particular, how operational costs for personnel, maintenance, and upgrades of equipment will be paid with institutional resources (Up to 5 points); and

(5) The five-year plan describes how the applicant will improve its services to Hispanic and other low-income students (Up to 5 points).

*Note:* Under 34 CFR 606.8(a), a comprehensive development plan is an institution's strategy for achieving growth and self-sufficiency by strengthening its—

(1) Academic programs;

(2) Institutional management; and

(3) Fiscal stability.

(b) *Quality of the project design.* (Up to 15 points)

The Secretary considers the quality of the design of the proposed project. In determining the quality of the design of the proposed project, the Secretary considers the following:

(1) The extent to which the proposed project demonstrates a rationale (as defined in this notice) (Up to 10 points); and

(2) The extent to which the proposed project is supported by promising evidence (as defined in this notice) (Up to 5 points).

*Note:* To establish that their projects ''demonstrate a rationale,'' applicants must use a logic model (as defined in this notice) and identify research or evaluation findings suggesting that a key project component is likely to improve a relevant outcome. To establish that their projects are supported by ''promising evidence,'' applicants should cite the supporting study or studies that meet the conditions in the definition of ''promising evidence'' and attach the study(ies) as part of the application attachments. In addressing ''promising evidence,'' applicants are encouraged to align the direct student services proposed in this application to evidence-based practices identified in the selected studies. Note that the research cited to address the ''promising evidence'' criterion can be the same research provided to demonstrate a rationale, but only applications that include logic models can receive full points under the ''demonstrates a rationale'' selection factor.

(c) *Quality of activity objectives.* (Up to 10 points)

The extent to which the objectives for each activity are—

(1) Realistic and defined in terms of measurable results (Up to 5 points); and

(2) Directly related to the problems to be solved and to the goals of the comprehensive development plan (Up to 5 points).

(d) *Quality of implementation strategy.* (Up to 20 points)

The extent to which—

(1) The implementation strategy for each activity is comprehensive (Up to 10 points);

(2) The rationale for the implementation strategy for each activity is clearly described and is supported by the results of relevant studies or projects (Up to 5 points); and

(3) The timetable for each activity is realistic and likely to be attained (Up to 5 points).

(e) *Quality of the project management plan.* (Up to 10 points)

The extent to which—

(1) Procedures for managing the project are likely to ensure efficient and effective project implementation (Up to 5 points); and

(2) The project coordinator and activity directors have sufficient authority to conduct the project effectively, including access to the president or chief executive officer (Up to 5 points).

(f) *Quality of key personnel.* (Up to 5 points)

The extent to which—

(1) The past experience and training of key professional personnel are directly related to the stated activity objectives (Up to 2 points); and

(2) The time commitment of key personnel is realistic (Up to 3 points).

(g) *Quality of evaluation plan.* (Up to 10 points)

The extent to which—

(1) The data elements and the data collection procedures are clearly described and appropriate to measure the attainment of activity objectives and to measure the success of the project in achieving the goals of the comprehensive development plan (Up to 5 points); and

(2) The data analysis procedures are clearly described and are likely to produce formative and summative results on attaining activity objectives and measuring the success of the project on achieving the goals of the comprehensive development plan (Up to 5 points).

(h) *Budget.* (Up to 5 points)

The extent to which the proposed costs are necessary and reasonable in relation to the project's objectives and scope.

2. *Review and Selection Process:* We remind potential applicants that in reviewing applications in any discretionary grant competition, the Secretary may consider, under 34 CFR 75.217(d)(3), the past performance of the applicant in carrying out a previous award, such as the applicant's use of funds, achievement of project objectives, and compliance with grant conditions. The Secretary may also consider whether the applicant failed to submit a timely performance report or submitted a report of unacceptable quality.

In addition, in making a competitive grant award, the Secretary requires various assurances, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

A panel of three non-Federal reviewers will review and score each application in accordance with the selection criteria in this notice, as well as the competitive preference priorities. A rank order funding slate will be made from this review. Awards will be made in rank order according to the average score received from the peer review.

In tie-breaking situations for development grants described in 34 CFR 606.23(b), the DHSI Program regulations in 34 CFR part 606, subpart C require that we award additional points to an application from an IHE that:

(1) Has an endowment fund of which the current market value, per FTE enrolled student, is less than the average current market value of the endowment funds, per FTE enrolled student, at comparable institutions that offer similar instruction (1 point);

(2) Has expenditures for library materials per FTE enrolled student that are less than the average expenditures for library materials per FTE enrolled student at comparable institutions that offer similar instruction (1 point); or

(3) Proposes to carry out one or more of the following activities—

(i) Faculty development (1 point);

(ii) Funds and administrative management (1 point);

(iii) Development and improvement of academic programs (2 points);

(iv) Acquisition of equipment for use in strengthening management and academic programs (1 point);

(v) Joint use of facilities (2 points); or

(vi) Student services (2 points).

If a tie remains after applying the tiebreaker mechanism above, priority will be given to applicants that addressed the priority in section 521(d) of the HEA (20 U.S.C. 1103): the Secretary gives priority to an application that contains satisfactory evidence that the Hispanic-Serving Institution has entered or will enter into a collaborative arrangement with at least one local educational agency or community-based organization to provide such agency or organization with assistance (from funds other than funds provided under title 20 of the U.S. Code) in reducing dropout rates for Hispanic students, improving rates of academic achievement for Hispanic students, and increasing the rates at which Hispanic secondary school graduates enroll in higher education.

If a tie still remains after applying the additional point(s) and the statutory priority, we will determine the ranking of applicants based on the applicant that scores the highest under the selection criterion ''Quality of the applicant's comprehensive development plan,'' followed by ''Quality of implementation strategy.''

If a tie still remains, we will select the applicant with the lowest endowment per FTE enrolled student.

3. *Risk Assessment and Specific Conditions:* Consistent with 2 CFR 200.206, before awarding grants under this program, the Department conducts a review of the risks posed by applicants. Under 2 CFR 200.208, the Secretary may impose specific conditions and, under 2 CFR 3474.10, in appropriate circumstances, high-risk conditions on a grant if the applicant or grantee is not financially stable; has a history of unsatisfactory performance; has a financial or other management system that does not meet the standards in 2 CFR part 200, subpart D; has not fulfilled the conditions of a prior grant; or is otherwise not responsible.

4. *Integrity and Performance System:* If you are selected under this competition to receive an award that over the course of the project period may exceed the simplified acquisition threshold (currently $250,000), under 2 CFR 200.206(a)(2) we must make a judgment about your integrity, business ethics, and record of performance under Federal awards—that is, the risk posed by you as an applicant—before we make an award. In doing so, we must consider any information about you that is in the integrity and performance system (currently referred to as the Federal Awardee Performance and Integrity Information System (FAPIIS)), accessible through the System for Award Management. You may review and comment on any information about yourself that a Federal agency previously entered and that is currently in FAPIIS.

Please note that, if the total value of your currently active grants, cooperative agreements, and procurement contracts from the Federal Government exceeds $10,000,000, the reporting requirements in 2 CFR part 200, Appendix XII, require you to report certain integrity information to FAPIIS semiannually. Please review the requirements in 2 CFR part 200, Appendix XII, if this grant plus all the other Federal funds you receive exceed $10,000,000.

5. *In General:* In accordance with the Office of Management and Budget's guidance located at 2 CFR part 200, all applicable Federal laws, and relevant Executive guidance, the Department will review and consider applications for funding pursuant to this notice inviting applications in accordance with—

(a) Selecting recipients most likely to be successful in delivering results based on the program objectives through an objective process of evaluating Federal award applications (2 CFR 200.205);

(b) Prohibiting the purchase of certain telecommunication and video surveillance services or equipment in alignment with section 889 of the National Defense Authorization Act of 2019 (Pub. L. 115–232) (2 CFR 200.216);

(c) Providing a preference, to the extent permitted by law, to maximize use of goods, products, and materials produced in the United States (2 CFR 200.322); and

(d) Terminating agreements in whole or in part to the greatest extent authorized by law if an award no longer effectuates the program goals or agency priorities (2 CFR 200.340).

## VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN); or we may send you an email containing a link to access an electronic version of your GAN. We may notify you informally, also.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Open Licensing Requirements:* Unless an exception applies, if you are awarded a grant under this competition, you will be required to openly license to the public grant deliverables created in whole, or in part, with Department grant funds. When the deliverable consists of modifications to pre-existing works, the license extends only to those modifications that can be separately identified and only to the extent that open licensing is permitted under the terms of any licenses or other legal restrictions on the use of pre-existing works. Additionally, a grantee or subgrantee that is awarded competitive grant funds must have a plan to disseminate these public grant deliverables. This dissemination plan can be developed and submitted after your application has been reviewed and selected for funding. For additional information on the open licensing requirements, please refer to 2 CFR 3474.20.

4. *Reporting:* (a) If you apply for a grant under this competition, you must ensure that you have in place the necessary processes and systems to comply with the reporting requirements in 2 CFR part 170 should you receive funding under this competition. This does not apply if you have an exception under 2 CFR 170.110(b).

(b) At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multiyear award, you must submit an annual performance report that provides the most current performance and financial expenditure information as directed by the Secretary under 34 CFR 75.118. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For specific requirements on reporting, please go to *www.ed.gov/fund/grant/apply/appforms/appforms.html.*

(c) Under 34 CFR 75.250(b), the Secretary may provide a grantee with additional funding for data collection analysis and reporting. In this case, the Secretary establishes a data collection period.

5. *Performance Measures:* The Secretary has established the following

key performance measures for assessing the effectiveness of the DHSI Program under 34 CFR 75.110:

(a) The annual rate of degree or certificate completion for all students, and specifically for Hispanic students, at DHSI grantee institutions.

(b) The annual persistence rate at DHSI grantee institutions for all students, and for Hispanic students in particular, from one year to the next.

(c) The percentage of all students, and of Hispanic students in particular, who transfer from a two-year HSI to a four-year institution.

(d) The number of all students, and the number of Hispanic students in particular, served by any direct student service supported by the grant.

(e) The Federal cost per undergraduate and graduate degree at institutions in the DHSI program.

6. *Continuation Awards:* In making a continuation award under 34 CFR 75.253, the Secretary considers, among other things: whether a grantee has made substantial progress in achieving the goals and objectives of the project; whether the grantee has expended funds in a manner that is consistent with its approved application and budget; and, if the Secretary has established performance measurement requirements, whether the grantee has made substantial progress in achieving the performance targets in the grantee's approved application.

In making a continuation award, the Secretary also considers whether the grantee is operating in compliance with the assurances in its approved application, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

## VII. Other Information

*Accessible Format:* Individuals with disabilities can obtain this document and a copy of the application package in an accessible format (*e.g.,* braille, large print, audiotape, or compact disc) on request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT**.

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

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

**Nasser H. Paydar,**

*Assistant Secretary for Postsecondary Education.*

[FR Doc. 2023–07904 Filed 4–13–23; 8:45 am]

**BILLING CODE 4000–01–P**

## DEPARTMENT OF ENERGY

### Agency Information Collection Extension

**AGENCY:** U.S. Department of Energy.

**ACTION:** Notice of request for comments.

**SUMMARY:** The Department of Energy (DOE) invites public comment on a proposed collection of information that DOE is developing for submission to the Office of Management and Budget (OMB) pursuant to the Paperwork Reduction Act of 1995.

**DATES:** Comments regarding this proposed information collection must be received on or before June 13, 2023. If you anticipate any difficulty in submitting comments within that period, contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section as soon as possible.

**ADDRESSES:** Written comments may be sent by email to *shipmentwaiver@nuclear.energy.gov.*

**FOR FURTHER INFORMATION CONTACT:** Mr. John Krohn, Office of Nuclear Energy, Department of Energy, Phone: (202) 586–7246, Email: *shipmentwaiver@nuclear.energy.gov.*

**SUPPLEMENTARY INFORMATION:** Comments are invited on: (a) Whether the extended collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

This information collection request contains:

(1) *OMB No.:* 1910–NEW;

(2) *Information Collection Request Titled:* Instructions for Requesting an Exception from the Secretary of Energy under Presidential Proclamation Relating to the Regulation of the Anchorage and Movement of Russian-Affiliated Vessels to United States Ports;

(3) *Type of Review:* New;

(4) *Purpose:*

Per Proclamation 10371, ''Declaration of National Emergency and Invocation of Emergency Authority Relating to the Regulation of the Anchorage and Movement of Russian-Affiliated Vessels to United States Ports'' (''the Proclamation''), DOE seeks to provide instructions for requesting an exception from the Secretary of Energy to the prohibition set forth in the Proclamation.

The policies and actions of the Government of the Russian Federation to continue the premeditated, unjustified, unprovoked, and brutal war against Ukraine constitute a national emergency by reason of a disturbance or threatened disturbance of international relations of the United States. In order to address this national emergency and secure the observance of the rights and obligations of the United States, President Biden, by his authority under the Constitution and the laws of the United States of America, including the National Emergencies Act (50 U.S.C. 1601 *et seq.*) and section 1 of title II of Public Law 65–24, ch. 30, June 15, 1917, as amended (Magnuson Act) (46 U.S.C. 70051), has authorized the Secretary of Homeland Security to make and issue such rules and regulations as appropriate to regulate the anchorage and movement of Russian-affiliated vessels, and delegated to the Secretary of Homeland Security the authority to approve such rules and regulations, as authorized by the Magnuson Act.

### Prohibition

Pursuant to the Proclamation, Russian-affiliated vessels are prohibited from entering into United States ports effective April 28, 2022, subject to two limited exceptions. One such exception (Sec. 2(a) of the Proclamation) applies to Russian-affiliated vessels used in the transport of source material, special nuclear material (SNM), and byproduct material for which, and for such time as, the Secretary of Energy, in consultation with the Secretaries of State and Commerce, determines that there is no viable source of supply available that would not require transport by Russian-affiliated vessels.

**Application for Secretarial Determination**

This proposed collection of information will request information from applicants seeking to request an exception pursuant to Section 2(a) of the prohibition set forth in Section 1 of Proclamation 10371.

(5) *Annual Estimated Number of Respondents:* 10;

(6) *Annual Estimated Number of Total Responses:* 20;

(7) *Annual Estimated Number of Burden Hours:* 40;

(8) *Annual Estimated Reporting and Recordkeeping Cost Burden:* $2580;

*Statutory Authority:* Proclamation 10371, ''Declaration of National Emergency and Invocation of Emergency Authority Relating to the Regulation of the Anchorage and Movement of Russian-Affiliated Vessels to United States Ports'', April 21, 2022.

**Signing Authority**

This document of the Department of Energy was signed on April 10, 2023, by Dr. Kathryn Huff, Assistant Secretary for the Office of Nuclear Energy, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on April 11, 2023.

**Treena V. Garrett,**

*Federal Register Liaison Officer, U.S. Department of Energy.*

[FR Doc. 2023–07899 Filed 4–13–23; 8:45 am]

**BILLING CODE 6450–01–P**

## DEPARTMENT OF ENERGY

**[Docket No. 13–132–LNG]**

## Magnolia LNG, LLC; Request for Limited Extension to Start Date of Term of Authorization

**AGENCY:** Office of Fossil Energy and Carbon Management, Department of Energy.

**ACTION:** Notice of request.

**SUMMARY:** The Office of Fossil Energy and Carbon Management (FECM) (formerly the Office of Fossil Energy) of the Department of Energy (DOE) gives notice (Notice) of receipt of a request (Request), filed by Magnolia LNG, LLC (Magnolia) on March 20, 2023. Magnolia requests an amendment to its existing authorization to export domestically produced liquefied natural gas (LNG) to non-free trade agreement countries set forth in DOE/FE Order No. 3909, as amended most recently in DOE/FECM Order No. 3909–C—specifically, an extension of its deadline to commence export operations. Magnolia filed its request under the Natural Gas Act (NGA). Protests, motions to intervene, notices of intervention, and written comments are invited.

**DATES:** Protests, motions to intervene, or notices of intervention, as applicable, and written comments are to be filed electronically as detailed in the Public Comment Procedures section no later than 4:30 p.m., Eastern time, May 15, 2023.

**ADDRESSES:**

*Electronic Filing by Email*

*fergas@hq.doe.gov*

Although DOE has routinely accepted public comment submissions through a variety of mechanisms, including postal mail and hand delivery/courier, DOE has found it necessary to make temporary modifications to the comment submission process in light of the ongoing Covid-19 pandemic. DOE is currently accepting only electronic submissions at this time. If a commenter finds that this change poses an undue hardship, please contact Office of Resource Sustainability staff at (202) 586–4749 or (202) 586–7893 to discuss the need for alternative arrangements. Once the Covid-19 pandemic health emergency is resolved, DOE anticipates resuming all of its regular options for public comment submission, including postal mail and hand delivery/courier.

**FOR FURTHER INFORMATION CONTACT:**

Jennifer Wade or Peri Ulrey, U.S. Department of Energy (FE–34) Office of Regulation, Analysis, and Engagement, Office of Resource Sustainability, Office of Fossil Energy and Carbon Management, Forrestal Building, Room 3E–042, 1000 Independence Avenue SW, Washington, DC 20585, (202) 586–4749 or (202) 586–7893, *jennifer.wade@hq.doe.gov* or *peri.ulrey@hq.doe.gov*.

Cassandra Bernstein, U.S. Department of Energy (GC–76), Office of the Assistant General Counsel for Energy Delivery and Resilience, Forrestal Building, Room 6D–033, 1000 Independence Avenue SW, Washington, DC 20585, (202) 586–9793, *cassandra.bernstein@hq.doe.gov*.

**SUPPLEMENTARY INFORMATION:** Under DOE/FE Order No. 3909, as amended most recently in DOE/FECM Order No. 3909–C,[1] Magnolia is authorized to export domestically produced LNG by vessel from the proposed Magnolia LNG Project, a natural gas liquefaction and LNG export terminal to be located near Lake Charles, Calcasieu Parish, Louisiana, to any country with which the United States has not entered into a free trade agreement (FTA) requiring national treatment for trade in natural gas, and with which trade is not prohibited by U.S. law or policy (non-FTA countries).[2] Magnolia is authorized to export this LNG in a volume equivalent to 449 billion cubic feet per year (Bcf/yr) of natural gas for a term extending through December 31, 2050.[3]

As relevant here, Order No. 3909–C requires Magnolia to ''commence export operations using the planned liquefaction facilities no later than seven years from the date of issuance of Order No. 3909 (*i.e.,* by November 30, 2023).'' [4] In the Request, Magnolia asks DOE to extend this commencement deadline from November 30, 2023, to April 15, 2026—an extension of approximately 29 months.[5]

In support of this Request, Magnolia states that, on October 7, 2020, FERC issued an order granting Magnolia's request for a five-year extension of time—from April 15, 2021, to April 15, 2026—to complete construction of the Magnolia LNG Project and to make it available for service (FERC Extension Order).[6] Magnolia states that its

[1] *Magnolia LNG, LLC,* DOE/FE Order No. 3909, Docket No. 13–132–LNG, Opinion and Order Granting Long-Term, Multi-Contract Authorization to Export Liquefied Natural Gas by Vessel from the Proposed Magnolia LNG Terminal to be Constructed in Lake Charles, Louisiana, to Non-Free Trade Agreement Nations (Nov. 30, 2016), *reh'g denied,* Order No. 3909–A (Apr. 2, 2018), *amended by* Order No. 3909–B (Dec. 10, 2020) (extending export term), *further amended by* Order No. 3909–C (Apr. 27, 2022) (increasing export volume), *reh'g denied,* Order No. 3909–D (June 24, 2022). On August 22, 2022, Sierra Club filed a petition for review of DOE/FECM Order Nos. 3909–C and 3909–D in the United States Court of Appeals for the District of Columbia Circuit. That case is ongoing. *See Sierra Club* v. *U.S. Dep't of Energy,* No. 22–1217, Order (D.C. Cir. Feb. 28, 2023).

[2] 15 U.S.C. 717b(a).

[3] *See supra* note 1 (Order Nos. 3909–B and 3909–C).

[4] *Magnolia LNG, LLC,* DOE/FE Order No. 3909–C, at 68 (Ordering Para. D) (citing *Magnolia LNG, LLC,* DOE/FE Order No. 3909, at 161 (Term and Condition B), 168 (Ordering Para. D)).

[5] Magnolia LNG, LLC, Request for Limited Extension to Start Date of Term Authorization, Docket No. 13–132–LNG, 1, 5 (Mar. 20, 2023) [hereinafter Request].

[6] *Id.* at 4 (citing *Magnolia LNG, LLC,* FERC Staff Letter Order, Request for Extension of Time (Oct.

Request, if granted, would ''align its commencement of [export] deadline under Order No. 3909 (as amended) with its completion of construction deadline under its FERC Authorization, as amended by the FERC Extension of Time Order.'' [7] According to Magnolia, this alignment of DOE and FERC deadlines would ''ensure the terms of its non-FTA authorization accommodates its current construction schedule and its non-FTA authorization remains valid during construction.'' [8] Magnolia further states that it is not seeking to modify any aspect of Order No. 3909, as amended, beyond extending the existing export commencement deadline to April 15, 2026.[9]

Magnolia asserts that good cause exists to grant the requested extension to its export commencement deadline. Magnolia identifies the actions it has taken to date to develop the Magnolia LNG Project, the ''unforeseeable developments in the global LNG market'' that have affected Magnolia (and its former parent company, Glenfarne Group, LLC), and its intention to execute commercial agreements sufficient to support a positive final investment decision for the Magnolia LNG Project within the requested timeframe.[10]

Magnolia adds that, because it is not proposing any change to the approved design, operation, or export capacity of the Magnolia LNG Project, DOE's public interest analyses under NGA section 3(a) [11] set forth in Order Nos. 3909 and 3909–C ''need not be revisited by [DOE] in granting the Request.'' [12]

Additional details can be found in the Request, posted on the DOE website at: *www.energy.gov/sites/default/files/2023-03/Magnolia%20LNG%20LLC%20Request%20for%20Extension%20of%20NFTA%20Commencement%20of%20Service%20Deadline.pdf.*

## DOE Evaluation

In reviewing Magnolia's Request, DOE will consider any issues required by law or policy under NGA section 3(a). To the extent appropriate, DOE will consider the study entitled, *Macroeconomic Outcomes of Market Determined Levels of U.S. LNG Exports* (2018 LNG Export Study),[13] DOE's response to public comments received on that Study,[14] and the following environmental documents:

- *Addendum to Environmental Review Documents Concerning Exports of Natural Gas From the United States,* 79 FR 48132 (Aug. 15, 2014); [15]
- *Life Cycle Greenhouse Gas Perspective on Exporting Liquefied Natural Gas From the United States,* 79 FR 32260 (June 4, 2014); [16] and
- *Life Cycle Greenhouse Gas Perspective on Exporting Liquefied Natural Gas From the United States: 2019 Update,* 84 FR 49278 (Sept. 19, 2019), and DOE's response to public comments received on that study.[17]

Parties that may oppose the Request should address these issues and documents in their comments and/or protests, as well as other issues deemed relevant to the Request.

The National Environmental Policy Act (NEPA), 42 U.S.C. 4321 *et seq.,* requires DOE to give appropriate consideration to the environmental effects of its proposed decisions. No final decision will be issued in this proceeding until DOE has met its environmental responsibilities.

## Public Comment Procedures

In response to this Notice, any person may file a protest, comments, or a motion to intervene or notice of intervention, as applicable, addressing the Request. Interested parties will be provided 30 days from the date of publication of this Notice in which to submit comments, protests, motions to intervene, or notices of intervention. The public previously was given an opportunity to intervene in, protest, and comment on Magnolia's prior non-FTA applications in Docket No. 13–132–LNG.[18] Therefore, DOE will not consider comments or protests that do not bear directly on this Request.

Any person wishing to become a party to this proceeding evaluating Magnolia's Request must file a motion to intervene or notice of intervention.[19] The filing of comments or a protest with respect to the Request will not serve to make the commenter or protestant a party to this proceeding, although protests and comments received from persons who are not parties will be considered in determining the appropriate action to be taken on the Request. All protests, comments, motions to intervene, or notices of intervention must meet the requirements specified by the regulations in 10 CFR part 590, including the service requirements.

As noted, DOE is only accepting electronic submissions at this time. Please email the filing to *fergas@hq.doe.gov.* All filings must include a reference to ''Docket No. 13–132–LNG'' or ''Magnolia LNG, LLC Request for Limited Extension'' in the title line.

*Please Note:* Please include all related documents and attachments (*e.g.,* exhibits) in the original email correspondence. Please do not include any active hyperlinks or password protection in any of the documents or attachments related to the filing. All electronic filings submitted to DOE must follow these guidelines to ensure that all documents are filed in a timely manner.

The Request and any filed protests, motions to intervene, notices of intervention, and comments will also be available electronically by going to the following DOE Web address: *www.energy.gov/fecm/regulation.*

A decisional record on the Request will be developed through responses to this Notice by parties, including the parties' written comments and replies thereto. Additional procedures will be used as necessary to achieve a complete understanding of the facts and issues. If an additional procedure is scheduled, notice will be provided to all parties. If no party requests additional procedures, a final Order may be issued based on the official record, including the Request and responses filed by parties pursuant to this Notice, in accordance with 10 CFR 590.316.

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7, 2020)). The FERC Extension Order is available at *https://elibrary.ferc.gov/eLibrary/filelist?accession_number=20201007-3041.*

[7] *Id.* at 7.

[8] *Id.* at 5.

[9] *Id.* at 8; *see also id.* at 5.

[10] *Id.* at 7.

[11] 15 U.S.C. 717b(a).

[12] Request at 8.

[13] *See* NERA Economic Consulting, Macroeconomic Outcomes of Market Determined Levels of U.S. LNG Exports (June 7, 2018), *www.energy.gov/sites/prod/files/2018/06/f52/Macroeconomic%20LNG%20Export%20Study%202018.pdf.*

[14] U.S. Dep't of Energy, Study on Macroeconomic Outcomes of LNG Exports: Response to Comments Received on Study; Notice of Response to Comments, 83 FR 67251 (Dec. 28, 2018), *www.govinfo.gov/content/pkg/FR-2018-12-28/pdf/2018-28238.pdf.*

[15] The Addendum and related documents are available at *www.energy.gov/fecm/addendum-environmental-review-documents-concerning-exports-natural-gas-united-states.*

[16] The 2014 Life Cycle Greenhouse Gas Report is available at *www.energy.gov/fecm/life-cycle-greenhouse-gas-perspective-exporting-liquefied-natural-gas-united-states.*

[17] U.S. Dep't of Energy, Life Cycle Greenhouse Gas Perspective on Exporting Liquefied Natural Gas from the United States: 2019 Update—Response to Comments, 85 FR 72 (Jan. 2, 2020). The 2019 Update and related documents are available at *https://fossil.energy.gov/app/docketindex/docket/index/21.*

[18] *See supra* note 1.

[19] Status as an intervenor in prior proceeding(s) in this docket does not continue to this proceeding evaluating Magnolia's Request, and therefore any person interested in intervening must file a new motion to intervene (or notice of intervention, as applicable). 10 CFR 590.303.

Signed in Washington, DC, on April 10, 2023.

**Amy Sweeney,**

*Director, Office of Regulation, Analysis, and Engagement, Office of Resource Sustainability.*

[FR Doc. 2023–07873 Filed 4–13–23; 8:45 am]

**BILLING CODE 6450–01–P**

## DEPARTMENT OF ENERGY

### Agency Information Collection Extension

**AGENCY:** U.S. Department of Energy.

**ACTION:** Notice of request for comments.

**SUMMARY:** The Department of Energy (DOE) invites public comment on a proposed collection of information that DOE is developing for submission to the Office of Management and Budget (OMB) pursuant to the Paperwork Reduction Act of 1995.

**DATES:** Comments regarding this proposed information collection must be received on or before May 15, 2023. If you anticipate that you will be submitting comments but find it difficult to do so within the period of time allowed by this notice, please advise the DOE Desk Officer at OMB of your intention to make a submission as soon as possible. The Desk Officer may be telephoned at (202) 395–4718.

**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 information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

**FOR FURTHER INFORMATION CONTACT:** Michael Reim, *michael.reim@nuclear.energy.gov,* (202) 748–3383.

**SUPPLEMENTARY INFORMATION:** Comments are invited on: (a) Whether the extended collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

This information collection request contains:

(1) *OMB No.:* 1910–NEW;

(2) *Information Collection Request Titled:* Survey of High-Assay, Low-Enriched Uranium (HALEU) Needs for Civilian Domestic Research, Development, Demonstration, and Commercial Use.;

(3) *Type of Review:* New;

(4) *Purpose:* The purpose of this survey is to inform the planning and development of a Department of Energy (DOE) HALEU Availability Program. Section 2001 of The Energy Act of 2020 (Pub. L. 116–260, Dec. 27, 2020) authorizes the Secretary to establish and carry out, through the Office of Nuclear Energy (NE), a program to support the availability of HALEU for civilian domestic research and development, demonstration, and commercial use. The Act authorizes multiple actions to facilitate the development of a commercial HALEU supply chain including a biennial survey of stakeholders to estimate the quantity of HALEU necessary for domestic commercial use, establishing a consortium of fuel cycle entities to partner with DOE in making HALEU available, and to provide HALEU to consortium members during development of commercial domestic sources. NE is developing plans to establish the HALEU Availability Program to implement these and other directed actions, including those related to HALEU fuel fabrication, enrichment, and transportation.

(5) *Annual Estimated Number of Respondents:* 25;

(6) *Annual Estimated Number of Total Responses:* 25;

(7) *Annual Estimated Number of Burden Hours:* 200;

(8) *Annual Estimated Reporting and Recordkeeping Cost Burden:* $13,376.

HALEU is defined as uranium enriched between 5 and 20 percent uranium-235, and HALEU enriched between 10–20 percent will be required by several advanced reactor designs currently under development. Multiple stakeholders will require HALEU for commercial and research purposes in the coming years, including advanced reactor designers, traditional nuclear fuel and nuclear reactor vendors, Advanced Reactor Demonstration Program awardees, and other companies and organizations engaged in nuclear research and development.

For stakeholders that plan to utilize HALEU enriched between 5 and 20 percent, please provide the following information:

(1) A short summary of the stakeholder's planned commercial and research needs for HALEU including:

a. The type of reactor system or facilities that would use the fuel,

b. Projections regarding the number of reactors or facilities, and

c. Current status and future plans for licensing and regulatory milestones,

d. Plans for U.S. and international deployment.

(2) The number of metric tons of uranium required per year (MTU/yr) where the year listed is the delivery date of HALEU required for fuel fabrication or fuel qualification experiments.

(3) The specific enrichment percentage or range of enrichment percentages required between 5 and 20 percent.

(4) The chemical and physical form of HALEU required (metal, oxide, etc.).

TABLE 1—HALEU NEEDS BY YEAR

| | 2023 | 2024 | 2025 | 2026 | 2027 | 2028–2032 | 2033–2037 |
|---|---|---|---|---|---|---|---|
| MTU/yr. | | | | | | | |
| Specific enrichment % or range of enrichment required between 5–20%. | | | | | | | |

(5) For small quantity requests of HALEU of 50 kgU or less please provide:

a. An individual point of contact for resolving questions related to the request (name, organization, title, email address, phone number).

b. Quantity requested (in kilograms), enrichment level, and form (*e.g.,* UF6, metal, oxide, other).

c. Desired delivery date(s) for HALEU. Provide multiple dates and quantities if that would be the case to support multiple experiments over time.

d. How will the HALEU be used? Briefly describe the fuel form,

fabrication, and experiments to be conducted. Provide a schedule.

e. Is this activity associated with an existing public-private partnership or cost-shared agreement? If so, please identify the agreement.

f. Describe your capabilities, experience, and financing that will enable you to use the HALEU for the intended purpose on the schedule provided.

g. Describe your progress in achieving the following:

i. Regulatory approvals

ii. Fabrication services

iii. Access to experimental facilities

iv. Capabilities to ship/receive HALEU

v. Any other areas that are required to execute your plans.

h. Provide detailed material specifications for the HALEU including contamination and purity limits.

i. Provide any other requirements that would be important for us to know in processing your request.

*Statutory Authority:* Section 2001 of The Energy Act of 2020 (Pub. L. 116–260, Dec. 27, 2020).

**Signing Authority**

This document of the Department of Energy was signed on April 7, 2023, by Jon Carmack, Deputy Assistant Secretary for Nuclear Fuel Cycle and Supply Chain, Office of Nuclear Energy, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on April 11, 2023.

**Treena V. Garrett,**

*Federal Register Liaison Officer, U.S. Department of Energy.*

[FR Doc. 2023–07900 Filed 4–13–23; 8:45 am]

**BILLING CODE 6450–01–P**

## DEPARTMENT OF ENERGY

**[Docket No. 23–34–LNG]**

## Gulfstream LNG Development, LLC; Application for Long-Term Authorization to Export Liquefied Natural Gas to Non-Free Trade Agreement Nations

**AGENCY:** Office of Fossil Energy and Carbon Management, Department of Energy.

**ACTION:** Notice of application.

**SUMMARY:** The Office of Fossil Energy and Carbon Management (FECM) of the Department of Energy (DOE) gives notice (Notice) of receipt of an application (Application), filed by Gulfstream LNG Development, LLC (Gulfstream LNG) on March 10, 2023. Gulfstream LNG requests long-term, multi-contract authorization to export domestically produced liquefied natural gas (LNG) in a volume equivalent to 237.5 billion cubic feet per year (Bcf/yr) of natural gas from the proposed Gulfstream LNG Project, a LNG export project to be located in Plaquemines Parish, Louisiana. Gulfstream LNG filed the Application under the Natural Gas Act (NGA).

**DATES:** Protests, motions to intervene, or notices of intervention, as applicable, and written comments are to be filed electronically as detailed in the Public Comment Procedures section no later than 4:30 p.m., Eastern time, June 13, 2023.

**ADDRESSES:**

Electronic Filing by email: *fergas@hq.doe.gov.*

Although DOE has routinely accepted public comment submissions through a variety of mechanisms, including postal mail and hand delivery/courier, DOE has found it necessary to make temporary modifications to the comment submission process in light of the ongoing Covid-19 pandemic. DOE is currently accepting only electronic submissions at this time. If a commenter finds that this change poses an undue hardship, please contact Office of Resource Sustainability staff at (202) 586–4749 or (202) 586–7893 to discuss the need for alternative arrangements. Once the Covid-19 pandemic health emergency is resolved, DOE anticipates resuming all of its regular options for public comment submission, including postal mail and hand delivery/courier.

**FOR FURTHER INFORMATION CONTACT:**

Jennifer Wade or Peri Ulrey, U.S. Department of Energy (FE–34) Office of Regulation, Analysis, and Engagement, Office of Resource Sustainability Office of Fossil Energy and Carbon Management, Forrestal Building, Room 3E–042, 1000 Independence Avenue SW, Washington, DC 20585, (202) 586–4749 or (202) 586–7893, *jennifer.wade@hq.doe.gov* or *peri.ulrey@hq.doe.gov.*

Cassandra Bernstein, U.S. Department of Energy (GC–76) Office of the Assistant General Counsel for Energy Delivery and Resilience, Forrestal Building, Room 6D–033, 1000 Independence Avenue SW, Washington, DC 20585, (202) 586–9793, *cassandra.bernstein@hq.doe.gov.*

**SUPPLEMENTARY INFORMATION:**

Gulfstream LNG requests authorization to export domestically produced LNG by ocean-going vessel from its proposed Gulfstream LNG Project (Project), to be constructed and located on an approximately 500-acre parcel of land south of the town of Belle Chasse, Plaquemines Parish, Louisiana. Gulfstream LNG states that it has executed a Ground Lease and Joint Development Agreement with Louisiana 23 Development Company, which is developing the site with Plaquemines Port, Harbor & Terminal District. Gulfstream LNG seeks to export this LNG in a volume equivalent to 237.5 Bcf/yr of natural gas (equivalent to approximately 0.65 Bcf per day) on a non-additive basis to: (i) any nation with which the United States has entered into a free trade agreement (FTA) requiring national treatment for trade in natural gas (FTA nations), and (ii) any other nation with which trade is not prohibited by U.S. law or policy (non-FTA nations). This Notice applies only to the portion of the Application requesting authority to export LNG to non-FTA countries pursuant to section 3(a) of the NGA.[1] DOE will review Gulfstream LNG's request for an export authorization to FTA countries separately pursuant to NGA section 3(c).[2]

Gulfstream LNG seeks this authorization on its own behalf and as agent for other entities that hold title to the LNG at the point of export. Gulfstream LNG requests the authorization for a term to commence on the date of first export following the start of commercial operation of the Project, and to extend through December 31, 2050.

Additional details can be found in Gulfstream LNG's Application, posted on the DOE website at: *www.energy.gov/sites/default/files/2023-03/23-34-LNG.pdf.*

[1] 15 U.S.C. 717b(a).

[2] 15 U.S.C. 717b(c).

**DOE Evaluation**

In reviewing Gulfstream LNG's Application, DOE will consider any issues required by law or policy. DOE will consider domestic need for the natural gas, as well as any other issues determined to be appropriate, including whether the arrangement is consistent with DOE's policy of promoting competition in the marketplace by allowing commercial parties to freely negotiate their own trade arrangements. As part of this analysis, DOE will consider the study entitled, *Macroeconomic Outcomes of Market Determined Levels of U.S. LNG Exports* (2018 LNG Export Study),[3] and DOE's response to public comments received on that Study.[4]

Additionally, DOE will consider the following environmental documents:

- *Addendum to Environmental Review Documents Concerning Exports of Natural Gas From the United States,* 79 FR 48132 (Aug. 15, 2014); [5]
- *Life Cycle Greenhouse Gas Perspective on Exporting Liquefied Natural Gas From the United States,* 79 FR 32260 (June 4, 2014); [6] and
- *Life Cycle Greenhouse Gas Perspective on Exporting Liquefied Natural Gas From the United States: 2019 Update,* 84 FR 49278 (Sept. 19, 2019), and DOE's response to public comments received on that study.[7]

Parties that may oppose this Application should address these issues and documents in their comments and protests, as well as other issues deemed relevant to the Application.

The National Environmental Policy Act (NEPA), 42 U.S.C. 4321 *et seq.,* requires DOE to give appropriate consideration to the environmental effects of its proposed decisions. No final decision will be issued in this proceeding until DOE has met its environmental responsibilities.

**Public Comment Procedures**

In response to this Notice, any person may file a protest, comments, or a motion to intervene or notice of intervention, as applicable. Interested parties will be provided 60 days from the date of publication of this Notice in which to submit comments, protests, motions to intervene, or notices of intervention.

Any person wishing to become a party to this proceeding evaluating the Application must file a motion to intervene or notice of intervention. The filing of comments or a protest with respect to the Application will not serve to make the commenter or protestant a party to this proceeding, although protests and comments received from persons who are not parties will be considered in determining the appropriate action to be taken on the Application. All protests, comments, motions to intervene, or notices of intervention must meet the requirements specified by the regulations in 10 CFR part 590, including the service requirements.

As noted, DOE is only accepting electronic submissions at this time. Please email the filing to *fergas@hq.doe.gov.* All filings must include a reference to ''Docket No. 23–34–LNG'' or ''GULFSTREAM LNG DEVELOPMENT, LLC Application'' in the title line.

**Please Note:** Please include all related documents and attachments (*e.g.,* exhibits) in the original email correspondence. Please do not include any active hyperlinks or password protection in any of the documents or attachments related to the filing. All electronic filings submitted to DOE must follow these guidelines to ensure that all documents are filed in a timely manner.

The Application and any filed protests, motions to intervene, notices of intervention, and comments will also be available electronically by going to the following DOE Web address: *www.energy.gov/fecm/regulation.*

A decisional record on the Application will be developed through responses to this Notice by parties, including the parties' written comments and replies thereto. Additional procedures will be used as necessary to achieve a complete understanding of the facts and issues. If an additional procedure is scheduled, notice will be provided to all parties. If no party requests additional procedures, a final Opinion and Order may be issued based on the official record, including the Application and responses filed by parties pursuant to this Notice, in accordance with 10 CFR 590.316.

Signed in Washington, DC, on April 10, 2023.

**Amy Sweeney,**

*Director, Office of Regulation, Analysis, and Engagement, Office of Resource Sustainability.*

[FR Doc. 2023–07872 Filed 4–13–23; 8:45 am]

**BILLING CODE 6450–01–P**

[3] *See* NERA Economic Consulting, Macroeconomic Outcomes of Market Determined Levels of U.S. LNG Exports (June 7, 2018), *www.energy.gov/sites/prod/files/2018/06/f52/Macroeconomic%20LNG%20Export%20Study%202018.pdf.*

[4] U.S. Dep't of Energy, Study on Macroeconomic Outcomes of LNG Exports: Response to Comments Received on Study; Notice of Response to Comments, 83 FR 67251 (Dec. 28, 2018).

[5] The Addendum and related documents are available at *www.energy.gov/fecm/addendum-environmental-review-documents-concerning-exports-natural-gas-united-states.*

[6] The 2014 Life Cycle Greenhouse Gas Report is available at *www.energy.gov/fecm/life-cycle-greenhouse-gas-perspective-exporting-liquefied-natural-gas-united-states.*

[7] U.S. Dep't of Energy, Life Cycle Greenhouse Gas Perspective on Exporting Liquefied Natural Gas from the United States: 2019 Update—Response to Comments, 85 FR 72 (Jan. 2, 2020). The 2019 Update and related documents are available at *https://fossil.energy.gov/app/docketindex/docket/index/21.*

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. ER23–1542–000]**

### Desert Peak Energy Storage I, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Desert Peak Energy Storage I, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is May 1, 2023.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be

delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://www.ferc.gov*) using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact the Federal Energy Regulatory Commission at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

Dated: April 10, 2023.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2023–07936 Filed 4–13–23; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. ER23–1577–000]**

### Daggett Solar Power 2 LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Daggett Solar Power 2 LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is May 1, 2023.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://www.ferc.gov*) using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact the Federal Energy Regulatory Commission at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

Dated: April 10, 2023.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2023–07944 Filed 4–13–23; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. ER23–1543–000]**

### Desert Peak Energy Storage II, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Desert Peak Energy Storage II, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is May 1, 2023.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://www.ferc.gov*) using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact the Federal Energy Regulatory Commission at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

Dated: April 10, 2023.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2023–07937 Filed 4–13–23; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. ER23–1565–000]**

### Umbriel Solar, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Umbriel Solar, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is May 1, 2023.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://www.ferc.gov*) using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact the Federal Energy Regulatory Commission at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

Dated: April 10, 2023.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2023–07938 Filed 4–13–23; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. ER23–1585–000]**

### Riverstart Solar Park III LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Riverstart Solar Park III LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is May 1, 2023.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://www.ferc.gov*) using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact the Federal Energy Regulatory Commission at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

Dated: April 10, 2023.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2023–07947 Filed 4–13–23; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Project No. 1971–135]**

### Idaho Power Company; Notice of Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Protests

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Type of Application:* Non-Capacity Amendment of License.

b. *Project No.:* 1971–135.

c. *Date Filed:* October 6 and 7, 2022, and supplemented October 21, 2022 and March 17, 2023.

d. *Applicant:* Idaho Power Company (licensee).

e. *Name of Project:* Hells Canyon Project.

f. *Location:* The project is located on the Snake River in Adams and Washington counties, Idaho, and in Baker, Wallowa, and Malheur counties, Oregon. Federal lands administered by the U.S. Forest Service and the Bureau of Land Management (Payette and Wallowa-Whitman National Forests and Hells Canyon National Recreational Area) are included within the project boundary.

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791a–825r.

h. *Applicant Contact:* Mr. Nathan Gardiner, Senior Counsel, Idaho Power Company, 1221 West Idaho Street, Boise, ID 83702; (208) 388–2975; *ngardiner@idahopower.com.*

Mr. Scott Pugrud, Corporate Counsel, Idaho Power Company, 1221 West Idaho Street, Boise, ID 83702; (208) 388–2975; *spugrud2@idahopower.com.*

i. *FERC Contact:* Jeremy Jessup, (202) 502–6779, *Jeremy.Jessup@ferc.gov.*

j. *Deadline for filing comments, motions to intervene, and protests:* May 10, 2023.

The Commission strongly encourages electronic filing. Please file comments, motions to intervene, and protests using the Commission's eFiling system at *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY). In lieu of electronic filing, you may submit a paper copy. Submissions sent via the U.S. Postal Service must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852. The first page of any filing should include the docket number 1971–135. Comments emailed to Commission staff are not considered part of the Commission record.

The Commission's Rules of Practice and Procedure require all intervenors filing documents with the Commission to serve a copy of that document on each person whose name appears on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, it must also serve a copy of the document on that resource agency.

k. *Description of Request:* The licensee proposes to refurbish the four turbine generating units at the Oxbow Development of the project sequentially over the course of approximately four years. The licensee also proposes to increase the size of the erection deck at the development by extending it to the east and provide an area for additional parking and a job trailer to facilitate the turbine generating maintenance. All proposed activity for the turbine and generator maintenance would occur in the powerhouse. The only ground disturbing area would be to the east of the existing erection deck and would be approximately 0.75 acres. None of the work being done will involve in water work, and the licensee would use best management practices for construction. A single turbine generating unit would be offline periodically during the refurbishment period. Therefore, the proposal may result in an increased flow over the spillway while the work is being done, depending on whether the inflow to the project exceeds the hydraulic capacity of the three online units. Under the proposal, the total authorized capacity of the project would increase from 1,222,300 to 1,252,065 kilowatts and the hydraulic capacity of each unit at the Oxbow Development would increase from 5,400 to 6,000 cubic feet per second.

l. *Locations of the Application:* This filing may be viewed on the Commission's website at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, call 1–866–208–3676 or email *FERCOnlineSupport@ferc.gov,* for TTY, call (202) 502–8659. Agencies may obtain copies of the application directly from the applicant.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Comments, Protests, or Motions to Intervene:* Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214, respectively. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. *Filing and Service of Documents:* Any filing must (1) bear in all capital letters the title ''COMMENTS'', ''PROTEST'', or ''MOTION TO INTERVENE'' as applicable; (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person commenting, protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, motions to intervene, or protests must set forth their evidentiary basis. Any filing made by an intervenor must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 385.2010.

Dated: April 10, 2023.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2023–07935 Filed 4–13–23; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. ER23–1541–000]**

### Desert Peak Energy Center, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Desert Peak Energy Center, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888

First Street NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is May 1, 2023.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

In addition to publishing the full text of this document in the **Federal Register,** the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://www.ferc.gov*) using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact the Federal Energy Regulatory Commission at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

Dated: April 10, 2023.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2023–07934 Filed 4–13–23; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. ER23–1583–000]**

### Indiana Crossroads Wind Farm II LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Indiana Crossroads Wind Farm II LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is May 1, 2023.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://www.ferc.gov*) using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact the Federal Energy Regulatory Commission at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

Dated: April 10, 2023.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2023–07946 Filed 4–13–23; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

### Combined Notice of Filings #1

Take notice that the Commission received the following exempt wholesale generator filings:

*Docket Numbers:* EG23–119–000.

*Applicants:* Hecate Energy Desert Storage 1 LLC.

*Description:* Hecate Energy Desert Storage 1 LLC submits Notice of Self-Certification of Exempt Wholesale Generator Status.

*Filed Date:* 4/7/23.

*Accession Number:* 20230407–5156.

*Comment Date:* 5 p.m. ET 4/28/23.

Take notice that the Commission received the following electric rate filings:

*Docket Numbers:* ER17–1394–007; ER19–2429–007; ER19–2728–004; ER19–2729–004.

*Applicants:* Lily Solar Lessee, LLC, Lily Solar LLC, Brookfield Smoky Mountain Hydropower LP, 83WI 8me, LLC.

*Description:* Notice of Non-Material Change in Status of 83WI 8me, LLC, et al.

*Filed Date:* 4/5/23.

*Accession Number:* 20230405–5189.

*Comment Date:* 5 p.m. ET 4/26/23.

*Docket Numbers:* ER23–1275–000; ER23–1276–000.

*Applicants:* Aron Energy Prepay 22 LLC, Aron Energy Prepay 21 LLC.

*Description:* Supplemental of Refund Report of Aron Energy Prepay 21 LLC et al.

*Filed Date:* 3/28/23.

*Accession Number:* 20230328–5294.

*Comment Date:* 5 p.m. ET 4/20/23.

*Docket Numbers:* ER23–1596–000.

*Applicants:* Tri-State Generation and Transmission Association, Inc.

*Description:* § 205(d) Rate Filing: Certificate of Concurrence—Amendment to Rate Schedule FERC No. 328 to be effective 5/1/2023.

*Filed Date:* 4/7/23.

*Accession Number:* 20230407–5139.

*Comment Date:* 5 p.m. ET 4/28/23.

*Docket Numbers:* ER23–1597–000.

*Applicants:* Idaho Power Company.

*Description:* § 205(d) Rate Filing: IPC/PAC JOOA Agreement—Changes to Rate Schedule 158 to be effective 6/9/2023.

*Filed Date:* 4/10/23.

*Accession Number:* 20230410–5000.

*Comment Date:* 5 p.m. ET 5/1/23.

*Docket Numbers:* ER23–1598–000.

*Applicants:* Versant Power.

*Description:* Application for the Establishment and Recovery of Regulatory Assets of Versant Power.

*Filed Date:* 4/7/23.

*Accession Number:* 20230407–5157.

*Comment Date:* 5 p.m. ET 4/28/23.

*Docket Numbers:* ER23–1599–000.

*Applicants:* PJM Interconnection, L.L.C.

*Description:* § 205(d) Rate Filing: Amendment to ISA, SA No. 5757; Queue No. AC1–161 to be effective 6/9/2023.

*Filed Date:* 4/10/23.

*Accession Number:* 20230410–5035.

*Comment Date:* 5 p.m. ET 5/1/23.

*Docket Numbers:* ER23–1600–000.

*Applicants:* AEP Texas Inc.

*Description:* § 205(d) Rate Filing: AEPTX-Coleman County Electric Cooperative Amended TSA to be effective 3/10/2023.

*Filed Date:* 4/10/23.

*Accession Number:* 20230410–5036.

*Comment Date:* 5 p.m. ET 5/1/23.

*Docket Numbers:* ER23–1601–000.

*Applicants:* Alabama Power Company, Georgia Power Company, Mississippi Power Company.

*Description:* Tariff Amendment: Alabama Power Company submits tariff filing per 35.15: Madden Solar Center LGIA Termination Filing to be effective 4/10/2023.

*Filed Date:* 4/10/23.

*Accession Number:* 20230410–5060.

*Comment Date:* 5 p.m. ET 5/1/23.

*Docket Numbers:* ER23–1602–000.

*Applicants:* H.Q. Energy Services (U.S.) Inc.

*Description:* § 205(d) Rate Filing: Update to MBR Tariff to be effective 4/11/2023.

*Filed Date:* 4/10/23.

*Accession Number:* 20230410–5073.

*Comment Date:* 5 p.m. ET 5/1/23.

*Docket Numbers:* ER23–1603–000.

*Applicants:* ITC Midwest LLC.

*Description:* § 205(d) Rate Filing: Joint Use Pole Agreement with City of Ames (Rate Schedule No. 224) to be effective 6/10/2023.

*Filed Date:* 4/10/23.

*Accession Number:* 20230410–5093.

*Comment Date:* 5 p.m. ET 5/1/23.

*Docket Numbers:* ER23–1604–000.

*Applicants:* Pacific Gas & Electric Company.

*Description:* Notice of Termination of Service Agreement No. 11 under Pacific Gas and Electric Company's FERC Electric Tariff Volume No. 4.

*Filed Date:* 3/28/23.

*Accession Number:* 20230328–5306.

*Comment Date:* 5 p.m. ET 4/18/23.

The filings are accessible in the Commission's eLibrary system (*https://elibrary.ferc.gov/idmws/search/fercgensearch.asp*) by querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: April 10, 2023.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2023–07933 Filed 4–13–23; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. ER23–1582–000]**

### Crooked Lake Solar, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Crooked Lake Solar, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is May 1, 2023.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://www.ferc.gov*) using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact the Federal Energy Regulatory Commission at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

Dated: April 10, 2023.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2023–07945 Filed 4–13–23; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. ER23–1589–000]**

### AES ES Westwing, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of AES ES Westwing, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is May 1, 2023.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://www.ferc.gov*) using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact the Federal Energy Regulatory Commission at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

Dated: April 10, 2023.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2023–07948 Filed 4–13–23; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. ER23–1594–000]**

### Hecate Energy Desert Storage 1 LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Hecate Energy Desert Storage 1 LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is May 1, 2023.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://www.ferc.gov*) using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact the Federal Energy Regulatory Commission at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

Dated: April 10, 2023.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2023–07949 Filed 4–13–23; 8:45 am]

**BILLING CODE 6717–01–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[FRL–10895–01–OAR]**

### Announcing Upcoming Meeting of Mobile Sources Technical Review Subcommittee

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** Pursuant to the Federal Advisory Committee Act, the Environmental Protection Agency (EPA) announces an upcoming meeting of the Mobile Sources Technical Review Subcommittee (MSTRS), which is a subcommittee under the Clean Air Act Advisory Committee (CAAAC). This is a hybrid (both in-person and virtual) meeting and open to the public. The meeting will include discussion of current topics and presentations about activities being conducted by EPA's Office of Transportation and Air Quality. MSTRS listserv subscribers will

receive notification when the agenda is available on the Subcommittee website. To subscribe to the MSTRS listserv, send an email to *MSTRS@epa.gov.*

**DATES:** EPA will hold a hybrid (both in-person and virtual) public meeting on Thursday, May 11, 2023 from 10:00 a.m. to 4:30 p.m. Eastern Daylight Time (EDT). Registration for in-person participants begins at 9:30 a.m. Please monitor the website *https://www.epa.gov/caaac/mobile-sources-technical-review-subcommittee-mstrs-caaac* for any changes to meeting logistics. The final meeting agenda will be posted on the website.

**ADDRESSES:** The meeting is currently scheduled to be held virtually and at EPA's National Vehicle and Fuel Emissions Laboratory, 2565 Plymouth Rd., Ann Arbor, MI 48105. However, this date and location are subject to change and interested parties should monitor the Subcommittee website (above) for the latest logistical information. For information on the public meeting or to register to attend, please contact *MSTRS@epa.gov.*

**FOR FURTHER INFORMATION CONTACT:** Further information concerning this public meeting and general information concerning the MSTRS can be found at: *https://www.epa.gov/caaac/mobile-sources-technical-review-subcommittee-mstrs-caaac.* Other MSTRS inquiries can be directed to Jessica Mroz, the Designated Federal Officer for MSTRS, Office of Transportation and Air Quality, at 202–564–1094 or *mroz.jessica@epa.gov.*

**SUPPLEMENTARY INFORMATION:** During the meeting, the Subcommittee may also hear progress reports from its workgroups as well as updates and announcements on Office of Transportation and Air Quality activities of general interest to attendees.

*Participation in hyrbid public meetings. The hybrid (both in-person and virtual) public meeting will provide interested parties the opportunity to participate in this Federal Advisory Committee meeting.*

*For individuals with disabilities:* For information on access or services for individuals with disabilities, please email *MSTRS@epa.gov.* To request accommodate of a disability, please email *MSTRS@epa.gov,* preferably at least 10 business days prior to the meeting, to give EPA as much time as possible to process your request.

EPA is asking all meeting attendees, even those who do not intend to speak, to register for the meeting by sending an email to the address listed in the **FOR FURTHER INFORMATION CONTACT** section above, by Thursday, April 27, 2023. This will help EPA ensure that sufficient participation capacity will be available.

Please note that any updates made to any aspect of the meeting logistics, including potential additional sessions, will be posted online at *https://www.epa.gov/caaac/mobile-sources-technical-review-subcommittee-mstrs-caaac.* While EPA expects the meeting to go forward as set forth above, please monitor the website for any updates.

**Jessica Mroz,**

*Designated Federal Officer, Mobile Source Technical Review Subcommittee, Office of Transportation and Air Quality.*

[FR Doc. 2023–07916 Filed 4–13–23; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[FRL OP–OFA–065]**

### Environmental Impact Statements; Notice of Availability

*Responsible Agency:* Office of Federal Activities, General Information 202–564–5632 or *https://www.epa.gov/nepa.*

Weekly receipt of Environmental Impact Statements (EIS)

Filed April 3, 2023 10 a.m. EST

Through April 10, 2023 10 a.m. EST

Pursuant to 40 CFR 1506.9.

**Notice**

Section 309(a) of the Clean Air Act requires that EPA make public its comments on EISs issued by other Federal agencies. EPA's comment letters on EISs are available at: *https://cdxapps.epa.gov/cdx-enepa-II/public/action/eis/search.*

*EIS No. 20230048, Final, GSA, MD*, U.S. Food and Drug Administration Muirkirk Road Campus Master Plan, Review Period Ends: 05/15/2023, Contact: Lindsey Veas 202–262–9236.

*EIS No. 20230049, Final, FERC, ND*, Wahpeton Expansion Project, Review Period Ends: 05/15/2023, Contact: Office of External Affairs 866–208–3372.

*EIS No. 20230050, Final, TxDOT, TX*, Spur 399 Extension, Contact: Doug Booher 512–416–2663.

Under 23 U.S.C. 139(n)(2), TxDOT has issued a single document that consists of a final environmental impact statement and record of decision. Therefore, the 30-day wait/review period under NEPA does not apply to this action.

*EIS No. 20230051, Draft Supplement, BR, CO*, Near-term Colorado River Operations, Comment Period Ends: 05/30/2023, Contact: Genevieve Johnson 602–609–6739.

*EIS No. 20230052, Final Supplement, USFS, VA*, Mountain Valley Pipeline and Equitrans Expansion Project, Review Period Ends: 05/15/2023, Contact: Joby Timm 540–265–5100.

**Amended Notice**

EIS No. 20230007, Draft, TxDOT, TX, US 380 McKinney, Comment Period Ends: 04/20/2023, Contact: Doug Booher 512–416–2663.

Revision to FR Notice Published 03/24/2023; Extending the Comment Period from 04/05/2023 to 04/20/2023.

Dated: April 10, 2023.

**Cindy S. Barger,**

*Director, NEPA Compliance Division, Office of Federal Activities.*

[FR Doc. 2023–07923 Filed 4–13–23; 8:45 am]

**BILLING CODE 6560–50–P**

## FEDERAL DEPOSIT INSURANCE CORPORATION

### Sunshine Act Meetings

**TIME AND DATE:** 10 a.m. on Tuesday, April 18, 2023.

**PLACE:** This Board meeting will be open to public observation only by webcast. Visit *https://www.fdic.gov/news/board-matters/* for a link to the webcast. FDIC Board Members and staff will participate from FDIC Headquarters, 550 17th Street NW, Washington, DC.

Observers requiring auxiliary aids (*e.g.,* sign language interpretation) for this meeting should email *DisabilityProgram@fdic.gov* to make necessary arrangements.

**STATUS:** Open to public observation via webcast.

**MATTER TO BE CONSIDERED:** The Federal Deposit Insurance Corporation's Board of Directors will meet to consider the following matters:

**Discussion Agenda**

Semiannual Update of the DIF Restoration Plan.

**Summary Agenda**

No substantive discussion of the following items is anticipated. The Board will resolve these matters with a single vote unless a member of the Board of Directors requests that an item be moved to the discussion agenda.

Disposition of Minutes of a Board of Directors' Meeting Previously Distributed.

Summary reports, status reports, and reports of actions taken pursuant to authority delegated by the Board of Directors.

**CONTACT PERSON FOR MORE INFORMATION:** Direct requests for further information concerning the meeting to Debra A. Decker, Executive Secretary of the Corporation, at 202–898–8748.

*Authority:* 5 U.S.C. 552b.

Dated at Washington, DC, on April 11, 2023.

Federal Deposit Insurance Corporation.

**James P. Sheesley,**

*Assistant Executive Secretary.*

[FR Doc. 2023–08001 Filed 4–12–23; 11:15 am]

**BILLING CODE 6714–01–P**

## FEDERAL HOUSING FINANCE AGENCY

**[No. 2023–N–6]**

## Proposed Collection; Comment Request

**AGENCY:** Federal Housing Finance Agency.

**ACTION:** National Survey of Mortgage Originations—30-Day notice of submission of information collection for approval from Office of Management and Budget.

**SUMMARY:** In accordance with the requirements of the Paperwork Reduction Act of 1995 (PRA), the Federal Housing Finance Agency (FHFA) is seeking public comments concerning an information collection known as the ''National Survey of Mortgage Originations'' (NSMO), which has been assigned control number 2590–0012 by the Office of Management and Budget (OMB). FHFA intends to submit the information collection to OMB for review and approval of a three-year extension of the control number, which is due to expire on June 30, 2023.

**DATES:** Interested persons may submit comments on or before May 15, 2023.

**ADDRESSES:** Submit comments to the Office of Information and Regulatory Affairs of the Office of Management and Budget, Attention: Desk Officer for the Federal Housing Finance Agency, Washington, DC 20503, Fax: (202) 395–3047, Email: *OIRA_submission@omb.eop.gov.* Please also submit comments to FHFA, identified by ''Proposed Collection; Comment Request: 'National Survey of Mortgage Originations, (No. 2023–N–6)' '' by any of the following methods:

- *Agency Website: www.fhfa.gov/open-for-comment-or-input.*
- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments. If you submit your comment to the *Federal eRulemaking Portal,* please also send it by *email* to FHFA at *RegComments@fhfa.gov* to ensure timely receipt by the agency.
- *Mail/Hand Delivery:* Federal Housing Finance Agency, Fourth Floor, 400 Seventh Street SW, Washington, DC 20219, ATTENTION: Proposed Collection; Comment Request: ''National Survey of Mortgage Originations, (No. 2023–N–6).'' Please note that all mail sent to FHFA via the U.S. Postal Service is routed through a national irradiation facility, a process that may delay delivery by approximately two weeks. For any time-sensitive correspondence, please plan accordingly.

We will post all public comments we receive without change, including any personal information you provide, such as your name and address, email address, and telephone number, on the FHFA website at *http://www.fhfa.gov.*

Copies of all comments received will be available for examination by the public through the electronic comment docket for this PRA Notice also located on the FHFA website.

**FOR FURTHER INFORMATION CONTACT:** Saty Patrabansh, Associate Director, Office of Data and Statistics, *Saty.Patrabansh@fhfa.gov,* (202) 649–3213; or Angela Supervielle, Counsel, *Angela.Supervielle@fhfa.gov,* (202) 649–3973, (these are not toll-free numbers). For TTY/TRS users with hearing and speech disabilities, dial 711 and ask to be connected to any of the contact numbers above.

**SUPPLEMENTARY INFORMATION:**

### A. Need for and Use of the Information Collection

The NSMO is a recurring quarterly survey of individuals who have recently obtained a loan secured by a first mortgage on single-family residential property. The survey questionnaire is sent to a representative sample of approximately 6,000 recent mortgage borrowers each calendar quarter and typically consists of about 96 multiple choice and short answer questions designed to obtain information about borrowers' experiences in choosing and in taking out a mortgage.[1] The questionnaire may be completed either on paper (in English only) or electronically online (in either English or Spanish). FHFA is also seeking clearance to pretest future iterations of the survey questionnaire and related materials from time to time through the use of cognitive pre-testing. A copy of the survey questionnaire sent out in the first quarter of 2023 appears at the end of this notice.[2]

The NSMO is a component of the ''National Mortgage Database'' (NMDB) Program which is a joint effort of FHFA and the Consumer Financial Protection Bureau (CFPB). The NMDB Program is designed to satisfy the Congressionally-mandated requirements of section 1324(c) of the Federal Housing Enterprises Financial Safety and Soundness Act.[3] Section 1324(c) requires that FHFA conduct a monthly survey to collect data on the characteristics of individual prime and subprime mortgages, and on the borrowers and properties associated with those mortgages, in order to enable it to prepare a detailed annual report on the mortgage market activities of the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) for review by the appropriate Congressional oversight committees. Section 1324(c) also authorizes and requires FHFA to compile a database of otherwise unavailable residential mortgage market information and to make that information available to the public in a timely fashion.

As a means of fulfilling those and other statutory requirements, as well as to support policymaking and research regarding the residential mortgage markets, FHFA and CFPB jointly established the NMDB Program in 2012. The Program is designed to provide comprehensive information about the U.S. mortgage market and has three primary components: (1) the NMDB; (2) the NSMO; and (3) the American Survey of Mortgage Borrowers (ASMB).

The NMDB is a de-identified loan-level database of closed-end first-lien residential mortgage loans that is representative of the market as a whole, contains detailed loan-level information on the terms and performance of the mortgages and the characteristics of the associated borrowers and properties, is continually updated, has an historical component dating back to 1998, and provides a sampling frame for surveys to collect additional information. The core data in the NMDB are drawn from a random 1-in-20 sample of all closed-end first-lien mortgage files outstanding at any time between January 1998 and the present in the files of Experian, one of the three national credit repositories, with a random sample of mortgages

[1] The NSMO questionnaire sent out in the first quarter of 2023 contained 96 questions.

[2] In addition, a copy of the questionnaire can be accessed online at: *http://www.fhfa.gov/Homeownersbuyer/Pages/National-Survey-of-Mortgage-Originations.aspx.*

[3] 12 U.S.C. 4544(c).

newly reported to Experian added each quarter.

The NMDB draws additional information on mortgages in the NMDB datasets from other existing sources, including the Home Mortgage Disclosure Act (HMDA) data that are maintained by the Federal Financial Institutions Examination Council (FFIEC), property valuation models, and administrative data files maintained by Fannie Mae and Freddie Mac and by federal agencies. FHFA also obtains data from the ASMB, which historically solicited information on borrowers' experience with maintaining their existing mortgages, including their experience maintaining mortgages under financial stress, their experience in soliciting financial assistance, their success in accessing federally-sponsored programs designed to assist them, and, where applicable, any challenges they may have had in terminating a mortgage loan.[4]

While the ASMB focused on borrowers' experience with maintaining existing mortgages, the NSMO solicits information on newly-originated mortgages and the borrowers' experiences with the mortgage origination process. It was developed to complement the NMDB by providing critical and timely information—not available from existing sources—on the range of nontraditional and subprime mortgage products being offered, the methods by which these mortgages are being marketed, and the characteristics of borrowers for these types of loans. In particular, the survey questionnaire is designed to elicit directly from mortgage borrowers information on the characteristics of the borrowers and on their experiences in finding and obtaining a mortgage loan, including: their mortgage shopping behavior; their mortgage closing experiences; their expectations regarding house price appreciation; and critical financial and other life events affecting their households, such as unemployment, expenses or divorce. The survey questions do not focus on the terms of the borrowers' mortgage loans because these fields are available in the Experian data. However, the NSMO collects a limited amount of information on each respondent's mortgage to verify that the Experian records and survey responses pertain to the same mortgage.

Each wave of the NSMO is sent to the primary borrowers on about 6,000 mortgage loans, which are drawn from a simple random sample of about 100,000 newly originated mortgage loans that are added to the National Mortgage Database from the Experian files each quarter (at present, this represents an approximately 1-in-15 sample of loans added to the National Mortgage Database and an approximately 1-in-300 sample of all mortgage loan originations). By contract with FHFA, the conduct of the NSMO is administered through Experian, which has subcontracted the survey administration through a competitive process to Westat, a nationally-recognized survey vendor.[5] Westat also carries out the pre-testing of the survey materials.

[4] OMB has assigned the ASMB control no. 2590–0015, which expires on July 31, 2025.

## B. Need for and Use of the Information Collection

FHFA views the NMDB Program as a whole, including the NSMO, as the monthly ''survey'' that is required by section 1324 of the Safety and Soundness Act. Core inputs to the NMDB, such as a regular refresh of the Experian data, occur monthly, though NSMO itself does not. In combination with the other information in the NMDB, the information obtained through the NSMO is used to prepare the report to Congress on the mortgage market activities of Fannie Mae and Freddie Mac that FHFA is required to submit under section 1324, as well as for research and analysis by FHFA and CFPB in support of their regulatory and supervisory responsibilities related to the residential mortgage markets. The NSMO is especially critical in ensuring that the NMDB contains uniquely comprehensive information on the range of nontraditional and subprime mortgage products being offered, the methods by which these mortgages are being marketed and the characteristics—and particularly the creditworthiness—of borrowers for these types of loans. In March 2023, FHFA and the CFPB released a loan-level dataset collected through the NSMO for public use.[6] The information provides a resource for research and analysis by federal agencies, by Fannie Mae and Freddie Mac, and by academics and other interested parties outside of the government.

FHFA is also seeking OMB approval to continue to conduct cognitive pre-testing of the survey materials. The Agency uses information collected through that process to assist in drafting and modifying the survey questions and instructions, as well as the related communications, to read in the way that will be most readily understood by the survey respondents and that will be most likely to elicit usable responses. Such information is also used to help the Agency decide on how best to organize and format the survey questionnaires.

The OMB control number for this information collection is 2590–0012. The current clearance for the information collection expires on June 30, 2023.

[5] The Fair Credit Reporting Act, 15 U.S.C. 1681 *et seq.,* requires that the survey process, because it utilizes borrower names and addresses drawn from credit reporting agency records, must be administered through Experian in order to maintain consumer privacy.

[6] The March 2023 NSMO public use dataset can be accessed here: *https://www.fhfa.gov/DataTools/Downloads/Pages/NMDB_Data_Sets.aspx.*

## C. Burden Estimate

FHFA has analyzed the hour burden on members of the public associated with conducting the survey (10,080 hours) and with pre-testing the survey materials (50 hours) and estimates the total annual hour burden imposed on the public by this information collection to be 10,130 hours. The estimate for each phase of the collection was calculated as follows:

*I. Conducting the Survey*

FHFA estimates that the NSMO questionnaire will be sent to 24,000 recipients annually (6,000 recipients per quarterly survey × 4 calendar quarters). Although, based on historical experience, the Agency expects that only 20 to 30 percent of those surveys will be returned, it has assumed that all of the surveys will be returned for purposes of this burden calculation. Based on the reported experience of respondents to prior NSMO questionnaires, FHFA estimates that it will take each respondent 25 minutes to complete the survey, including the gathering of necessary materials to respond to the questions. This results in a total annual burden estimate of 10,080 hours for the survey phase of this collection (24,000 respondents × .42 hours per respondent = 10,080 hours annually).

*II. Pre-Testing the Materials*

FHFA estimates that it will pre-test the survey materials with 50 cognitive testing participants annually. The estimated participation time for each participant is one hour, resulting in a total annual burden estimate of 50 hours for the pre-testing phase of the collection (50 participants × 1 hour per participant = 50 hours annually).

## D. Comment Request

In accordance with the requirements of 5 CFR 1320.8(d), FHFA published an initial notice and request for public comments regarding this information

collection in the **Federal Register** on December 6, 2022.[7] The 60-day comment period closed on February 6, 2023. FHFA received no comments.

FHFA requests written comments on the following: (1) Whether the collection of information is necessary for the proper performance of FHFA functions, including whether the information has practical utility; (2) the accuracy of FHFA's estimates of the burdens of the collection of information; (3) ways to enhance the quality, utility, and clarity of the information collected; and (4) 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.

**Shawn Bucholtz,**

*Chief Data Officer, Federal Housing Finance Agency.*

**BILLING CODE 8070–01–P**

## *Improving Mortgage Experiences in America*

### National Survey of Mortgage Originations

You have been selected to participate in an important national survey. Learning directly from borrowers like you about your experiences obtaining a mortgage to purchase or refinance your home will help us improve lending practices and the mortgage process for future borrowers like you.

**To Complete the Survey Online**

| | |
|---|---|
| **PC/TABLET** | **Go to: www.NSMOsurvey.com and enter the unique access code provided in the letter and your 5-digit zip code.** |
| **MOBILE DEVICE** | **Text your unique access code to (202) 759-2029 to receive a link to the survey or scan the QR code.** |
| **ESPAÑOL** | **Vaya a: www.NSMOsurvey.com e ingrese el código de acceso único que se le envió en la carta y su código postal de 5 dígitos.** |
| | **Para contestar la encuesta en un aparato móvil/teléfono inteligente Envie en un mensaje de texto su código de acceso único al (202) 759-2029 o escanee el código QR.** |

**While we prefer online to help us save costs for processing, it is important we hear from you. If you prefer paper, you can mail back the completed survey in the enclosed pre-paid postage envelope.**

If you have any questions or need assistance completing this due to a disability, please call us toll free at 1-855-531-0724, TTY #711 or visit our web sites www.fhfa.gov/nsmo or www.consumerfinance.gov.

[7] *See* 87 FR 74616 (Dec. 6, 2022).

# National Survey of Mortgage Originations

## Who is sponsoring this survey?

The **Federal Housing Finance Agency (FHFA),** is an independent regulatory agency responsible for the effective supervision, regulation, and housing mission oversight of **Fannie Mae**, **Freddie Mac**, the Federal Home Loan Bank System, and the Office of Finance, and ensures a competitive, liquid, efficient, and resilient housing finance market.

The **Consumer Financial Protection Bureau (CFPB)** is a Federal agency created in 2010 to make mortgages, credit cards, automobile and other consumer loans work better and ensure that these markets are fair, transparent, and competitive.

## How was I selected for this survey?

Survey recipients were selected at random from across the United States. Your answers will not be connected to your name or any other identifying information.

## How long will it take?

The time will vary based on your experiences, but you can expect to spend 15-25 minutes.

**Privacy Act Notice:** In accordance with the Privacy Act, as amended (5 U.S.C. § 552a), the following notice is provided. The information requested on this Survey is collected pursuant to 12 U.S.C. 4544 for the purposes of gathering information for the National Mortgage Database. Routine uses which may be made of the collected information can be found in the Federal Housing Finance Agency's System of Records Notice (SORN) FHFA-21 National Mortgage Database. Providing the requested information is voluntary. Submission of the survey authorizes FHFA to collect the information provided and to disclose it as set forth in the referenced SORN.

**Paperwork Reduction Act Statement:** Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the Paperwork Reduction Act, unless that collection of information displays a currently valid OMB Control Number.

OMB No. 2590-0012
Expires 6/30/23

1. **Did you take out or co-sign for a mortgage loan sometime in the last couple of years including a purchase or any refinance/modification of an existing loan?**

☐ Yes
☐ No → **Skip to 71 on page 7**

2. **When did you take out this mortgage?** If you took out or co-signed for more than one mortgage, please refer to your experience with the most recent refinance, modification, or new mortgage.

_____ / _____
month year

3. **Did we mail this survey to the address of the property you financed with this mortgage?**

☐ Yes ☐ No

4. **Who signed or co-signed for this mortgage?** *Mark all that apply.*

☐ I signed
☐ Spouse/partner including a former spouse/partner
☐ Parents
☐ Children
☐ Other relatives
☐ Other (e.g. friend, business partner)

→ **If you co-signed this loan with others, take into account all co-signers as best you can when answering the survey. If no co-signers, answer based on your own situation.**

5. **When you began the process of getting this mortgage, how familiar were you (and any co-signers) with each of the following?**

| | Very | Somewhat | Not At All |
|---|---|---|---|
| The mortgage interest rates available at that time | ☐ | ☐ | ☐ |
| The different types of mortgages available | ☐ | ☐ | ☐ |
| The mortgage process | ☐ | ☐ | ☐ |
| The down payment needed to qualify for a mortgage | ☐ | ☐ | ☐ |
| The income needed to qualify for a mortgage | ☐ | ☐ | ☐ |
| Your credit history or credit score | ☐ | ☐ | ☐ |
| The money needed at closing | ☐ | ☐ | ☐ |

6. **When you began the process of getting this mortgage, how concerned were you about qualifying for a mortgage?**

☐ Very ☐ Somewhat ☐ Not at all

7. **How firm an idea did you have about the mortgage you wanted?**

☐ Firm idea ☐ Some idea ☐ Little idea

8. **How much did you use each of the following sources to get information about mortgages or mortgage lenders?**

| | A Lot | A Little | Not At All |
|---|---|---|---|
| Your mortgage lender/broker | ☐ | ☐ | ☐ |
| Other mortgage lenders/brokers | ☐ | ☐ | ☐ |
| Real estate agents or builders | ☐ | ☐ | ☐ |
| Material in the mail | ☐ | ☐ | ☐ |
| Websites that provide information on getting a mortgage | ☐ | ☐ | ☐ |
| Newspaper/TV/Radio | ☐ | ☐ | ☐ |
| Friends/relatives/co-workers | ☐ | ☐ | ☐ |
| Bankers, credit unions or financial planners | ☐ | ☐ | ☐ |
| Housing counselors | ☐ | ☐ | ☐ |
| Other (specify) _____ | ☐ | ☐ | ☐ |

9. **Which one of the following best describes your shopping process?**

☐ I picked the loan type first, and then I picked the mortgage lender/broker
☐ I picked the mortgage lender/broker first, and then I picked the loan type

10. **Which one of the following best describes how you applied for this mortgage?**

☐ Directly to a lender, such as a bank or credit union
☐ Through a mortgage broker who works with multiple lenders to get you a loan
☐ Through a builder who arranged financing
☐ Other (specify) _____

11. **How many different mortgage lenders/brokers did you seriously consider before choosing where to apply for this mortgage?**

☐ 1 ☐ 2 ☐ 3 ☐ 4 ☐ 5 or more

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**12. How many different mortgage lenders/brokers did you end up applying to?**

☐ 1 ☐ 2 ☐ 3 ☐ 4 ☐ 5 or more

**13. Did you apply to more than one mortgage lender/broker for any of the following reasons?**

| | Yes | No |
|---|---|---|
| Searching for better loan terms | ☐ | ☐ |
| Concern over qualifying for a loan | ☐ | ☐ |
| Information learned from the "Loan Estimate" | ☐ | ☐ |
| Turned down on earlier application | ☐ | ☐ |

**14. How important were each of the following in choosing the mortgage lender/broker you used for the mortgage you took out?**

| | Important | Not Important |
|---|---|---|
| Having an established banking relationship | ☐ | ☐ |
| Having a local office or branch nearby | ☐ | ☐ |
| Used previously to get a mortgage | ☐ | ☐ |
| Mortgage lender/broker is a personal friend or relative | ☐ | ☐ |
| Paperless online mortgage process | ☐ | ☐ |
| Recommendation from a friend/ relative/co-worker | ☐ | ☐ |
| Recommendation from a real estate agent/home builder | ☐ | ☐ |
| Reputation of mortgage lender/broker | ☐ | ☐ |
| Spoke my primary language, which is not English | ☐ | ☐ |
| Accommodations for people with disabilities | ☐ | ☐ |

**15. Who initiated the first contact between you and the mortgage lender/broker you used for the mortgage you took out?**

☐ I (or one of my co-signers) did
☐ The mortgage lender/broker did
☐ We were put in contact by a third party *(such as a real estate agent or home builder)*

**16. While you were getting your mortgage, how did you primarily interact with your mortgage lender/broker?**

☐ Online (web portal, email)
☐ Phone (voice calls, text messages, fax)
☐ Mail
☐ In person
☐ No primary way

**17. How open were you to suggestions from your mortgage lender/broker about mortgages with different features or terms?**

☐ Very ☐ Somewhat ☐ Not at all

**18. How important were each of the following in determining the mortgage you took out?**

| | Important | Not Important |
|---|---|---|
| Lower interest rate | ☐ | ☐ |
| Lower APR *(Annual Percentage Rate)* | ☐ | ☐ |
| Lower closing fees | ☐ | ☐ |
| Lower down payment | ☐ | ☐ |
| Lower monthly payment | ☐ | ☐ |
| An interest rate fixed for the life of the loan | ☐ | ☐ |
| A term of 30 years | ☐ | ☐ |
| No mortgage insurance | ☐ | ☐ |

**19. Your lender may have given you a booklet "Your home loan toolkit: A step-by-step guide," do you remember receiving a copy?**

☐ Yes
☐ No
☐ Don't know

**20. In the process of getting this mortgage from your mortgage lender/broker, did you…**

| | Yes | No |
|---|---|---|
| Have to add another co-signer to qualify | ☐ | ☐ |
| Resolve credit report errors or problems | ☐ | ☐ |
| Answer follow-up requests for more information about income or assets | ☐ | ☐ |
| Have more than one appraisal | ☐ | ☐ |
| Redo/refile paperwork due to processing delays | ☐ | ☐ |
| Delay or postpone closing date | ☐ | ☐ |
| Have your "Loan Estimate" revised to reflect changes in your loan terms | ☐ | ☐ |
| Check other sources to confirm that terms of this mortgage were reasonable | ☐ | ☐ |

**21. Did the "Loan Estimate" you received from your mortgage lender/broker…**

| | Yes | No |
|---|---|---|
| Have easy to understand information | ☐ | ☐ |
| Contain valuable information | ☐ | ☐ |
| Cause you to take an action, such as seek a change in your loan or closing | ☐ | ☐ |

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**22. During the application process were you told about mortgages with any of the following?**

| | Yes | No |
|---|---|---|
| An interest rate that is fixed for the life of the loan | ☐ | ☐ |
| An interest rate that could change over the life of the loan | ☐ | ☐ |
| A term of less than 30 years | ☐ | ☐ |
| A higher interest rate in return for lower closing costs | ☐ | ☐ |
| A lower interest rate in return for paying higher closing costs *(discount points)* | ☐ | ☐ |
| Interest-only monthly payments | ☐ | ☐ |
| An escrow account for taxes and/or homeowner insurance | ☐ | ☐ |
| A prepayment penalty *(fee if the mortgage is paid off early)* | ☐ | ☐ |
| Reduced documentation or "easy" approval | ☐ | ☐ |
| An FHA, VA, USDA or Rural Housing loan | ☐ | ☐ |

**23. In selecting your settlement/closing agent did you use someone...**

| | Yes | No |
|---|---|---|
| Selected/recommended by the mortgage lender/broker, or real estate agent | ☐ | ☐ |
| You used previously | ☐ | ☐ |
| Found shopping around | ☐ | ☐ |

☐ Did not have a settlement/closing agent

**24. Do you have title insurance on this mortgage?**

☐ Yes
☐ No
☐ Don't know } **Skip to 26**

**25. Which one best describes how you picked the title insurance?**

☐ Reissued previous title insurance
☐ Used title insurance recommended by mortgage lender/broker or settlement agent
☐ Shopped around

**26. Overall, how satisfied are you that the mortgage you got was the one with the...**

| | Very | Somewhat | Not At All |
|---|---|---|---|
| Best terms to fit your needs | ☐ | ☐ | ☐ |
| Lowest interest rate for which you could qualify | ☐ | ☐ | ☐ |
| Lowest closing costs | ☐ | ☐ | ☐ |

**27. Overall, how satisfied are you with the...**

| | Very | Somewhat | Not At All |
|---|---|---|---|
| Mortgage lender/broker you used | ☐ | ☐ | ☐ |
| Application process | ☐ | ☐ | ☐ |
| Documentation process required for the loan | ☐ | ☐ | ☐ |
| Property appraisal | ☐ | ☐ | ☐ |
| Loan closing process | ☐ | ☐ | ☐ |
| Information in mortgage disclosure documents | ☐ | ☐ | ☐ |
| Timeliness of mortgage disclosure documents | ☐ | ☐ | ☐ |
| Settlement agent | ☐ | ☐ | ☐ |

**28. Did you take a course about home-buying or talk to a professional housing counselor?**

☐ Yes
☐ No → **Skip to 32 on page 4**

**29. Was your home-buying course or counseling...**

| | Yes | No |
|---|---|---|
| In person, one-on-one | ☐ | ☐ |
| In person, in a group | ☐ | ☐ |
| Over the phone | ☐ | ☐ |
| Online | ☐ | ☐ |
| Required | ☐ | ☐ |

**30. How many hours was your home-buying course or counseling?**

☐ Less than 3 hours
☐ 3 – 6 hours
☐ 7 – 12 hours
☐ More than 12 hours

**31. Overall, how helpful was your home-buying course or counseling?**

☐ Very ☐ Somewhat ☐ Not at all

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**32. Which one of these reasons best describes this most recent mortgage?**

- ☐ To buy a property
- ☐ To refinance or modify an earlier mortgage
- ☐ To add/remove co-signer(s)/co-owner(s)
- ☐ To finance a construction loan
- ☐ To take out a new loan on a mortgage-free property
- ☐ Some other purpose (specify)

_____

Skip to 36

**33. Did you do the following before or after you made an offer on this house or property?**

| | Before Offer | After Offer | Did Not Do |
|---|---|---|---|
| Contacted a lender to explore mortgage options | ☐ | ☐ | ☐ |
| Got a pre-approval or pre-qualification from a lender | ☐ | ☐ | ☐ |
| Decided on the type of loan | ☐ | ☐ | ☐ |
| Made a decision on which lender to use | ☐ | ☐ | ☐ |
| Submitted an official loan application | ☐ | ☐ | ☐ |

**34. Did you use any of the following sources of funds to buy this property?**

| | Used | Not Used |
|---|---|---|
| Proceeds from the sale of another property | ☐ | ☐ |
| Savings, retirement account, inheritance, or other assets | ☐ | ☐ |
| Assistance or loan from a nonprofit or government agency | ☐ | ☐ |
| A second lien, home equity loan, or home equity line of credit (HELOC) | ☐ | ☐ |
| Gift or loan from family or friend | ☐ | ☐ |
| Seller contribution | ☐ | ☐ |

**35. What percent of the purchase price was the down payment to buy this property (including money from a prior home sale, gifts, etc.)?**

_____ %  ☐ Don't know

Skip to 39

**36. How important were the following in your decision to refinance, modify or obtain a new mortgage?**

| | Important | Not Important |
|---|---|---|
| Change to a fixed-rate loan | ☐ | ☐ |
| Get a lower interest rate | ☐ | ☐ |
| Remove private mortgage insurance | ☐ | ☐ |
| Get a lower monthly payment | ☐ | ☐ |
| Consolidate or pay down other debt | ☐ | ☐ |
| Repay the loan more quickly | ☐ | ☐ |
| Take out cash | ☐ | ☐ |

**37. Approximately how much was owed, in total, on the old mortgage(s) and loan(s) you refinanced?**

$ _____ .00

☐ Zero *(the property was mortgage-free)*

**38. Did you use the money you got from this new mortgage for any of the following?**

| | Yes | No |
|---|---|---|
| College expenses | ☐ | ☐ |
| Auto or other major purchase | ☐ | ☐ |
| Buy out co-signer(s)/co-owner(s) | ☐ | ☐ |
| Pay off other bills or debts | ☐ | ☐ |
| Home repairs or new construction | ☐ | ☐ |
| Savings | ☐ | ☐ |
| Closing costs of new mortgage | ☐ | ☐ |
| Business or investment | ☐ | ☐ |
| Other (specify) _____ | ☐ | ☐ |

☐ Did not get money from refinancing

## This Mortgage

**39. When you took out this most recent mortgage or refinance, what was the dollar amount you borrowed?**

$ _____ .00  ☐ Don't know

**40. What is the monthly payment, including the amount paid to escrow for taxes and insurance?**

$ _____ .00  ☐ Don't know

**41. What is the interest rate on this mortgage?**

_____ %  ☐ Don't know

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**42. Which one of the following best describes how you decided on the interest rate of your mortgage?**

- ☐ Paid higher closing costs to get lower interest rate
- ☐ Paid lower closing costs with a higher interest rate
- ☐ Got a balance between closing costs and interest rate

**43. Does this mortgage have...**

| | Yes | No | Don't Know |
|---|---|---|---|
| A prepayment penalty *(fee if the mortgage is paid off early)* | ☐ | ☐ | ☐ |
| An escrow account for taxes and/or homeowner insurance | ☐ | ☐ | ☐ |
| An adjustable rate *(one that can change over the life of the loan)* | ☐ | ☐ | ☐ |
| A balloon payment | ☐ | ☐ | ☐ |
| Interest-only payments | ☐ | ☐ | ☐ |
| Private mortgage insurance | ☐ | ☐ | ☐ |
| Lender-required flood insurance | ☐ | ☐ | ☐ |

**44. At any time after you made your final loan application did any of the following change?**

| | Higher | Same | Lower |
|---|---|---|---|
| Monthly payment | ☐ | ☐ | ☐ |
| Interest rate | ☐ | ☐ | ☐ |
| Other fees | ☐ | ☐ | ☐ |
| Amount of money needed to close loan | ☐ | ☐ | ☐ |

**45. The "Closing Disclosure" statement you received at closing shows the loan closing costs and other closing costs separately. What were the loan closing costs you paid on this loan?**

$ _____ .00 ☐ Don't know

**46. How were the total closing costs (loan costs and other costs) for this loan paid?**

| | Yes | No | Don't Know |
|---|---|---|---|
| By me or a co-signer with a check or wire transfer | ☐ | ☐ | ☐ |
| Added to the mortgage amount | ☐ | ☐ | ☐ |
| By mortgage lender/broker | ☐ | ☐ | ☐ |
| By seller/builder | ☐ | ☐ | ☐ |
| Other (specify) _____ | ☐ | ☐ | ☐ |

☐ Loan had no closing costs

**47. Were the loan costs you paid similar to what you had expected to pay based on the Loan Estimates or Closing Disclosures you received?**

☐ Yes ☐ No

**48. After closing on this mortgage, how much cash reserves in checking, savings, and other similar assets did you have remaining?**

- ☐ Less than one month's mortgage payment
- ☐ 1-2 months' worth of mortgage payments
- ☐ 3-6 months' worth of mortgage payments
- ☐ 7 months' worth or more of mortgage payments

**49. Did you seek input about your closing documents from any of the following people?**

| | Yes | No |
|---|---|---|
| Mortgage lender/broker | ☐ | ☐ |
| Settlement/closing agent | ☐ | ☐ |
| Real estate agent | ☐ | ☐ |
| Personal attorney | ☐ | ☐ |
| Title insurance agent | ☐ | ☐ |
| Trusted friend or relative who is not a co-signer on the mortgage | ☐ | ☐ |
| Housing counselor | ☐ | ☐ |
| Other (specify) _____ | ☐ | ☐ |

**50. Did you face any of the following at your <u>loan closing</u>?**

| | Yes | No |
|---|---|---|
| Loan documents not ready at closing | ☐ | ☐ |
| Closing did not occur as originally scheduled | ☐ | ☐ |
| Three-day rule required re-disclosure | ☐ | ☐ |
| Mortgage terms different at closing than expected, e.g. interest rate, monthly payment | ☐ | ☐ |
| More cash needed at closing than expected, e.g. escrow, unexpected fees | ☐ | ☐ |
| Less cash needed at closing than expected | ☐ | ☐ |
| Asked to sign blank documents at closing | ☐ | ☐ |
| Asked to sign pre-dated or post-dated documents at closing | ☐ | ☐ |
| Felt rushed at closing or not given time to read documents | ☐ | ☐ |

**51. Is there any <u>additional problem</u> you encountered while getting this mortgage that you'd like to tell us about?**

_____

_____

_____

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**52. At the same time you took out this mortgage, did you also take out another loan on the property you financed with this mortgage** *(a second lien, home equity loan, or a home equity line of credit (HELOC))*?

- ☐ Yes
- ☐ No → **Skip to 54**

**53. What was the amount of this loan?**

$ _____ .00

☐ Don't know

**54. How well could you explain to someone the...**

| | Very | Somewhat | Not At All |
|---|---|---|---|
| Process of taking out a mortgage | ☐ | ☐ | ☐ |
| Difference between a fixed- and an adjustable-rate mortgage | ☐ | ☐ | ☐ |
| Difference between a prime and subprime loan | ☐ | ☐ | ☐ |
| Difference between a mortgage's interest rate and its APR | ☐ | ☐ | ☐ |
| Amortization of a loan | ☐ | ☐ | ☐ |
| Consequences of not making required mortgage payments | ☐ | ☐ | ☐ |
| Difference between lender's and owner's title insurance | ☐ | ☐ | ☐ |
| Relationship between discount points and interest rate | ☐ | ☐ | ☐ |
| Reason payments into an escrow account can change | ☐ | ☐ | ☐ |

## This Mortgaged Property

**55. When did you first become the owner of this property?**

_____ / _____
month year

**56. What was the purchase price of this property, or if you built it, how much did the construction and land cost?**

$ _____ .00 ☐ Don't know

**57. Which one of the following best describes how you acquired this property?**

- ☐ Purchased an existing home
- ☐ Purchased a newly-built home from a builder
- ☐ Had or purchased land and built a house
- ☐ Received as a gift or inheritance
- ☐ Other (specify) _____

**58. Which one of the following best describes this property?**

- ☐ Single-family detached house
- ☐ Mobile home or manufactured home
- ☐ Townhouse, row house, or villa
- ☐ 2-unit, 3-unit, or 4-unit dwelling
- ☐ Apartment (or condo/co-op) in apartment building
- ☐ Unit in a partly commercial structure
- ☐ Other (specify) _____

**59. Does this mortgage cover more than one unit?**

☐ Yes ☐ No

**60. About how much do you think this property is worth in terms of what you could sell it for now?**

$ _____ .00 ☐ Don't know

**61. Do you rent out all or any portion of this property?**

- ☐ Yes
- ☐ No → **Skip to 63**

**62. How much rent do you receive annually?**

$ _____ .00 per year

**63. Besides you, the mortgage co-signers, and renters, does anyone else help pay the expenses for this property?**

☐ Yes ☐ No

**64. Which one of the following best describes how you use this property?**

- ☐ Primary residence *(where you spend the majority of your time)*
- ☐ It will be my primary residence soon
- ☐ Seasonal or second home
- ☐ Home for other relatives
- ☐ Rental or investment property
- ☐ Other (specify) _____

**Skip to 67 on page 7**

**65. If primary residence, when did you move into this property?**

_____ / _____
month year

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**66. Which one of the following best describes your willingness or ability to move from your primary residence?**

- ☐ Willing and able to move
- ☐ Willing but unable to move
- ☐ Unwilling to move
- ☐ Unsure/Don't know at this time

**67. In the last couple years, how have the following changed in the neighborhood where this property is located?**

| | Significant Increase | Little/No Change | Significant Decrease |
|---|---|---|---|
| Number of homes for sale | ☐ | ☐ | ☐ |
| Number of vacant homes | ☐ | ☐ | ☐ |
| Number of homes for rent | ☐ | ☐ | ☐ |
| Number of foreclosures or short sales | ☐ | ☐ | ☐ |
| Number of homes impacted by natural disasters | ☐ | ☐ | ☐ |
| House prices | ☐ | ☐ | ☐ |
| Overall desirability of living there | ☐ | ☐ | ☐ |

**68. What do you think will happen to the prices of homes in this neighborhood over the next couple of years?**

- ☐ Increase a lot
- ☐ Increase a little
- ☐ Remain about the same
- ☐ Decrease a little
- ☐ Decrease a lot

**69. In the next couple of years, how do you expect the overall desirability of living in this neighborhood to change?**

- ☐ Become more desirable
- ☐ Stay about the same
- ☐ Become less desirable

**70. How likely is it that in the next couple of years you will…**

| | Very | Somewhat | Not At All |
|---|---|---|---|
| Sell this property | ☐ | ☐ | ☐ |
| Move but keep this property | ☐ | ☐ | ☐ |
| Refinance the mortgage on this property | ☐ | ☐ | ☐ |
| Pay off this mortgage and own the property mortgage-free | ☐ | ☐ | ☐ |

## Your Household

**71. What is your current marital status?**

- ☐ Married
- ☐ Separated
- ☐ Never married
- ☐ Divorced
- ☐ Widowed

**72. Do you have a partner who shares the decision-making and responsibilities of running your household but is not your legal spouse?**

☐ Yes ☐ No

**Please answer the following questions for you and your spouse or partner, if applicable.**

**73. Age at last birthday:**

| | You | Spouse/ Partner |
|---|---|---|
| | _____ years | _____ years |

**74. Sex:**

| | You | Spouse/ Partner |
|---|---|---|
| Male | ☐ | ☐ |
| Female | ☐ | ☐ |

**75. Highest level of education achieved:**

| | You | Spouse/ Partner |
|---|---|---|
| Some schooling | ☐ | ☐ |
| High school graduate | ☐ | ☐ |
| Technical school | ☐ | ☐ |
| Some college | ☐ | ☐ |
| College graduate | ☐ | ☐ |
| Postgraduate studies | ☐ | ☐ |

**76. Hispanic or Latino:**

| | You | Spouse/ Partner |
|---|---|---|
| Yes | ☐ | ☐ |
| No | ☐ | ☐ |

**77. Race:** *Mark all that apply.*

| | You | Spouse/ Partner |
|---|---|---|
| White | ☐ | ☐ |
| Black or African American | ☐ | ☐ |
| American Indian or Alaska Native | ☐ | ☐ |
| Asian | ☐ | ☐ |
| Native Hawaiian or Other Pacific Islander | ☐ | ☐ |

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**78. Current work status:** *Mark all that apply.*

| | You | Spouse/ Partner |
|---|---|---|
| Self-employed full time | ☐ | ☐ |
| Self-employed part time | ☐ | ☐ |
| Employed full time | ☐ | ☐ |
| Employed part time | ☐ | ☐ |
| Retired | ☐ | ☐ |
| Unemployed, temporarily laid-off or on leave | ☐ | ☐ |
| Not working for pay *(student, homemaker, disabled)* | ☐ | ☐ |

**79. Ever served on active duty in the U.S. Armed Forces, Reserves or National Guard?**

| | You | Spouse/ Partner |
|---|---|---|
| Never served in the military | ☐ | ☐ |
| Only on active duty for training in the Reserves or National Guard | ☐ | ☐ |
| Now on active duty | ☐ | ☐ |
| On active duty in the past, but not now | ☐ | ☐ |

**80. Besides you (and your spouse/partner) who else lives in your household?** *Mark all that apply.*

- ☐ Children/grandchildren under age 18
- ☐ Children/grandchildren age 18 – 22
- ☐ Children/grandchildren age 23 or older
- ☐ Parents of you or your spouse or partner
- ☐ Other relatives like siblings or cousins
- ☐ Non-relative

☐ No one else

**81. Do you speak a language other than English at home?**

- ☐ Yes
- ☐ No → **Skip to 84**

**82. Was it important to get your mortgage documents in this language?**

☐ Yes ☐ No

**83. Did you get mortgage documents in this language?**

☐ Yes ☐ No

**84. Approximately how much is your total annual household income from all sources** *(wages, salaries, tips, interest, child support, investment income, retirement, social security, and alimony)***?**

- ☐ Less than $35,000
- ☐ $35,000 to $49,999
- ☐ $50,000 to $74,999
- ☐ $75,000 to $99,999
- ☐ $100,000 to $174,999
- ☐ $175,000 or more

**85. How does this total annual household income compare to what it is in a "normal" year?**

- ☐ Higher than normal
- ☐ Normal
- ☐ Lower than normal

**86. Does your total annual household income include any of the following sources?**

| | Yes | No |
|---|---|---|
| Wages or salary | ☐ | ☐ |
| Business or self-employment | ☐ | ☐ |
| Interest or dividends | ☐ | ☐ |
| Alimony or child support | ☐ | ☐ |
| Social Security, pension or other retirement benefits | ☐ | ☐ |

**87. Does anyone in your household have any of the following?**

| | Yes | No |
|---|---|---|
| 401(k), 403(b), IRA, or pension plan | ☐ | ☐ |
| Stocks, bonds, or mutual funds *(not in retirement accounts or pension plans)* | ☐ | ☐ |
| Certificates of deposit | ☐ | ☐ |
| Investment real estate | ☐ | ☐ |

**88. Which one of the following statements best describes the amount of financial risk you are willing to take when you save or make investments?**

- ☐ Take substantial financial risks expecting to earn substantial returns
- ☐ Take above-average financial risks expecting to earn above-average returns
- ☐ Take average financial risks expecting to earn average returns
- ☐ Not willing to take any financial risks

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**89. Do you agree or disagree with the following statements?**

| | Agree | Disagree |
|---|---|---|
| Owning a home is a good financial investment | ☐ | ☐ |
| Most mortgage lenders generally treat borrowers well | ☐ | ☐ |
| Most mortgage lenders would offer me roughly the same rates and fees | ☐ | ☐ |
| Late payments will lower my credit rating | ☐ | ☐ |
| Lenders shouldn't care about any late payments, only whether loans are fully repaid | ☐ | ☐ |
| It is okay to default or stop making mortgage payments if it is in the borrower's financial interest | ☐ | ☐ |
| I would consider counseling or taking a course about managing my finances if I faced financial difficulties | ☐ | ☐ |

**90. In the last couple of years, have any of the following happened to you?**

| | Yes | No |
|---|---|---|
| Separated, divorced or partner left | ☐ | ☐ |
| Married, remarried or new partner | ☐ | ☐ |
| Death of a household member | ☐ | ☐ |
| Addition to your household (not spouse/partner) | ☐ | ☐ |
| Person leaving your household (not spouse/partner) | ☐ | ☐ |
| Disability or serious illness of household member | ☐ | ☐ |
| Disaster affecting a property you own | ☐ | ☐ |
| Disaster affecting your (or your spouse/partner's) work | ☐ | ☐ |
| Moved within the area (less than 50 miles) | ☐ | ☐ |
| Moved to a new area (50 miles or more) | ☐ | ☐ |

**91. In the last couple of years, have any of the following happened to you (or your spouse/partner)?**

| | Yes | No |
|---|---|---|
| Layoff, unemployment, or reduced hours of work | ☐ | ☐ |
| Retirement | ☐ | ☐ |
| Promotion | ☐ | ☐ |
| Starting a new job | ☐ | ☐ |
| Starting a second job | ☐ | ☐ |
| Business failure | ☐ | ☐ |
| A personal financial crisis | ☐ | ☐ |

**92. In the last couple years, how have the following changed for you (and your spouse/partner)?**

| | Significant Increase | Little/No Change | Significant Decrease |
|---|---|---|---|
| Household income | ☐ | ☐ | ☐ |
| Housing expenses | ☐ | ☐ | ☐ |
| Non-housing expenses | ☐ | ☐ | ☐ |

**93. In the next couple of years, how do you expect the following to change for you (and your spouse/partner)?**

| | Significant Increase | Little/No Change | Significant Decrease |
|---|---|---|---|
| Household income | ☐ | ☐ | ☐ |
| Housing expenses | ☐ | ☐ | ☐ |
| Non-housing expenses | ☐ | ☐ | ☐ |

**94. How likely is it that in the next couple of years you (or your spouse/partner) will face…**

| | Very | Somewhat | Not At All |
|---|---|---|---|
| Retirement | ☐ | ☐ | ☐ |
| Difficulties making your mortgage payments | ☐ | ☐ | ☐ |
| A layoff, unemployment, or forced reduction in hours | ☐ | ☐ | ☐ |
| Some other personal financial crisis | ☐ | ☐ | ☐ |

**95. If your household faced an unexpected personal financial crisis in the next couple of years, how likely is it you could…**

| | Very | Somewhat | Not At All |
|---|---|---|---|
| Pay your bills for the next 3 months without borrowing | ☐ | ☐ | ☐ |
| Get significant financial help from family or friends | ☐ | ☐ | ☐ |
| Borrow a significant amount from a bank or credit union | ☐ | ☐ | ☐ |
| Significantly increase your income | ☐ | ☐ | ☐ |

**96. In the next ten years, what do you think could decrease the value of a property you own?**

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***Thank you for completing this survey and sharing your experiences to help improve the processes of getting a mortgage.***

We have provided space below for any additional comments.
Is there anything else you would like to tell us about your experience getting a mortgage to purchase or refinance your property?
***Please do not put your name or address on the questionnaire.***

**Please use the enclosed business reply envelope to return your completed questionnaire.**
**FHFA**
**1600 Research Blvd, RC B16**
**Rockville, MD 20850**

**For any questions about the survey or online access you can call toll free 1-855-531-0724.**

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[FR Doc. 2023–07863 Filed 4–13–23; 8:45 am]
BILLING CODE 8070–01–C

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Medicare & Medicaid Services

**[CMS–9896–N3]**

### Membership List Update and New Meeting Dates for Ground Ambulance and Patient Billing (GAPB) Advisory Committee—May 2 and 3, 2023

**AGENCY:** Centers for Medicare & Medicaid Services (CMS), Department of Health and Human Services (HHS).

**ACTION:** Notice of meeting.

**SUMMARY:** This notice announces new dates for a public meeting of the Ground Ambulance and Patient Billing (GAPB) Advisory Committee on May 2 and 3, 2023. The GAPB Advisory Committee will make recommendations with respect to the disclosure of charges and fees for ground ambulance services and insurance coverage, consumer protection and enforcement authorities of the Departments of Labor, Health and Human Services, and the Treasury (the Departments) and relevant States, and the prevention of balance billing to consumers. The recommendations shall address options, best practices, and identified standards to prevent instances of balance billing; steps that can be taken by State legislatures, State insurance regulators, State attorneys general, and other State officials as appropriate, consistent with current legal authorities regarding consumer protection; and legislative options for Congress to prevent balance billing. This notice also updates the GAPB Advisory Committee membership roster.

**DATES:** *Virtual Meeting Dates:* The GAPB Advisory Committee will hold a virtual meeting on Tuesday, May 2, 2023 and Wednesday, May 3, 2023 from 9:30 a.m. to 5:30 p.m., Eastern Standard Time.

*Registration Link:* The virtual meeting will be open to the public and held via the Zoom webinar platform. Virtual attendance information will be provided upon registration. To register for this virtual meeting, please visit: *https://priforum.zoomgov.com/webinar/register/WN_nSWKovtFQ_bqGY15qaF9CFw.*

Attendance is open to the public subject to any technical or capacity limitations.

*Deadline for Registration:* All individuals who plan to attend the virtual public meeting must register to attend. The deadline to register for the public meeting is Monday, May 1, 2023. Interested parties are encouraged to register as far in advance of the meeting as possible. A detailed agenda and materials will be available prior to the meeting on the GAPB Advisory Committee website at: *https://www.cms.gov/regulations-guidance/advisory-committees/advisory-committee-ground-ambulance-and-patient-billing-gapb.*

A recording and a summary of the meeting will be made available on the GAPB Advisory Committee website within 30 calendar days after the meeting.

**ADDRESSES:** *Virtual Meeting Location:* The May 2 and 3, 2023 public meeting will be held virtually via Zoom only.

**FOR FURTHER INFORMATION CONTACT:** Shaheen Halim, CMS, by phone (410) 786–0641 or via email at *gapbadvisorycommittee@cms.hhs.gov.* Press inquiries may be submitted by phone at (202) 690–6145 or via email at *press@cms.hhs.gov.*

**SUPPLEMENTARY INFORMATION:**

#### I. Background

Section 117(a) of the No Surprises Act, enacted as part of the Consolidated Appropriations Act, 2021, div. BB, tit. I, Public Law 116–260 (Dec. 27, 2020), requires the Secretaries of Labor, HHS, and the Treasury to establish and convene an advisory committee for the purpose of reviewing options to improve the disclosure of charges and fees for ground ambulance services, better inform consumers of insurance options for such services, and protect consumers from balance billing. The GAPB Advisory Committee is governed by the provisions of the Federal Advisory Committee Act (FACA), Public Law 92–463 (Oct. 6, 1972), as amended, 5 U.S.C. App. 2.

#### II. Advisory Committee Membership Roster

On November 23, 2021, HHS published a Notice of Charter and Invitation for Member Nominations in the **Federal Register** for the GAPB Advisory Committee (86 FR 66565 through 66566). The Departments evaluated the nominees for alignment with the membership categories required under Section 117 of the No Surprises Act, their professional qualifications, recognition by the ground ambulance and emergency medical services community, years of relevant experience, experience with State or Federal committees on related issues, and expertise in subject matter to be addressed by the committee. The Departments also considered membership balance as required by the FACA, and as appropriate to address health equity issues pertaining to ground ambulance consumer balance billing, and ground ambulance services in underserved communities. On December 16, 2022, HHS published a **Federal Register** Notice Announcing the 17 Members of the GAPB Advisory Committee (87 FR 77122 through 77123). The Committee Roster has since been updated to include a new Designee to represent the Secretary of the Treasury as a Member of the Committee.

The 17 Members of the GAPB Advisory Committee are:

- Asbel Montes—Committee Chairperson; Additional Representative determined necessary and appropriate by the Secretaries.
- Ali Khawar—Secretary of Labor's Designee
- Carol Weiser—Secretary of the Treasury's Designee
- Rogelyn McLean—Secretary of Health and Human Services' Designee
- Gamunu Wijetunge—Department of Transportation—National Highway Traffic Safety Administration
- Suzanne Prentiss—State Insurance Regulators
- Adam Beck—Health Insurance Providers
- Patricia Kelmar—Consumer Advocacy Groups
- Gary Wingrove—Patient Advocacy Groups
- Ayobami Ogunsola—State and Local Governments
- Ritu Sahni—Physician specializing in emergency, trauma, cardiac, or stroke
- Peter Lawrence—State Emergency Medical Services Officials
- Shawn Baird—Emergency Medical Technicians, Paramedics, and Other Emergency Medical Services Personnel
- Edward Van Horne—Representative of Various Segments of the Ground Ambulance Industry
- Regina Godette-Crawford—Representative of Various Segments of the Ground Ambulance Industry
- Rhonda Holden—Representative of Various Segments of the Ground Ambulance Industry
- Loren Adler—Additional Representative determined necessary and appropriate by the Secretaries

The GAPB Advisory Committee Roster will also be posted on the GAPB Advisory Committee website at: *https://www.cms.gov/regulations-guidance/advisory-committees/advisory-committee-ground-ambulance-and-patient-billing-gapb.*

#### III. Meeting Agenda

The first public meeting of the GAPB Advisory Committee will occur on May 2 and 3, 2023. During this meeting, the Committee will gather background information on the No Surprises Act,

the ground ambulance industry, insurance and billing practices, and consumer issues such as disclosure of fees and balance billing, prior to discussing potential subcommittees and focus areas. The agenda will cover the following topics:

- No Surprises Act overview
- Overview of the ground ambulance industry
- Insurance and ground ambulance payment systems
- Ground ambulance billing practices
- Disclosure of charges to consumers, separation of charges, and cost shifting
- Impact of balance billing on consumers and current consumer protections
- Balance billing prevention, including potential legislative and regulatory options

A more detailed agenda and materials will be made available approximately 2 days before the meeting on the GAPB Advisory Committee website (listed above).

*Anticipated Dates and Agendas for Future GAPB Advisory Committee Meetings*

CMS expects to convene future GAPB Advisory Committee Meetings on the following dates:

- August 16, 2023
- October 31 and November 1, 2023

Agendas and registration information for these future meetings will be published in the **Federal Register** and on the GAPB Advisory Committee website closer to the anticipated meeting dates, which are subject to change.

## IV. Public Participation

The May 2 and May 3, 2023 meeting will be open to the public. Attendance may be limited due to virtual meeting constraints. Interested parties are encouraged to register as far in advance of the meeting as possible. To register for the meeting, please visit: *https://www.cms.gov/regulations-guidance/advisory-committees/advisory-committee-ground-ambulance-and-patient-billing-gapb.* CMS is committed to providing equal access to this meeting for all participants and to ensuring Section 508 compliance. Closed captioning will be provided. If you need alternative formats or services because of a disability, such as sign language interpreter or other ancillary aids, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

## V. Submitting Written Comments

Members of the public may submit written comments on subject matter under committee deliberation prior to the May 2 and May 3, 2023 meeting via email to *gapbadvisorycommittee@cms.hhs.gov.* Comments must be submitted via email no later than April 21, 2023. During the virtual meeting, members of the public will have the opportunity to submit comments through the chat feature of the Zoom webinar platform. These comments will be compiled for future consideration by the Committee.

## V. Viewing Documents

You may view the documents discussed in this notice at *https://www.cms.gov/regulations-guidance/advisory-committees/advisory-committee-ground-ambulance-and-patient-billing-gapb.*

The Administrator of CMS, Chiquita Brooks-LaSure, having reviewed and approved this document, authorizes Evell J. Barco Holland, who is the Federal Register Liaison, to electronically sign this document for purposes of publication in the **Federal Register**.

Dated: April 11, 2023.

**Evell J. Barco Holland,**

*Federal Register Liaison, Centers for Medicare & Medicaid Services.*

[FR Doc. 2023–07910 Filed 4–13–23; 8:45 am]

**BILLING CODE 4120–01–P**

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## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Medicare & Medicaid Services

**[CMS–1794–N]**

### Medicare Program; Public Meeting for New Revisions to the Healthcare Common Procedure Coding System (HCPCS) Coding: May 30–June 1, 2023

**AGENCY:** Centers for Medicare & Medicaid Services (CMS), Health and Human Services.

**ACTION:** Notice.

**SUMMARY:** This notice announces the dates and times of the virtual Healthcare Common Procedure Coding System (HCPCS) public meeting to be held May 30, 2023 through June 1, 2023 to discuss our preliminary coding, Medicare benefit category, and payment determinations for new revisions to the HCPCS Level II code set for non-drug and non-biological products, as well as how to register for those meetings.

**DATES:** *Virtual Meeting Dates:* Tuesday, May 30, 2023, 9 a.m. to 5 p.m., eastern daylight time (e.d.t); Wednesday, May 31, 2023, 9 a.m. to 5 p.m., e.d.t.; and Thursday, June 1, 2023, 9 a.m. to 5 p.m., e.d.t.

**ADDRESSES:** *Virtual Meeting Location:* The HCPCS public meetings will be held virtually via Zoom only.

**FOR FURTHER INFORMATION CONTACT:** Sundus Ashar, (410) 786–0750, *Sundus.ashar1@cms.hhs.gov,* or *HCPCS@cms.hhs.gov.*

**SUPPLEMENTARY INFORMATION:**

## I. Background

On December 21, 2000, Congress enacted the Medicare, Medicaid, and the Children's Health Insurance Program (CHIP) Benefits Improvement and Protection Act of 2000 (BIPA) (Pub. L. 106–554). Section 531(b) of BIPA mandated that the Secretary establish procedures that permit public consultation for coding and payment determinations for new durable medical equipment (DME) under Medicare Part B of title XVIII of the Social Security Act (the Act). In the November 23, 2001 **Federal Register** (66 FR 58743), we published a notice providing information regarding the establishment of the annual public meeting process for DME.

In 2020, we implemented changes to our HCPCS coding procedures, including the establishment of quarterly coding cycles for drugs and biological products and biannual coding cycles for non-drug and non-biological items and services.

In the December 28, 2021 **Federal Register** (86 FR 73860), we published a final rule that established procedures for making Medicare benefit category and payment determinations for new items and services that are DME, prosthetic devices, orthotics and prosthetics, therapeutic shoes and inserts, surgical dressings, or splints, casts, and other devices used for reductions of fractures and dislocations under Medicare Part B.

## II. Public Meeting Agendas

Prior to registering to attend a virtual public meeting, all potential participants and other stakeholders are advised to review the public meeting agendas at *https://www.cms.gov/Medicare/Coding/MedHCPCSGenInfo/HCPCSPublicMeetings* which identify our preliminary coding, Medicare benefit category, and payment determinations, and the date each item will be discussed. In establishing the public meeting agendas, we may group multiple, related code applications under the same agenda item.

## III. Virtual Meeting Registration

The May 30, 2023 through June 1, 2023 HCPCS public meetings will be

virtual and available for remote audio attendance and participation only via Zoom. The registration link will be posted in the Guidelines for Participation in HCPCS Public Meetings document on the CMS website at *https://www.cms.gov/Medicare/Coding/MedHCPCSGenInfo/HCPCSPublicMeetings* and in an announcement on the HCPCS General Information page at *https://www.cms.gov/Medicare/Coding/MedHCPCSGenInfo*. The same website also contains detailed information on how attendees can join the virtual public meetings using Zoom, including dial-in information. All individuals who plan to attend the virtual public meetings must register to attend. Attendees can attend more than one day of the public meeting.

*A. Required Information for Registration*

The following information must be provided when registering online to attend:

- Name;
- Company name (if applicable);
- Email address;
- Any special assistance requests (will be considered if the registration is submitted by 5 p.m. e.d.t., Tuesday, May 16, 2023);
- Whether the registrant is a primary speaker or a 5-minute speaker for an agenda item;
- Agenda item and Application number;
- Whether the primary speaker will use a PowerPoint presentation; and
- Whether the registrant will participate in a practice Zoom session, to be held on Thursday, May 25, 2023.

*B. Speakers and Attendees*

1. Primary Speakers

Each applicant that submitted a HCPCS code application that will be discussed at the virtual public meetings is permitted to designate a primary speaker. Fifteen minutes is the total time interval for a primary speaker per agenda item. The deadline for primary speakers to register and submit any supporting PowerPoint presentation is 5 p.m., e.d.t, Tuesday, May 16, 2023. We will accept PowerPoint presentations if those materials are emailed to *HCPCS@cms.hhs.gov* by the stated deadline. Due to the timeframe needed for the planning and coordination of the HCPCS virtual public meetings, materials that are not submitted in accordance with this deadline cannot be accommodated.

All PowerPoint presentation materials must not exceed 10 slides and should be in PowerPoint presentation format, not PDF. We will not play videos or animations during the public meeting sessions and request the speakers to submit any relevant video or animation materials along with the written comments. We request the speakers to ensure that the presentation does not include any inappropriate content before submission.

Every primary speaker must declare at the beginning of their presentation at the meeting, as well as in their written summary, whether they have any financial involvement with the manufacturer of the item that is the subject of the HCPCS application that the primary speaker presented, or any competitors of that manufacturer with respect to the item. This includes any payment, salary, remuneration, or benefit provided to that speaker by the applicant.

2. 5-Minute Speakers

Any individual related to the public meeting agenda item, including but not limited to, an employee, stakeholder, competitor, insurer, public consumer, etc., may register and speak as a 5-minute speaker. The deadline for registering to be a 5-minute speaker is 5 p.m., e.d.t, Tuesday, May 16, 2023.

Every 5-minute speaker must declare at the beginning of their presentation at the meeting, as well as in their written summary, whether they have any financial involvement with the manufacturer of the item that is the subject of the HCPCS code application or agenda item that the 5-minute speaker presented, or any competitors of that manufacturer with respect to the item. This includes any payment, salary, remuneration, or benefit provided to that speaker by the applicant. We will not accept any other written materials, outside of the written comments, from a 5-minute speaker.

3. All Other Attendees

All individuals who plan to attend the virtual public meetings to listen and do not plan to speak, may register up to the date of that public meeting. Individuals who require special assistance must register and request special assistance services by 5 p.m. e.d.t., Tuesday, May 16, 2023.

## IV. Written Comments

The primary and 5-minute speaker(s) must email a brief, written summary (one paragraph) of their comments and conclusions. Written comments from anyone, including the primary and 5-minute speaker(s), will only be accepted when emailed to *HCPCS@cms.hhs.gov* before 5 p.m., e.d.t. on the date of the virtual public meeting at which the HCPCS code application that is the subject of the comments is discussed.

## V. Additional Information

The HCPCS section of the CMS website also includes details regarding the public meeting process for new revisions to the HCPCS code set, including information on how to join the meeting remotely, and guidelines for an effective presentation. The HCPCS section of the CMS website also contains a document titled ''Healthcare Common Procedure Coding System (HCPCS) Level II Coding Procedures,'' which is a description of the HCPCS coding process, including a detailed explanation of the procedures CMS uses to make HCPCS coding determinations.

When CMS refers to HCPCS code or HCPCS coding application above, CMS may also be referring to circumstances when a HCPCS code has already been issued, but a Medicare benefit category and/or payment has not been determined. CMS is working diligently to address Medicare benefit category and payment determinations for new items and services that may be DME, prosthetic devices, orthotics and prosthetics, therapeutic shoes and inserts, surgical dressings, or splints, casts, and other devices used for reductions of fractures and dislocations under Medicare Part B. Please check the CMS website listed above for the final agenda.

## VI. Collection of Information Requirements

This document does not impose information collection requirements, that is, reporting, recordkeeping or third-party disclosure requirements. Consequently, there is no need for review by the Office of Management and Budget under the authority of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

The Administrator of CMS, Chiquita Brooks-LaSure, having reviewed and approved this document, authorizes Evell J. Barco Holland, who is the Federal Register Liaison, to electronically sign this document for purposes of publication in the **Federal Register**.

Dated: April 11, 2023.

**Evell J. Barco Holland,**

*Federal Register Liaison, Centers for Medicare & Medicaid Services.*

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**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**Centers for Medicare & Medicaid Services**

**[CMS–2443–N]**

**RIN 0938–ZB78**

# Medicaid Program; Final FY 2020, Final FY 2021, Preliminary FY 2022, and Preliminary FY 2023 Disproportionate Share Hospital Allotments, and Final FY 2020, Final FY 2021, Preliminary FY 2022, and Preliminary FY 2023 Institutions for Mental Diseases Disproportionate Share Hospital Limits

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

**ACTION:** Notice.

**SUMMARY:** This notice announces the final Federal share (FS) disproportionate share hospital (DSH) allotments for Federal fiscal year (FY) 2020 and FY 2021, and the preliminary FS DSH allotments for FY 2022 and FY 2023. This notice also announces the final FY 2020 and FY 2021 and the preliminary FY 2022 and FY 2023 limitations on aggregate DSH payments that States may make to institutions for mental disease and other mental health facilities. In addition, this notice includes background information describing the methodology for determining the amounts of States' FY DSH allotments.

**DATES:** The allotments announced in this notice are effective May 15, 2023. The final allotments and limitations set forth in this notice are applicable for the fiscal years specified.

**FOR FURTHER INFORMATION CONTACT:** Stuart Goldstein, (410) 786–0694 and Richard Cuno, (410) 786–1111.

**SUPPLEMENTARY INFORMATION:**

## I. Background

### *A. Fiscal Year DSH Allotments*

A State's Federal fiscal year (FY) disproportionate share hospital (DSH) allotment represents the aggregate limit on the Federal share (FS) amount of the State's DSH payments to DSH hospitals in the State for the FY. The amount of such allotment is determined in accordance with the provisions of section 1923(f) of the Social Security Act (the Act), with some State-specific exceptions as specified in section 1923(f) of the Act. Under such provisions, in general, a State's FY DSH allotment is calculated by increasing the amount of its DSH allotment for the preceding FY by the percentage change in the Consumer Price Index for all Urban Consumers (CPI–U) for the previous FY.

The Patient Protection and Affordable Care Act of 2010 (Pub. L. 111–148), as amended by the Health Care and Education Reconciliation Act of 2010 (Pub. L. 111–152) (collectively, the Affordable Care Act), amended Medicaid DSH provisions, adding section 1923(f)(7) of the Act. Section 1923(f)(7) of the Act would have required reductions to States' FY DSH allotments from FY 2014 through FY 2020, the calculation of which was described in the Disproportionate Share Hospital Payment Reduction final rule published in the September 18, 2013 **Federal Register** (78 FR 57293). Subsequent legislation, most recently the Consolidated Appropriations Act, 2021 (Pub. L. 116–260, enacted December 27, 2020), delayed the start of these reductions until FY 2024. The final rule delineating a revised methodology for the calculation of DSH allotment reductions beginning in 2020 (subsequently delayed by further statutory enactment) was published in the September 25, 2019 **Federal Register** (82 FR 50308).

Because there are no reductions to DSH allotments for FY 2018 through FY 2023 under section 1923(f)(7) of the Act, as amended, this notice contains only the State-specific final FY 2020 and FY 2021 DSH allotments and preliminary FY 2022 and FY 2023 DSH allotments, as calculated under the statute without application of the reductions that would have been imposed beginning as early as FY 2014 under prior versions of section 1923(f)(7) of the Act. This notice also provides information on the calculation of the FY DSH allotments, the calculation of the States' institution for mental diseases (IMD) DSH limits, and the amounts of States' final FY 2020 and FY 2021 IMD DSH limits and preliminary FY 2022 and FY 2023 IMD DSH limits.

### *B. Determination of Fiscal Year DSH Allotments*

Generally, in accordance with the methodology specified under section 1923(f)(3) of the Act, a State's FY DSH allotment is calculated by increasing the amount of its DSH allotment for the preceding FY by the percentage change in the CPI–U for the previous FY. Also, in accordance with section 1923(f)(3) of the Act, a State's DSH allotment for a FY is subject to the limitation that an increase to a State's DSH allotment for a FY cannot result in the DSH allotment exceeding the greater of the State's DSH allotment for the previous FY or 12 percent of the State's total medical assistance expenditures for the allotment year (this is referred to as the 12 percent limit).

Furthermore, under section 1923(h) of the Act, Federal financial participation (FFP) for DSH payments to IMDs and other mental health facilities is limited to State-specific aggregate amounts. Under this provision, the aggregate limit for DSH payments to IMDs and other mental health facilities is the lesser of a State's FY 1995 total computable (State and FS) IMD and other mental health facility DSH expenditures applicable to the State's FY 1995 DSH allotment (as reported on the Form CMS–64 as of January 1, 1997), or the amount equal to the product of the State's current year total computable DSH allotment and the applicable percentage specified in section 1923(h) of the Act.

### *C. Determination of Fiscal Year DSH Allotments for FY 2020, FY 2021, FY 2022, and FY 2023*

The Families First Coronavirus Response Act's (FFCRA) (Pub. L. 116–127, enacted March 18, 2020) temporary Federal medical assistance percentage (FMAP) increase went into effect on January 1, 2020 for eligible States, as provided in section 6008 of the FFCRA. All DSH allotment amounts listed in this notice assume that all States qualify for the temporary FMAP increase under section 6008 of the FFCRA for the period of January 1, 2020 through March 31, 2023, during which time the FMAP increase available under the FFCRA is 6.2 percentage points. Section 5131 of the Consolidated Appropriations Act, 2023 (CAA, 2023) (Pub. L. 117–328, enacted December 29, 2022) amended section 6008 of the FFCRA such that the FMAP increase is phased down beginning on April 1, 2023, and ends on December 31, 2023. As a result, qualifying States will receive a temporary FMAP increase for FY 2023 of 5 percentage points for the period of April 1, 2023, through June 30, 2023 and 2.5 percentage points for the period July 1, 2023, through September 30, 2023. The CAA, 2023 provides for a 1.5 percentage point FMAP increase for the period of October 1, 2023, through December 31, 2023, but this period is not applicable to the FY 2023 DSH allotment.

As relevant to this notice, the 6.2 percentage point FMAP increase applies to eligible Medicaid expenditures including DSH payments for FY 2020 (with the exception of the 1st quarter, from October 1, 2019, through December 31, 2019), FY 2021, FY 2022, and FY 2023 (with respect only to the 1st and 2nd quarters, from October 1, 2022, through March 31, 2023). All States currently are receiving the temporary 6.2 percent FFCRA FMAP increase.

Thereafter, qualifying States will receive a temporary FMAP increase for FY 2023 of 5 percentage points for the period of April 1, 2023, through June 30, 2023 and 2.5 percentage points for the period of July 1, 2023, through September 30, 2023. Please note that not all States may qualify for the temporary FMAP increase, for one or more quarters, under section 6008 of the FFCRA, as amended by section 5131 of the CAA, 2023. States will be subject to the applicable FMAP rate in effect at the time when DSH payments are made to providers, dependent on each State's qualifying status with respect to any FMAP increase that may be available under section 6008 of the FFCRA, as amended.

For States that exhaust their entire DSH allotment, the FFCRA FMAP increase would effectively reduce the amount of total computable (TC) DSH payments that such States could pay to qualifying providers. To avoid this reduction in TC DSH allotments, section 9819 of the American Rescue Plan Act of 2021 (ARP) (Pub. L. 117–2, enacted March 11, 2021) added section 1923(f)(3)(F) of the Act, adjusting FS DSH allotments during periods when and for States where the temporary FMAP increase under section 6008 of the FFCRA is in effect. As directed by the ARP, we are required to recalculate FS DSH allotments to equal an amount that will allow States to make the same amount of TC DSH payments as they would have been otherwise able to make in the absence of the FFCRA FMAP increase.

In accordance with section 1923(f)(3)(B) of the Act, a State's DSH allotment for a FY is subject to the limitation that an increase to a State's DSH allotment for a FY cannot result in the DSH allotment exceeding the greater of the State's DSH allotment for the previous FY or 12 percent of the State's total medical assistance expenditures for the allotment year. Because States incur medical assistance expenditures throughout the fiscal year, the calculations for the 12 percent limit under section 1923(f)(3)(B)(ii) of the Act were performed using a prorated FMAP for FY 2020. To arrive at the stated limits, we prorated each State's FY 2020 FMAP rate because the temporary 6.2 percentage point FMAP increase under section 6008 of the FFCRA does not apply to the 1st quarter of FY 2020 (that is, October 1, 2019, through December 31, 2020). For FY 2023, we prorated each State's FY 2023 FMAP rate because the temporary 6.2 percentage point FMAP increase under section 6008 of the FFCRA only applies to the 1st and 2nd quarters of FY 2023, whereas the FMAP rate, for qualifying States, is 5 percentage points for the 3rd quarter and 2.5 percentage points for the 4th quarter of FY 2023, respectively. Please note that these calculations are subject to change based upon each State's qualifying status under section 6008 of the FFCRA, as amended. For the calculation of the 12 percent limit for FY 2021 and FY 2022, we used the FFCRA FMAP rate (that is, the otherwise applicable FMAP rate plus the temporary 6.2 percentage point FFCRA FMAP increase that was in effect in both FYs), because the 6.2 percentage point FFCRA FMAP rate applies to both entire FYs for qualifying States, and medical assistance expenditures are made throughout the year.

Section 1923(f)(3)(F)(i) of the Act requires us to recalculate the annual DSH allotment, including the DSH allotment specified under paragraph (6)(A)(vi), to ensure that the total DSH payments (including both Federal and State shares) that a State may make related to a fiscal year is equal to the total DSH payments that the State could have made for such fiscal year without such FMAP increase. To meet the statutory requirement to enable States to make the same amount of TC DSH payments as if the FFCRA FMAP increase were not in effect, we have used the full (non-prorated) FFCRA-increased FMAP rate in the calculation of the increased final FY 2020 and FY 2021 FS DSH allotments and preliminary FY 2022 and FY 2023 FS DSH allotments. We used the 6.2 percentage point FFCRA-increased FMAP rate rather than a prorated FMAP rate for the FY 2020 and FY 2023 calculations, despite it not being applicable to either full FY, to ensure this provision applies to all States consistent with the statutory requirement. For instance, a State may have made all DSH payments for FY 2020 in quarters other than the first fiscal quarter of that FY or may make all of its DSH payments for FY 2023 in the first two fiscal quarters of that FY. While States may qualify for the FFCRA temporary FMAP increase of 5 percentage points for the 3rd quarter and 2.5 percentage points for the 4th quarter of FY 2023, respectively, the FY 2023 DSH allotments must reflect the 6.2 percentage point temporary FMAP increase in order to ensure States may make the same amount of TC DSH payments as they would have been otherwise able to make in the absence of the FFCRA temporary FMAP increase, regardless of which FY 2023 quarter in which the State makes DSH payments.

While States have distinct payment methodologies that specify when DSH payments are made to providers, States may not claim TC DSH payments in excess of the amount they would have otherwise been able to claim without the application of the temporary FFCRA FMAP increase. This is regardless of whether a portion of unspent FS DSH allotment as adjusted to account for section 1923(f)(3)(F) of the Act, as added by section 9819 of the ARP, remains. For example, if the State made all DSH payments for FY 2020 during the first quarter of that FY, then no increase to the State's DSH allotment is available for that year, since the temporary FMAP increase under section 6008 of the FFCRA was not available for that quarter and section 1923(f)(3)(F) therefore has no effect. Similarly, for FY 2023, only the increase to the State's DSH allotment associated with the FFCRA temporary FMAP increase (in the amount that applies to each quarter of FY 2023) will be available for qualifying States making DSH payments in the 3rd and 4th fiscal quarters of FY 2023. We will monitor both the FS and TC DSH allotments to ensure that States do not exceed statutory authority to claim DSH payments. Consistent with previous guidance provided by CMS during the public health emergency, States should follow existing Federal requirements regarding the applicability of a particular match rate available for a given quarter, including reporting prior period adjustments.

For calculation of the FY 2020 through FY 2023 IMD limits determined under section 1923(h) of the Act, we used the ARP-adjusted DSH allotments and the associated non-prorated FFCRA-increased FMAP rates for each respective FY, to reflect the maximum DSH allotment amount and IMD limit that might be available to a State, for FY 2020 and FY 2023, depending on the State's timing of DSH payments.

In general, we determine States' DSH allotments for a FY and the IMD DSH limits for the same FY using the most recent available estimates of or actual medical assistance expenditures, including DSH expenditures and the most recent available CPI–U data for the FY in accordance with the methodology prescribed in the statute. The indicated estimated or actual expenditures are obtained from States for each relevant FY from the most recent available quarterly Medicaid budget reports (Form CMS–37) or quarterly Medicaid expenditure reports (Form CMS–64), respectively, submitted by the States. For example, as part of the initial determination of a State's FY DSH allotment (referred to as the preliminary

DSH allotments) that is determined before the beginning of the FY for which the DSH allotments and IMD DSH limits are being determined, we use estimated expenditures for the FY obtained from the August submission of the CMS–37 submitted by States prior to the beginning of the FY; such estimated expenditures are subject to update and revision during the FY before actual expenditure data become available. We also use the most recent available estimated CPI–U percentage change that is available before the beginning of the FY for determining the States' preliminary FY DSH allotments; such estimated CPI–U percentage change is subject to update and revision during the FY before the actual CPI–U percentage change becomes available. In determining the final DSH allotments and IMD DSH limits for a FY we use the actual expenditures for the FY and actual CPI–U percentage change for the previous FY.

## II. Provisions of the Notice

### *A. Calculation of the Final FY 2020 and FY 2021 FS State DSH Allotments and the Preliminary FY 2022 and FY 2023 FS State DSH Allotments*

#### 1. Final FY 2020 FS State DSH Allotments

Addendum 1 to this notice provides the States' final FY 2020 DSH allotments determined in accordance with section 1923(f)(3) of the Act. As described in the background section, in general, the DSH allotment for a FY is calculated by increasing the FY DSH allotment for the preceding FY by the CPI–U increase for the previous fiscal year. For purposes of calculating the States' final FY 2020 DSH allotments, the preceding final fiscal year DSH allotments (for FY 2019) were published in the March 16, 2022 **Federal Register** (87 FR 14858). For purposes of calculating the States' final FY 2020 DSH allotments we are using the actual Medicaid expenditures for FY 2020. Finally, for purposes of calculating the States' final FY 2020 DSH allotments, the applicable historical percentage change in the CPI–U for the previous FY (FY 2019) was 1.9 percent; we note that this is the same as the estimated 1.9 percentage change in the CPI–U for FY 2019 that was available and used in the calculation of the preliminary FY 2020 DSH allotments which were published in the March 16, 2022 **Federal Register** (87 FR 14858). We then used each State's FS DSH allotment divided by its respective regular FMAP rate to determine the TC amount of DSH payments each State would have otherwise been able to make without application of the FFCRA-increased FMAP rate. We then multiplied each State's TC DSH payment amount by its respective FFCRA-increased FMAP rate to calculate the increased FY 2020 DSH allotment.

#### 2. Final FY 2021 FS State DSH Allotments

Addendum 2 to this notice provides the States' final FY 2021 DSH allotments determined in accordance with section 1923(f)(3) of the Act. As described in the background section, in general, the DSH allotment for a FY is calculated by increasing the FY DSH allotment for the preceding FY by the CPI–U increase for the previous fiscal year. For purposes of calculating the States' final FY 2021 DSH allotments, the preceding final fiscal year DSH allotments (for FY 2020) are being published in this notice. For purposes of calculating the States' final FY 2021 DSH allotments we are using the actual Medicaid expenditures for FY 2021. Finally, for purposes of calculating the States' final FY 2021 DSH allotments, the applicable historical percentage change in the CPI–U for the previous FY (FY 2020) was 1.5 percent; we note that this is the same as the estimated 1.5 percentage change in the CPI–U for FY 2020 that was available and used in the calculation of the preliminary FY 2021 DSH allotments which were published in the March 16, 2022 **Federal Register** (87 FR 14858). We then used each State's FS DSH allotment divided by its respective regular FMAP rate to determine the TC amount of DSH payments each State would have otherwise been able to make without application of the FFCRA-increased FMAP rate. We then multiplied each State's TC DSH payment amount by its respective FFCRA-increased FMAP rate to calculate the increased FY 2021 DSH allotment.

#### 3. Calculation of the Preliminary FY 2022 FS State DSH Allotments

Addendum 3 to this notice provides the preliminary FY 2022 DSH allotments determined in accordance with section 1923(f)(3) of the Act. The preliminary FY 2022 DSH allotments contained in this notice were determined based on the most recent available estimates from States of their FY 2022 total computable Medicaid expenditures and by increasing the preliminary FY 2021 DSH allotments. The applicable historical percentage change in the CPI–U for FY 2021 was 3.3 percent (we originally published the preliminary FY 2021 DSH allotments in the March 16, 2022 **Federal Register** (87 FR 14858)). We then used each State's FS DSH allotment divided by its respective regular FMAP rate to determine the TC amount of DSH payments each State would have otherwise been able to make without application of the FFCRA-increased FMAP rate. We then multiplied each State's TC DSH payment amount by its respective FFCRA-increased FMAP rate to calculate the increased FY 2022 DSH allotment.

We will publish States' final FY 2022 DSH allotments in a future notice based on the States' four quarterly Medicaid expenditure reports (Form CMS–64) for FY 2022 available following the end of FY 2022 utilizing the actual change in the CPI–U for FY 2021.

#### 4. Calculation of the Preliminary FY 2023 FS State DSH Allotments

Addendum 4 to this notice provides the preliminary FY 2023 DSH allotments determined in accordance with section 1923(f)(3) of the Act. The preliminary FY 2023 DSH allotments contained in this notice were determined based on the most recent available estimates from States of their FY 2023 total computable Medicaid expenditures and by increasing the preliminary FY 2022 DSH allotments calculated prior to the application of the ARP adjustment. The applicable historical percentage change in the CPI–U for FY 2022 was 7.6 percent (we are publishing the preliminary FY 2022 DSH allotments in this notice). We then used each State's FS DSH allotment divided by its respective regular FMAP rate to determine the TC amount of DSH payments each State would have otherwise been able to make without application of the FFCRA-increased FMAP rate. We then multiplied each State's TC DSH payment amount by its respective FFCRA-increased FMAP rate to calculate the ARP-adjusted FY 2023 DSH allotment.

We will publish States' final FY 2023 DSH allotments in a future notice based on the States' four quarterly Medicaid expenditure reports (Form CMS–64) for FY 2023 available following the end of FY 2023.

### *B. Calculation of the Final FY 2020 and FY 2021 and Preliminary FY 2022 and FY 2023 IMD DSH Limits*

Section 1923(h) of the Act specifies the methodology to be used to establish the limits on the amount of DSH payments that a State can make to IMDs and other mental health facilities. FFP is not available for DSH payments to IMDs or other mental health facilities that exceed the IMD DSH limits. In this notice, we are publishing the final FY 2020 and FY 2021 and the preliminary

FY 2022 and FY 2023 IMD DSH limits determined in accordance with the provisions discussed above.

Addendums 5 through 8 to this notice detail each State's final FY 2020 and FY 2021 and preliminary FY 2022 and FY 2023 IMD DSH limits, respectively, determined in accordance with section 1923(h) of the Act.

## III. Collection of Information Requirements

As it relates to the Paperwork Reduction Act of 1995 (PRA; 44 U.S.C. 3501 *et seq.*), this notice does not impose any new or revised ''collection of information'' requirements or burden. For the PRA and this section of the preamble, collection of information is defined under 5 CFR 1320.3(c) of the PRA's implementing regulations. While discussed in sections I.B., I.C., II.A.3., II.A.4., and in Addendums 1 through 8 of this notice, the currently approved requirements and burden associated with form CMS–37 and form CMS–64 are unaffected by this notice. They are approved by the Office of Management and Budget (OMB) under control number 0938–1265. Since this notice will not impose any new or revised collection of information requirements/burden, the notice is not subject to the requirements of the PRA.

## IV. Regulatory Impact Analysis

We have examined the impact of this notice as required by Executive Order 12866 on Regulatory Planning and Review (September 1993), 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 (Pub. L. 104–4; enacted on March 22, 1995) (UMRA '95), Executive Order 13132 on Federalism (August 4, 1999) and the Congressional Review Act (5 U.S.C. 804(2)).

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). A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects ($100 million or more in any 1 year). This notice reaches the $100 million economic threshold and thus has been designated a major rule under the Congressional Review Act by the Office of Information and Regulatory Affairs.

The final FY 2020 DSH allotments being published in this notice are equal to the preliminary FY 2020 DSH allotments published in the March 16, 2022 **Federal Register** (87 FR 14858). This is due to the actual percentage change in the CPI–U for FY 2019 used in the calculation of the final FY 2020 allotments (1.9 percent) being equal to the estimated percentage change in the CPI–U for FY 2019 used in the calculation of the preliminary FY 2020 allotments (1.9 percent). The final FY 2020 IMD DSH limits being published in this notice are also equal to the preliminary FY 2020 IMD DSH limits published in the March 16, 2022 **Federal Register** (87 FR 14858). Since the final FY 2020 DSH allotments were the same as the preliminary FY 2020 DSH allotments, the associated FY 2020 IMD DSH limits also remained the same.

The final FY 2021 DSH allotments being published in this notice are equal to the preliminary FY 2021 DSH allotments published in the March 16, 2022 **Federal Register** (87 FR 14858). This is due to the actual percentage change in the CPI–U for FY 2020 used in the calculation of the final FY 2021 allotments (1.5 percent) being equal to the estimated percentage change in the CPI–U for FY 2020 used in the calculation of the preliminary FY 2021 allotments (1.5 percent). The final FY 2021 IMD DSH limits being published in this notice are also equal to the preliminary FY 2021 IMD DSH limits published in the March 16, 2022 **Federal Register** (87 FR 14858). Since the final FY 2021 DSH allotments were the same as the preliminary FY 2021 DSH allotments, the associated FY 2021 IMD DSH limits also remained the same.

The preliminary FY 2022 DSH allotments (before application of the ARP adjustment) being published in this notice are approximately $428 million more than the preliminary FY 2021 DSH allotments published in the March 16, 2022 **Federal Register** (87 FR 14858). The increase in the DSH allotments is due to the application of the statutory formula for calculating DSH allotments under which the prior fiscal year allotments are increased by the percentage increase in the CPI–U for the prior fiscal year. The applicable historical percentage change in the CPI–U for FY 2021 was 3.3 percent. The preliminary FY 2022 DSH allotments were increased by approximately $1.5 billion to comply with the statutory provisions of the ARP requiring us to recalculate FS DSH allotments to an amount that will allow States to make the same amount of TC DSH payments as they would have been otherwise able to make in the absence of the FFCRA temporary FMAP increase.

The preliminary FY 2022 IMD DSH limits being published in this notice are approximately $29 million more than the preliminary FY 2021 IMD DSH limits published in the March 16, 2022 **Federal Register** (87 FR 14858). The increases in the IMD DSH limits are because the DSH allotment for a FY is a factor in the determination of the IMD DSH limit for the FY. Since the preliminary FY 2022 DSH allotments are greater than the preliminary FY 2021 DSH allotments, the associated preliminary FY 2022 IMD DSH limits for some States also increased.

The preliminary FY 2023 DSH allotments (before application of the ARP adjustment) being published in this notice are approximately $1 billion more than the preliminary FY 2022 DSH allotments published in this notice. The increase in the DSH allotments is due to the application of the statutory formula for calculating DSH allotments under which the prior fiscal year allotments are increased by the percentage increase in the CPI–U for the prior fiscal year. The applicable historical percentage change in the CPI–U for FY 2022 was 7.6 percent. The preliminary FY 2023 DSH allotments were increased by approximately $1.6 billion to comply with the statutory provisions of the ARP requiring us to recalculate FS DSH allotments to an amount that will allow States to make the same amount of TC DSH payments as they would have been otherwise able to make in the absence of the FFCRA temporary FMAP increase.

The preliminary FY 2023 IMD DSH limits being published in this notice are approximately $57 million more than the preliminary FY 2022 IMD DSH limits published in this notice. The increases in the IMD DSH limits are because the DSH allotment for a FY is a factor in the determination of the IMD DSH limit for the FY. Since the preliminary FY 2023 DSH allotments are greater than the preliminary FY 2022 DSH allotments, the associated preliminary FY 2023 IMD DSH limits for some States also increased.

The RFA requires agencies to analyze options for regulatory relief of small businesses, if a rule has a significant impact on a substantial number of small entities. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and small governmental jurisdictions. Most hospitals and most other providers and suppliers are small entities, either by nonprofit status or by having revenues of less than $8.0 million to $41.5 million in any 1 year. Individuals and States are not included in the definition of a small entity. We are not preparing

an analysis for the RFA because the Secretary has determined that this notice will not have significant economic impact on a substantial number of small entities. Specifically, any impact on providers is due to the effect of the various controlling statutes; providers are not impacted as a result of the independent regulatory action in publishing this notice. The purpose of the notice is to announce the latest DSH allotments and IMD DSH limits, as required by the statute.

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 Core-Based Statistical Area for Medicaid payment regulations and has fewer than 100 beds. We are not preparing analysis for section 1102(b) of the Act because the Secretary has determined that this notice will not have a significant impact on the operations of a substantial number of small rural hospitals.

The Medicaid statute specifies the methodology for determining the amounts of States' DSH allotments and IMD DSH limits; and as described previously, the application of the methodology specified in statute results in the decreases or increases in States' DSH allotments and IMD DSH limits for the applicable FYs. The statute applicable to these allotments and limits does not apply to the determination of the amounts of DSH payments made to specific DSH hospitals; rather, these allotments and limits represent an overall limit on the total of such DSH payments. For this reason, we do not believe that this notice will have a significant economic impact on a substantial number of small entities.

Section 202 of the Unfunded Mandates Reform Act of 1995 also requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of $100 million in 1995 dollars, updated annually for inflation. In 2022, that threshold is approximately $165 million. This notice will have no consequential effect on spending by State, local, or tribal governments, in the aggregate, or on the private sector.

Executive Order 13132 establishes certain requirements that an agency must meet when it issues 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 any costs on State or local governments or otherwise have Federalism implications, the requirements of E.O. 13132 are not applicable.

*A. Alternatives Considered*

Because the FFCRA temporary FMAP increase of 6.2 percentage points was not applicable to the 1st quarter of FY 2020 and the phased down FMAP rates are applicable to the 3rd and 4th quarters of FY 2023, we considered utilizing prorated FMAP rates in the calculation of the ARP-adjusted final FY 2020 and preliminary FY 2023 DSH allotments. However, this could have been contrary to the statutory language at section 1923(f)(3)(F) of the Act requiring us to recalculate FS DSH allotments to an amount to allow for States to make the same amount of TC DSH payments as they would have been otherwise able to make in the absence of the FFCRA temporary FMAP increase, depending on States' timing of their DSH payments to eligible providers. The methodologies for determining the States' fiscal year DSH allotments and IMD DSH limits, as reflected in this notice, were established in accordance with the methodologies and formula for determining States' allotments and limits as specified in statute. This notice does not put forward any further discretionary administrative policies for determining such allotments and limits, or otherwise.

*B. Accounting Statement*

As required by OMB Circular A–4 (available at *http://www.whitehouse.gov/omb/circulars/a004/a-4.pdf*), in Tables 1 and 2, we have prepared an accounting statement showing the classification of the estimated expenditures associated with the provisions of this notice. Table 1 provides our best estimate of the change (decrease) in the FS of States' Medicaid DSH payments resulting from the application of the provisions of the Medicaid statute relating to the calculation of States' FY DSH allotments and the increase in the FY DSH allotments from FY 2021 to FY 2022. Table 2 provides our best estimate of the change (decrease) in the FS of States' Medicaid DSH payments resulting from the application of the provisions of the Medicaid statute relating to the calculation of States' FY DSH allotments and the increase in the FY DSH allotments from FY 2022 to FY 2023.

TABLE 1—ACCOUNTING STATEMENT: CLASSIFICATION OF ESTIMATED EXPENDITURES, FROM THE FY 2021 TO FY 2022

[In millions]

| Category | Transfers |
|---|---|
| Annualized Monetized Transfers | $428. |
| From Whom To Whom? | Federal Government to States. |

TABLE 2—ACCOUNTING STATEMENT: CLASSIFICATION OF ESTIMATED EXPENDITURES, FROM THE FY 2022 TO FY 2023

[In millions]

| Category | Transfers |
|---|---|
| Annualized Monetized Transfers | $1,018. |
| From Whom To Whom? | Federal Government to States. |

*C. Congressional Review Act*

This proposed regulation is subject to the Congressional Review Act provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*) and has been transmitted to the Congress and the Comptroller General for review.

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

Chiquita Brooks-LaSure, Administrator of the Centers for Medicare & Medicaid Services, approved this document on March 22, 2023.

Dated: April 11, 2023.

**Xavier Becerra,**

*Secretary, Department of Health and Human Services.*

**BILLING CODE 4120–01–P**

## Key to ADDENDUM 1: Final DSH Allotments for FY 2020

The Final FY 2020 DSH Allotments for the NON-Low DSH States are presented in the top section of this addendum, and the Final FY 2020 DSH Allotments for the Low-DSH States are presented in the bottom section of this addendum.

| Column | Description |
|---|---|
| Column A | **State.** |
| Column B1 | **FY 2020 FMAPs.**<br>This column contains the States' regular FY 2020 Federal Medical Assistance Percentages. |
| Column B2 | **FY 2020 FMAPs.**<br>This column contains the States' FY 2020 Federal Medical Assistance Percentages, adjusted for the FFCRA temporary FMAP increase. |
| Column B3 | **FY 2020 FMAPs.**<br>This column contains the States' prorated FY 2020 Federal Medical Assistance Percentages. |
| Column C | **Prior FY (2019) DSH Allotments**<br>This column contains the States' prior FY 2019 DSH Allotments. |
| Column D | **Prior FY (2019) DSH Allotments (Col C) x (100 percent + Percentage Increase in CPIU): 101.9 percent.**<br>This column contains the amount in Column C increased by 1 plus the percentage increase in the CPI-U for the prior FY (101.9 percent). |
| Column E | **FY 2020 TC MAP Exp. Including DSH.**<br>This column contains the amount of the States' FY 2020 total computable (TC) medical assistance expenditures including DSH expenditures. |
| Column F | **FY 2020 TC DSH Expenditures.**<br>This column contains the amount of the States' FY 2020 total computable DSH expenditures. |
| Column G | **FY 2020 TC MAP Exp. Net of DSH.**<br>This column contains the amount of the States' FY 2020 total computable medical assistance expenditures net of DSH expenditures, calculated as the amount in Column E minus the amount in Column F. |
| Column H | **12 percent Amount.**<br>This column contains the amount of the "12 percent limit" in Federal share, determined in accordance with the provisions of section 1923(f)(3) of the Act. This is calculated using the prorated FMAP rate in Column B3. |
| Column I | **Greater of FY 2019 Allotment or 12 percent Limit.**<br>This column contains the greater of the State's prior FY (FY 2019) DSH allotment or the amount of the 12 percent Limit, determined as the greater of the amount in Column C or Column H. |
| Column J | **FS FY 2020 Unadjusted DSH Allotment.**<br>This column contains the States' final FY 2020 DSH allotments, determined as the lesser of the amount in Column I or Column D.<br>For States with "na" in Columns I or D, refer to the footnotes in the addendum. |
| Column K | **FS FY 2020 ARP-adjusted DSH Allotment.**<br>This column contains the States' final FY 2020 ARP DSH allotments, determined by multiplying the FMAP in Column B2 by Column L. |
| Column L | **TC FY 2020 DSH Allotment.**<br>This column contains the States' final TC FY 2020 DSH allotments, determined by dividing Column B1 by Column J. |

# ADDENDUM 1: Final DSH Allotments for FY 2020

| A | B1 | B2 | B3 | C | D | E | F | G | H | I | J | K | L |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| STATE | FY 2020 FMAPs (Regular) /1 | FY 2020 FMAPs (FFCRA) /2 | FY 2020 FMAPs (Prorated) /3 | Prior FY 2019 DSH Allotments | Prior FY 2019 DSH Allotment (Col C) x 100% + Pct Increase in CPIU: 101.9% | FY 2020 TC MAP Exp. Including DSH /4 | FY 2020 TC DSH Expenditures /4 | FY 2020 TC MAP EXP. Net Of DSH Col E - F | "12% Amount" =Col G x .12/(1-.12/Col B3)* (In FS) | Greater of Col H Or Col C (12% Limit, 2019 Allotment) | FY 2020 Allotment MIN Col I, Col D | FY 2020 DSH FS Allotment ARP Column B2 x L | FY 2020 DSH TC Allotment Column J / B1 |
| ALABAMA | 71.97% | 78.17% | 76.62% | $352,884,938 | $359,589,752 | $6,096,166,669 | $469,951,981 | $5,626,214,688 | $800,521,020 | $800,521,020 | **$359,589,752** | **$390,567,332** | **$499,638,394** |
| ARIZONA | 70.02% | 76.22% | 74.67% | $116,193,822 | $118,401,505 | $14,380,097,500 | $137,097,929 | $14,242,999,571 | $2,036,428,488 | $2,036,428,488 | **$118,401,505** | **$128,885,500** | **$169,096,694** |
| CALIFORNIA | 50.00% | 56.20% | 54.65% | $1,258,049,146 | $1,281,952,080 | $97,209,600,476 | $589,717,957 | $96,619,882,519 | $14,856,581,232 | $14,856,581,232 | **$1,281,952,080** | **$1,440,914,138** | **$2,563,904,160** |
| COLORADO | 50.00% | 56.20% | 54.65% | $106,152,379 | $108,169,274 | $9,571,142,660 | $197,929,962 | $9,373,212,698 | $1,441,255,073 | $1,441,255,073 | **$108,169,274** | **$121,582,264** | **$216,338,548** |
| CONNECTICUT | 50.00% | 56.20% | 54.65% | $229,518,659 | $233,879,514 | $8,488,113,264 | $122,773,005 | $8,365,340,259 | $1,286,281,393 | $1,286,281,393 | **$233,879,514** | **$262,880,574** | **$467,759,028** |
| DISTRICT OF COLUMBIA | 70.00% | 76.20% | 74.65% | $70,290,089 | $71,625,601 | $3,116,473,398 | $82,699,986 | $3,033,773,412 | $433,783,595 | $433,783,595 | **$71,625,601** | **$77,969,583** | **$102,322,287** |
| FLORIDA | 61.47% | 67.67% | 66.12% | $229,518,659 | $233,879,514 | $25,287,463,190 | $340,376,398 | $24,947,086,792 | $3,657,430,995 | $3,657,430,995 | **$233,879,514** | **$257,469,118** | **$380,477,491** |
| GEORGIA | 67.30% | 73.50% | 71.95% | $308,415,698 | $314,275,596 | $11,298,595,472 | $436,864,247 | $10,861,731,225 | $1,564,306,712 | $1,564,306,712 | **$314,275,596** | **$343,228,177** | **$466,977,111** |
| ILLINOIS | 50.14% | 56.34% | 54.79% | $246,732,558 | $251,420,477 | $22,387,970,467 | $490,243,980 | $21,897,726,487 | $3,364,645,293 | $3,364,645,293 | **$251,420,477** | **$282,509,567** | **$501,436,931** |
| INDIANA | 65.84% | 72.04% | 70.49% | $245,298,068 | $249,958,731 | $14,269,009,974 | $668,870,739 | $13,600,139,235 | $1,966,846,602 | $1,966,846,602 | **$249,958,731** | **$273,496,765** | **$379,645,703** |
| KANSAS | 59.16% | 65.36% | 63.81% | $47,338,223 | $48,237,649 | $3,829,902,734 | $73,965,841 | $3,755,936,893 | $555,104,420 | $555,104,420 | **$48,237,649** | **$53,292,981** | **$81,537,608** |
| KENTUCKY | 71.82% | 78.02% | 76.47% | $166,401,028 | $169,562,648 | $11,905,613,440 | $208,065,772 | $11,697,547,668 | $1,664,981,797 | $1,664,981,797 | **$169,562,648** | **$184,200,471** | **$236,093,913** |
| LOUISIANA | 66.86% | 73.06% | 71.51% | $786,862,510 | $801,812,898 | $12,559,462,713 | $1,227,962,961 | $11,331,499,752 | $1,633,975,226 | $1,633,975,226 | **$801,812,898** | **$876,165,874** | **$1,199,241,547** |
| MAINE | 63.80% | 70.00% | 68.45% | $120,497,294 | $122,786,743 | $3,208,972,015 | $53,963,912 | $3,155,008,103 | $459,083,021 | $459,083,021 | **$122,786,743** | **$134,718,997** | **$192,455,710** |
| MARYLAND | 50.00% | 56.20% | 54.65% | $87,503,990 | $89,166,566 | $11,901,582,041 | $153,711,877 | $11,747,870,164 | $1,806,389,977 | $1,806,389,977 | **$89,166,566** | **$100,223,220** | **$178,333,132** |
| MASSACHUSETTS | 50.00% | 56.20% | 54.65% | $350,015,954 | $356,666,257 | $17,967,352,114 | $0 | $17,967,352,114 | $2,762,717,354 | $2,762,717,354 | **$356,666,257** | **$400,892,873** | **$713,332,514** |
| MICHIGAN | 64.06% | 70.26% | 68.71% | $304,112,223 | $309,890,355 | $19,110,820,883 | $818,701,860 | $18,292,119,023 | $2,659,534,117 | $2,659,534,117 | **$309,890,355** | **$339,882,865** | **$483,750,164** |
| MISSISSIPPI | 76.98% | 83.18% | 81.63% | $175,007,976 | $178,333,128 | $5,596,349,573 | $220,361,694 | $5,375,987,879 | $756,297,959 | $756,297,959 | **$178,333,128** | **$192,696,149** | **$231,661,637** |
| MISSOURI | 65.65% | 71.85% | 70.30% | $543,672,322 | $554,002,096 | $10,905,114,581 | $918,827,905 | $9,986,286,676 | $1,445,013,969 | $1,445,013,969 | **$554,002,096** | **$606,322,172** | **$843,872,195** |
| NEVADA | 63.93% | 70.13% | 68.58% | $53,076,189 | $54,084,637 | $4,119,506,708 | $1,101,579 | $4,118,405,129 | $599,024,865 | $599,024,865 | **$54,084,637** | **$59,329,823** | **$84,599,776** |

| A | B1 | B2 | B3 | C | D | E | F | G | H | I | J | K | L |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| STATE | FY 2020 FMAPs (Regular) /1 | FY 2020 FMAPs (FFCRA) /2 | FY 2020 FMAPs (Prorated) /3 | Prior FY 2019 DSH Allotments | Prior FY 2019 DSH Allotment (Col C) x 100% + Pct Increase in CPIU: 101.9% | FY 2020 TC MAP Exp. Including DSH /4 | FY 2020 TC DSH Expenditures /4 | FY 2020 TC MAP EXP. Net Of DSH Col E - F | "12% Amount" =Col G x .12/(1-.12/Col B3)* (In FS) | Greater of Col H Or Col C (12% Limit, 2019 Allotment) | FY 2020 Allotment MIN Col I, Col D | FY 2020 DSH FS Allotment ARP Column B2 x L | FY 2020 DSH TC Allotment Column J / B1 |
| NEW HAMPSHIRE | 50.00% | 56.20% | 54.65% | $183,727,990 | $187,218,822 | $2,252,876,680 | $270,244,843 | $1,982,631,837 | $304,855,793 | $304,855,793 | **$187,218,822** | **$210,433,956** | **$374,437,644** |
| NEW JERSEY | 50.00% | 56.20% | 54.65% | $738,763,183 | $752,799,683 | $16,411,726,557 | $863,233,310 | $15,548,493,247 | $2,390,785,902 | $2,390,785,902 | **$752,799,683** | **$846,146,844** | **$1,505,599,366** |
| NEW YORK | 50.00% | 56.20% | 54.65% | $1,843,321,726 | $1,878,344,839 | $70,674,153,157 | $3,441,229,426 | $67,232,923,731 | $10,337,948,742 | $10,337,948,742 | **$1,878,344,839** | **$2,111,259,599** | **$3,756,689,678** |
| NORTH CAROLINA | 67.03% | 73.23% | 71.68% | $338,540,021 | $344,972,281 | $14,778,330,531 | $490,707,159 | $14,287,623,372 | $2,059,256,387 | $2,059,256,387 | **$344,972,281** | **$376,880,802** | **$514,653,560** |
| OHIO | 63.02% | 69.22% | 67.67% | $466,209,777 | $475,067,763 | $25,194,454,160 | $667,488,907 | $24,526,965,253 | $3,577,667,840 | $3,577,667,840 | **$475,067,763** | **$521,805,626** | **$753,836,501** |
| PENNSYLVANIA | 52.25% | 58.45% | 56.90% | $644,086,735 | $656,324,383 | $34,964,896,749 | $1,047,134,018 | $33,917,762,731 | $5,157,917,237 | $5,157,917,237 | **$656,324,383** | **$734,204,023** | **$1,256,123,221** |
| RHODE ISLAND | 52.95% | 59.15% | 57.60% | $74,593,564 | $76,010,842 | $2,810,004,409 | $128,105,755 | $2,681,898,654 | $406,519,375 | $406,519,375 | **$76,010,842** | **$84,911,073** | **$143,552,110** |
| SOUTH CAROLINA | 70.70% | 76.90% | 75.35% | $375,836,803 | $382,977,702 | $6,651,671,712 | $494,854,663 | $6,156,817,049 | $878,767,794 | $878,767,794 | **$382,977,702** | **$416,562,734** | **$541,694,062** |
| TENNESSEE /5 | 65.21% | 71.41% | 69.86% | $53,100,000 | na | na | na | na | na | na | **$53,100,000** | **$58,148,612** | **$81,429,229** |
| TEXAS | 60.89% | 67.09% | 65.54% | $1,097,386,087 | $1,118,236,423 | $41,798,895,649 | $1,965,927,590 | $39,832,968,059 | $5,851,294,867 | $5,851,294,867 | **$1,118,236,423** | **$1,232,098,565** | **$1,836,486,160** |
| VERMONT | 53.86% | 60.06% | 58.51% | $25,820,851 | $26,311,447 | $1,616,960,203 | $22,704,470 | $1,594,255,733 | $240,670,573 | $240,670,573 | **$26,311,447** | **$29,340,243** | **$48,851,554** |
| VIRGINIA | 50.00% | 56.20% | 54.65% | $100,537,864 | $102,448,083 | $13,512,390,024 | $24,055,974 | $13,488,334,050 | $2,074,009,254 | $2,074,009,254 | **$102,448,083** | **$115,151,645** | **$204,896,166** |
| WASHINGTON | 50.00% | 56.20% | 54.65% | $212,304,760 | $216,338,550 | $13,616,067,808 | $351,805,243 | $13,264,262,565 | $2,039,555,308 | $2,039,555,308 | **$216,338,550** | **$243,164,530** | **$432,677,100** |
| WEST VIRGINIA | 74.94% | 81.14% | 79.59% | $77,462,547 | $78,934,335 | $4,145,950,758 | $70,665,275 | $4,075,285,483 | $575,857,917 | $575,857,917 | **$78,934,335** | **$85,464,798** | **$105,330,044** |
| TOTAL | | | | **$12,029,233,633** | **$12,203,680,172** | **$561,637,688,269** | **$17,051,346,218** | **$544,586,342,051** | **$81,645,310,098** | **$81,645,310,098** | **$12,256,780,174** | **$13,592,801,492** | **$21,548,730,937** |
| LOW DSH STATES | | | | | | | | | | | | | |
| ALASKA | 50.00% | 56.20% | 54.65% | $23,376,123 | $23,820,269 | $2,019,250,659 | $23,318,010 | $1,995,932,649 | $306,900,968.63 | $306,900,969 | **$23,820,269** | **$26,773,982** | **$47,640,538** |
| ARKANSAS | 71.42% | 77.62% | 76.07% | $49,504,631 | $50,445,219 | $6,619,665,977 | $3,457,577 | $6,616,208,400 | $942,647,054 | $942,647,054 | **$50,445,219** | **$54,824,390** | **$70,631,782** |
| DELAWARE | 57.86% | 64.06% | 62.51% | $10,389,387 | $10,586,785 | $2,376,240,280 | -$3,617,506 | $2,379,857,786 | $353,430,790 | $353,430,790 | **$10,586,785** | **$11,721,214** | **$18,297,243** |
| HAWAII | 53.47% | 59.67% | 58.12% | $11,184,206 | $11,396,706 | $2,330,861,339 | $10,401,572 | $2,320,459,767 | $350,906,647.85 | $350,906,648 | **$11,396,706** | **$12,718,187** | **$21,314,206** |
| IDAHO | 70.34% | 76.54% | 74.99% | $18,863,567 | $19,221,975 | $2,486,061,085 | $24,569,318 | $2,461,491,767 | $351,650,613.00 | $351,650,613 | **$19,221,975** | **$20,916,263** | **$27,327,232** |

| A | B1 | B2 | B3 | C | D | E | F | G | H | I | J | K | L |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| STATE | FY 2020 FMAPs (Regular) /1 | FY 2020 FMAPs (FFCRA) /2 | FY 2020 FMAPs (Prorated) /3 | Prior FY 2019 DSH Allotments | Prior FY 2019 DSH Allotment (Col C) x 100% + Pct Increase in CPIU: 101.9% | FY 2020 TC MAP Exp. Including DSH /4 | FY 2020 TC DSH Expenditures /4 | FY 2020 TC MAP EXP. Net Of DSH Col E - F | "12% Amount" =Col G x .12/(1-.12/Col B3)* (In FS) | Greater of Col H Or Col C (12% Limit, 2019 Allotment) | FY 2020 Allotment MIN Col I, Col D | FY 2020 DSH FS Allotment ARP Column B2 x L | FY 2020 DSH TC Allotment Column J / B1 |
| IOWA | 61.20% | 67.40% | 65.85% | $45,193,531 | $46,052,208 | $5,822,570,106 | $71,810,336 | $5,750,759,770 | $843,871,935 | $843,871,935 | **$46,052,208** | **$50,717,628** | **$75,248,706** |
| MINNESOTA | 50.00% | 56.20% | 54.65% | $85,712,452 | $87,340,989 | $13,611,654,951 | $59,847,804 | $13,551,807,147 | $2,083,769,080 | $2,083,769,080 | **$87,340,989** | **$98,171,272** | **$174,681,978** |
| MONTANA | 64.78% | 70.98% | 69.43% | $13,026,074 | $13,273,569 | $1,992,926,465 | $85,841 | $1,992,840,624 | $289,109,367 | $289,109,367 | **$13,273,569** | **$14,543,963** | **$20,490,227** |
| NEBRASKA | 54.72% | 60.92% | 59.37% | $32,474,849 | $33,091,871 | $2,290,915,253 | $43,386,973 | $2,247,528,280 | $338,025,976 | $338,025,976 | **$33,091,871** | **$36,841,315** | **$60,474,910** |
| NEW MEXICO | 72.71% | 78.91% | 77.36% | $23,376,123 | $23,820,269 | $6,287,136,348 | $31,757,995 | $6,255,378,353 | $888,462,796 | $888,462,796 | **$23,820,269** | **$25,851,429** | **$32,760,651** |
| NORTH DAKOTA | 50.05% | 56.25% | 54.70% | $10,961,790 | $11,170,064 | $1,274,342,537 | $1,809,524 | $1,272,533,013 | $195,618,424 | $195,618,424 | **$11,170,064** | **$12,553,768** | **$22,317,810** |
| OKLAHOMA | 66.02% | 72.22% | 70.67% | $41,557,549 | $42,347,142 | $4,971,314,398 | $62,378,652 | $4,908,935,746 | $709,557,503 | $709,557,503 | **$42,347,142** | **$46,324,002** | **$64,142,899** |
| OREGON | 61.23% | 67.43% | 65.88% | $51,946,941 | $52,933,933 | $10,660,624,000 | $75,492,332 | $10,585,131,668 | $1,553,114,642 | $1,553,114,642 | **$52,933,933** | **$58,293,894** | **$86,450,977** |
| SOUTH DAKOTA | 57.62% | 63.82% | 62.27% | $12,674,763 | $12,915,583 | $926,188,243 | $1,486,156 | $924,702,087 | $137,452,633 | $137,452,633 | **$12,915,583** | **$14,305,319** | **$22,415,104** |
| UTAH | 68.19% | 74.39% | 72.84% | $22,513,467 | $22,941,223 | $3,084,967,869 | $27,913,808 | $3,057,054,061 | $439,202,796 | $439,202,796 | **$22,941,223** | **$25,027,095** | **$33,643,090** |
| WISCONSIN | 59.36% | 65.56% | 64.01% | $108,485,232 | $110,546,451 | $9,345,285,225 | $130,907,095 | $9,214,378,130 | $1,360,843,709 | $1,360,843,709 | **$110,546,451** | **$122,092,745** | **$186,230,544** |
| WYOMING | 50.00% | 56.20% | 54.65% | $259,735 | $264,670 | $610,632,960 | $517,980 | $610,114,980 | $93,813,225 | $93,813,225 | **$264,670** | **$297,489** | **$529,340** |
| **TOTAL LOW DSH STATES** | | | | **$561,500,420** | **$572,168,928** | **$76,710,637,695** | **$565,523,467** | **$76,145,114,228** | **$11,238,378,160** | **$11,238,378,160** | **$572,168,926** | **$631,973,955** | **$964,597,238** |
| **TOTAL** | | | | **$12,590,734,053** | **$12,775,849,100** | **$638,348,325,964** | **$17,616,869,685** | **$620,731,456,279** | **$92,883,688,258** | **$92,883,688,258** | **$12,828,949,100** | **$14,224,775,447** | **$22,513,328,175** |

FOOTNOTES:

/1 Regular FMAP as determined under section 1905(b) of the Act.

/2 Section 6008 of the Families First Coronavirus Response Act (FFCRA) provides a temporary 6.2 percentage point increase for the 2nd through 4th quarters to each qualifying State and territory's State-specific FMAP as defined in section 1905(b) of the Act.

/3 Prorated to reflect the FFCRA FMAP increase going into effect beginning January 1, 2020.

/4 Expenditures based on the amounts reported by States on the Form CMS-64.

/5 Tennessee's DSH allotment for FY 2020 determined under section 1923(f)(6)(A) of the Act.

## Key to ADDENDUM 2: Final DSH Allotments for FY 2021

| The Final FY 2021 DSH Allotments for the NON-Low DSH States are presented in the top section of this addendum, and the Final FY 2021 DSH Allotments for the Low-DSH States are presented in the bottom section of this addendum. | |
|---|---|
| **Column** | **Description** |
| Column A | **State.** |
| Column B1 | **FY 2021 FMAPs.**<br>This column contains the States' regular FY 2021 Federal Medical Assistance Percentages. |
| Column B2 | **FY 2021 FMAPs.**<br>This column contains the States' FY2021 Federal Medical Assistance Percentages, adjusted for the FFCRA temporary FMAP increase. |
| Column C | **Prior FY (2020) DSH Allotments**<br>This column contains the States' prior FY 2020 DSH Allotments. |
| Column D | **Prior FY (2020) DSH Allotments (Col C) x (100 percent + Percentage Increase in CPIU): 101.5percent.**<br>This column contains the amount in Column C increased by 1 plus the percentage increase in the CPI-U for the prior FY (101.5 percent). |
| Column E | **FY 2021 TC MAP Exp. Including DSH.**<br>This column contains the amount of the States' FY 2021 total computable (TC) medical assistance expenditures including DSH expenditures. |
| Column F | **FY 2021 TC DSH Expenditures.**<br>This column contains the amount of the States' FY 2021 total computable DSH expenditures. |
| Column G | **FY 2021 TC MAP Exp. Net of DSH.**<br>This column contains the amount of the States' FY 2021 total computable medical assistance expenditures net of DSH expenditures, calculated as the amount in Column E minus the amount in Column F. |
| Column H | **12 percent Amount.**<br>This column contains the amount of the "12 percent limit" in Federal share, determined in accordance with the provisions of section 1923(f)(3) of the Act. This is calculated using the full FMAP rate, inclusive of the FFCRA temporary FMAP increase, in Column B2. |
| Column I | **Greater of FY 2020 Allotment or 12 percent Limit.**<br>This column contains the greater of the State's final prior FY (FY 2020) DSH allotment or the amount of the 12 percent Limit, determined as the greater of the amount in Column C or Column H. |
| Column J | **FS FY 2021 Unadjusted DSH Allotment.**<br>This column contains the States' final FY 2021 DSH allotments, determined as the lesser of the amount in Column I or Column D.<br>For States with "na" in Columns I or D, refer to the footnotes in the addendum. |
| Column K | **FS FY 2021 ARP-adjusted DSH Allotment.**<br>This column contains the States' final FY 2021 ARP DSH allotments, determined by multiplying the FMAP in Column B2 by Column L. |
| Column L | **TC FY 2021 DSH Allotment.**<br>This column contains the States' final TC FY 2021 DSH allotments, determined by dividing Column B1 by Column J. |

# ADDENDUM 2: Final DSH Allotments for FY 2021

| A | B1 | B2 | C | D | E | F | G | H | I | J | K | L |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | FY 2021 | FY 2021 | Prior FY 2020 | Prior FY 2020 | FY 2021 | FY 2021 | FY 2021 | "12% Amount" | Greater of | FY 2021 | FY 2021 DSH | FY 2021 DSH |
| STATE | FMAPs | FMAPs | DSH Allotments | DSH Allotment (Col C) x | TC MAP Exp. | TC DSH | TC MAP EXP. | =Col G x | Col H Or Col C | Allotment | FS Allotment | TC Allotment |
| | (Regular) /1 | (FFCRA) /2 | | 100% + Pct Increase in CPIU: | Including DSII /3 | Expenditures /3 | Net Of DSII | .12/(1-.12/Col B2)* | (12% Limit, 2020 | | ARP | |
| | | | | 101.5% | | | Col E - F | (In FS) | Allotment) | MIN Col I, Col D | Column B2 x L | Column J / B1 |
| ALABAMA | 72.58% | 78.78% | $359,589,752 | $364,983,598 | $6,606,318,076 | $408,795,010 | $6,197,523,066 | $877,342,079 | $877,342,079 | **$364,983,598** | **$396,161,585** | **$502,870,761** |
| ARIZONA | 70.01% | 76.21% | $118,401,505 | $120,177,528 | $17,585,138,173 | $124,367,410 | $17,460,770,763 | $2,486,874,954 | $2,486,874,954 | **$120,177,528** | **$130,820,303** | **$171,657,660** |
| CALIFORNIA | 50.00% | 56.20% | $1,281,952,080 | $1,301,181,361 | $108,748,132,753 | $510,068,426 | $108,238,064,327 | $16,514,875,697 | $16,514,875,697 | **$1,301,181,361** | **$1,462,527,850** | **$2,602,362,722** |
| COLORADO | 50.00% | 56.20% | $108,169,274 | $109,791,813 | $10,693,728,321 | $219,367,288 | $10,474,361,033 | $1,598,169,475 | $1,598,169,475 | **$109,791,813** | **$123,405,998** | **$219,583,626** |
| CONNECTICUT | 50.00% | 56.20% | $233,879,514 | $237,387,707 | $9,249,509,783 | $170,422,716 | $9,079,087,067 | $1,385,279,710 | $1,385,279,710 | **$237,387,707** | **$266,823,783** | **$474,775,414** |
| DISTRICT OF COLUMBIA | 70.00% | 76.20% | $71,625,601 | $72,699,985 | $3,344,903,713 | $103,717,821 | $3,241,185,892 | $461,641,804 | $461,641,804 | **$72,699,985** | **$79,139,127** | **$103,857,121** |
| FLORIDA | 61.96% | 68.16% | $233,879,514 | $237,387,707 | $28,041,254,009 | $341,821,654 | $27,699,432,355 | $4,034,173,738 | $4,034,173,738 | **$237,387,707** | **$261,141,803** | **$383,130,579** |
| GEORGIA | 67.03% | 73.23% | $314,275,596 | $318,989,730 | $12,210,335,666 | $432,744,219 | $11,777,591,447 | $1,690,294,996 | $1,690,294,996 | **$318,989,730** | **$348,494,971** | **$475,890,989** |
| ILLINOIS | 50.96% | 57.16% | $251,420,477 | $255,191,784 | $26,827,868,427 | $527,589,194 | $26,300,279,233 | $3,994,660,658 | $3,994,660,658 | **$255,191,784** | **$286,239,450** | **$500,768,807** |
| INDIANA | 65.83% | 72.03% | $249,958,731 | $253,708,112 | $16,662,338,954 | $139,369,652 | $16,522,969,302 | $2,379,109,403 | $2,379,109,403 | **$253,708,112** | **$277,602,845** | **$385,398,925** |
| KANSAS | 59.68% | 65.88% | $48,237,649 | $48,961,214 | $4,061,376,155 | $76,020,522 | $3,985,355,633 | $584,755,521 | $584,755,521 | **$48,961,214** | **$54,047,667** | **$82,039,568** |
| KENTUCKY | 72.05% | 78.25% | $169,562,648 | $172,106,088 | $14,485,962,106 | $265,644,273 | $14,220,317,833 | $2,015,528,822 | $2,015,528,822 | **$172,106,088** | **$186,916,050** | **$238,870,351** |
| LOUISIANA | 67.42% | 73.62% | $801,812,898 | $813,840,091 | $13,256,442,445 | $911,499,062 | $12,344,943,383 | $1,769,882,633 | $1,769,882,633 | **$813,840,091** | **$888,681,511** | **$1,207,119,684** |
| MAINE | 63.69% | 69.89% | $122,786,743 | $124,628,544 | $3,344,325,038 | $57,829,488 | $3,286,495,550 | $476,130,262 | $476,130,262 | **$124,628,544** | **$136,760,699** | **$195,679,925** |
| MARYLAND | 50.00% | 56.20% | $89,166,566 | $90,504,064 | $13,382,585,628 | $188,965,853 | $13,193,619,775 | $2,013,071,759 | $2,013,071,759 | **$90,504,064** | **$101,726,568** | **$181,008,128** |
| MASSACHUSETTS | 50.00% | 56.20% | $356,666,257 | $362,016,251 | $19,909,697,384 | $0 | $19,909,697,384 | $3,037,805,411 | $3,037,805,411 | **$362,016,251** | **$406,906,266** | **$724,032,502** |
| MICHIGAN | 64.08% | 70.28% | $309,890,355 | $314,538,710 | $20,723,983,781 | $217,693,446 | $20,506,290,335 | $2,967,430,511 | $2,967,430,511 | **$314,538,710** | **$344,971,606** | **$490,853,168** |
| MISSISSIPPI | 77.76% | 83.96% | $178,333,128 | $181,008,125 | $5,738,901,095 | $235,144,781 | $5,503,756,314 | $770,587,071 | $770,587,071 | **$181,008,125** | **$195,440,357** | **$232,777,939** |
| MISSOURI | 64.96% | 71.16% | $554,002,096 | $562,312,127 | $11,436,249,176 | $908,120,112 | $10,528,129,064 | $1,519,638,264 | $1,519,638,264 | **$562,312,127** | **$615,981,080** | **$865,628,274** |
| NEVADA | 63.30% | 69.50% | $54,084,637 | $54,895,907 | $4,735,008,193 | $94,624,396 | $4,640,383,797 | $673,057,406 | $673,057,406 | **$54,895,907** | **$60,272,757** | **$86,723,392** |

| A | B1 | B2 | C | D | E | F | G | H | I | J | K | L |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | FY 2021 | FY 2021 | Prior FY 2020 | Prior FY 2020 | FY 2021 | FY 2021 | FY 2021 | "12% Amount" | Greater of | FY 2021 | FY 2021 DSH | FY 2021 DSH |
| STATE | FMAPs | FMAPs | DSH Allotments | DSH Allotment (Col C) x | TC MAP Exp. | TC DSH | TC MAP EXP. | =Col G x | Col H Or Col C | Allotment | FS Allotment | TC Allotment |
| | (Regular) /1 | (FFCRA) /2 | | 100% + Pct Increase in CPIU: | Including DSH /3 | Expenditures /3 | Net Of DSH | .12/(1-.12/Col B2)* | (12% Limit, 2020 | | ARP | |
| | | | | 101.5% | | | Col E - F | (In FS) | Allotment) | MIN Col I, Col D | Column B2 x L | Column J / B1 |
| NEW HAMPSHIRE | 50.00% | 56.20% | $187,218,822 | $190,027,104 | $2,381,983,996 | $241,574,688 | $2,140,409,308 | $326,581,909 | $326,581,909 | **$190,027,104** | **$213,590,465** | **$380,054,208** |
| NEW JERSEY | 50.00% | 56.20% | $752,799,683 | $764,091,678 | $18,952,810,634 | $1,147,557,679 | $17,805,252,955 | $2,716,710,994 | $2,716,710,994 | **$764,091,678** | **$858,839,046** | **$1,528,183,356** |
| NEW YORK | 50.00% | 56.20% | $1,878,344,839 | $1,906,520,012 | $71,121,854,348 | $4,162,108,885 | $66,959,745,463 | $10,216,663,425 | $10,216,663,425 | **$1,906,520,012** | **$2,142,928,493** | **$3,813,040,024** |
| NORTH CAROLINA | 67.40% | 73.60% | $344,972,281 | $350,146,865 | $16,732,381,973 | $443,336,702 | $16,289,045,271 | $2,335,468,309 | $2,335,468,309 | **$350,146,865** | **$382,356,221** | **$519,505,734** |
| OHIO | 63.63% | 69.83% | $475,067,763 | $482,193,779 | $27,416,270,572 | $687,665,917 | $26,728,604,655 | $3,872,990,067 | $3,872,990,067 | **$482,193,779** | **$529,177,928** | **$757,808,862** |
| PENNSYLVANIA | 52.20% | 58.40% | $656,324,383 | $666,169,249 | $37,182,173,112 | $995,866,369 | $36,186,306,743 | $5,465,380,122 | $5,465,380,122 | **$666,169,249** | **$745,292,800** | **$1,276,186,301** |
| RHODE ISLAND | 54.09% | 60.29% | $76,010,842 | $77,151,005 | $3,003,255,442 | $142,493,980 | $2,860,761,462 | $428,598,820 | $428,598,820 | **$77,151,005** | **$85,994,344** | **$142,634,507** |
| SOUTH CAROLINA | 70.63% | 76.83% | $382,977,702 | $388,722,368 | $7,017,110,878 | $517,482,471 | $6,499,628,407 | $924,324,758 | $924,324,758 | **$388,722,368** | **$422,844,960** | **$550,364,389** |
| TENNESSEE /4 | 66.10% | 72.30% | $53,100,000 | na | na | na | na | na | na | **$53,100,000** | **$58,080,635** | **$80,332,829** |
| TEXAS | 61.81% | 68.01% | $1,118,236,423 | $1,135,009,969 | $45,280,678,937 | $1,801,417,188 | $43,479,261,749 | $6,335,349,955 | $6,335,349,955 | **$1,135,009,969** | **$1,248,859,861** | **$1,836,288,576** |
| VERMONT | 54.57% | 60.77% | $26,311,447 | $26,706,119 | $1,673,166,756 | $22,704,470 | $1,650,462,286 | $246,787,598 | $246,787,598 | **$26,706,119** | **$29,740,349** | **$48,939,196** |
| VIRGINIA | 50.00% | 56.20% | $102,448,083 | $103,984,804 | $15,790,735,684 | -$44,358,212 | $15,835,093,896 | $2,416,105,729 | $2,416,105,729 | **$103,984,804** | **$116,878,920** | **$207,969,608** |
| WASHINGTON | 50.00% | 56.20% | $216,338,550 | $219,583,628 | $16,776,780,834 | $204,803,501 | $16,571,977,333 | $2,528,538,804 | $2,528,538,804 | **$219,583,628** | **$246,811,998** | **$439,167,256** |
| WEST VIRGINIA | 74.99% | 81.19% | $78,934,335 | $80,118,350 | $4,621,996,577 | $69,596,182 | $4,552,400,395 | $641,033,770 | $641,033,770 | **$80,118,350** | **$86,742,350** | **$106,838,712** |
| TOTAL | | | **$12,256,780,174** | **$12,386,735,377** | **$618,995,258,619** | **$16,326,055,143** | **$602,669,203,476** | **$89,704,844,435** | **$89,704,844,435** | **$12,439,835,376** | **$13,792,200,648** | **$21,812,343,093** |
| LOW DSH STATES | | | | | | | | | | | | |
| ALASKA | 50.00% | 56.20% | $23,820,269 | $24,177,573 | $2,144,763,808 | $25,285,920 | $2,119,477,888 | $323,388,209.88 | $323,388,210 | **$24,177,573** | **$27,175,592** | **$48,355,146** |
| ARKANSAS | 71.23% | 77.43% | $50,445,219 | $51,201,897 | $7,135,715,024 | $8,889,270 | $7,126,825,754 | $1,012,068,075 | $1,012,068,075 | **$51,201,897** | **$55,658,611** | **$71,882,489** |
| DELAWARE | 57.74% | 63.94% | $10,586,785 | $10,745,587 | $2,413,163,883 | $0 | $2,413,163,883 | $356,482,939 | $356,482,939 | **$10,745,587** | **$11,899,426** | **$18,610,300** |
| HAWAII | 53.02% | 59.22% | $11,396,706 | $11,567,657 | $2,787,226,892 | $10,340,650 | $2,776,886,242 | $417,909,029.86 | $417,909,030 | **$11,567,657** | **$12,920,344** | **$21,817,535** |
| IDAHO | 70.41% | 76.61% | $19,221,975 | $19,510,305 | $2,872,809,060 | $25,643,963 | $2,847,165,097 | $405,116,207.55 | $405,116,208 | **$19,510,305** | **$21,228,298** | **$27,709,565** |

| A | B1 | B2 | C | D | E | F | G | H | I | J | K | L |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | FY 2021 | FY 2021 | Prior FY 2020 | Prior FY 2020 | FY 2021 | FY 2021 | FY 2021 | "12% Amount" | Greater of | FY 2021 | FY 2021 DSII | FY 2021 DSII |
| STATE | FMAPs | FMAPs | DSH Allotments | DSH Allotment (Col C) x | TC MAP Exp. | TC DSH | TC MAP EXP. | =Col G x | Col H Or Col C | Allotment | FS Allotment | TC Allotment |
| | (Regular) /1 | (FFCRA) /2 | | 100% + Pct Increase in CPIU: | Including DSH /3 | Expenditures /3 | Net Of DSH | .12/(1-.12/Col B2)* | (12% Limit, 2020 | | ARP | |
| | | | | 101.5% | | | Col E - F | (In FS) | Allotment) | MIN Col I, Col D | Column B2 x L | Column J / B1 |
| IOWA | 61.75% | 67.95% | $46,052,208 | $46,742,991 | $5,926,977,802 | $64,615,198 | $5,862,362,604 | $854,364,695 | $854,364,695 | **$46,742,991** | **$51,436,214** | **$75,697,151** |
| MINNESOTA | 50.00% | 56.20% | $87,340,989 | $88,651,104 | $14,844,071,687 | $53,704,404 | $14,790,367,283 | $2,256,702,194 | $2,256,702,194 | **$88,651,104** | **$99,643,841** | **$177,302,208** |
| MONTANA | 65.60% | 71.80% | $13,273,569 | $13,472,673 | $2,159,386,283 | $170,995 | $2,159,215,288 | $311,100,316 | $311,100,316 | **$13,472,673** | **$14,746,005** | **$20,537,611** |
| NEBRASKA | 56.47% | 62.67% | $33,091,871 | $33,588,249 | $3,043,286,947 | $29,821,013 | $3,013,465,934 | $447,256,152 | $447,256,152 | **$33,588,249** | **$37,275,997** | **$59,479,811** |
| NEW MEXICO | 73.46% | 79.66% | $23,820,269 | $24,177,573 | $6,868,750,735 | $33,532,501 | $6,835,218,234 | $965,699,352 | $965,699,352 | **$24,177,573** | **$26,218,152** | **$32,912,569** |
| NORTH DAKOTA | 52.40% | 58.60% | $11,170,064 | $11,337,615 | $1,370,853,176 | $982,602 | $1,369,870,574 | $206,715,233 | $206,715,233 | **$11,337,615** | **$12,679,089** | **$21,636,670** |
| OKLAHOMA | 67.99% | 74.19% | $42,347,142 | $42,982,349 | $5,333,355,495 | $54,784,781 | $5,278,570,714 | $755,652,988 | $755,652,988 | **$42,982,349** | **$46,901,904** | **$63,218,634** |
| OREGON | 60.84% | 67.04% | $52,933,933 | $53,727,942 | $11,182,759,815 | $86,020,046 | $11,096,739,769 | $1,621,930,452 | $1,621,930,452 | **$53,727,942** | **$59,203,176** | **$88,310,227** |
| SOUTH DAKOTA | 58.28% | 64.48% | $12,915,583 | $13,109,317 | $993,783,946 | $1,391,438 | $992,392,508 | $146,317,383 | $146,317,383 | **$13,109,317** | **$14,503,925** | **$22,493,681** |
| UTAH | 67.52% | 73.72% | $22,941,223 | $23,285,341 | $3,522,910,222 | $29,746,249 | $3,493,163,973 | $500,679,290 | $500,679,290 | **$23,285,341** | **$25,423,509** | **$34,486,583** |
| WISCONSIN | 59.37% | 65.57% | $110,546,451 | $112,204,648 | $10,293,593,549 | $138,060,949 | $10,155,532,600 | $1,491,651,908 | $1,491,651,908 | **$112,204,648** | **$123,922,162** | **$188,992,164** |
| WYOMING | 50.00% | 56.20% | $264,670 | $268,640 | $588,254,128 | $470,943 | $587,783,185 | $89,683,480 | $89,683,480 | **$268,640** | **$301,951** | **$537,280** |
| **TOTAL LOW DSH STATES** | | | **$572,168,926** | **$580,751,460** | **$83,481,662,452** | **$563,460,922** | **$82,918,201,530** | **$12,162,717,905** | **$12,162,717,905** | **$580,751,461** | **$641,138,198** | **$973,979,623** |
| **TOTAL** | | | **$12,828,949,100** | **$12,967,486,837** | **$702,476,921,071** | **$16,889,516,065** | **$685,587,405,006** | **$101,867,562,340** | **$101,867,562,340** | **$13,020,586,837** | **$14,433,338,845** | **$22,786,322,716** |

FOOTNOTES:

/1 Regular FMAP as determined under section 1905(b) of the Act.

/2 Section 6008 of the Families First Coronavirus Response Act (FFCRA) provides a temporary 6.2 percentage point increase to each qualifying State and territory's State-specific FMAP as defined in section 1905(b) of the Act.

/3 Expenditures based on the amounts reported by States on the Form CMS-64.

'/4 Tennessee's DSH allotment for FY 2021 determined under section 1923(f)(6)(A) of the Act.

## Key to ADDENDUM 3: Preliminary DSH Allotments for FY 2022

| The Preliminary FY 2022 DSH Allotments for the NON-Low DSH States are presented in the top section of this addendum, and the Preliminary FY 2022 DSH Allotments for the Low-DSH States are presented in the bottom section of this addendum. | |
|---|---|
| **Column** | **Description** |
| Column A | **State.** |
| Column B1 | **FY 2022 FMAPs.**<br>This column contains the States' regular FY 2022 Federal Medical Assistance Percentages. |
| Column B2 | **FY 2022 FMAPs.**<br>This column contains the States' FY 2022 Federal Medical Assistance Percentages, adjusted for the FFCRA temporary FMAP increase. |
| Column C | **Prior FY (2021) DSH Allotments**<br>This column contains the States' prior preliminary FY 2021 DSH Allotments. |
| Column D | **Prior FY (2021) DSH Allotments (Col C) x (100percent + Percentage Increase in CPIU): 103.3percent.**<br>This column contains the amount in Column C increased by 1 plus the estimated percentage increase in the CPI-U for the prior FY (103.3 percent). |
| Column E | **FY 2022 TC MAP Exp. Including DSH.**<br>This column contains the amount of the States' projected FY 2022 total computable (TC) medical assistance expenditures including DSH expenditures. |
| Column F | **FY 2022 TC DSH Expenditures.**<br>This column contains the amount of the States' projected FY 2022 total computable DSH expenditures. |
| Column G | **FY 2022 TC MAP Exp. Net of DSH.**<br>This column contains the amount of the States' projected FY 2022 total computable medical assistance expenditures net of DSH expenditures, calculated as the amount in Column E minus the amount in Column F. |
| Column H | **12 percent Amount.**<br>This column contains the amount of the "12 percent limit" in Federal share, determined in accordance with the provisions of section 1923(f)(3) of the Act. This is calculated using the full FMAP rate, inclusive of the FFCRA temporary FMAP increase, in Column B2. |
| Column I | **Greater of FY 2021 Allotment or 12 percent Limit.**<br>This column contains the greater of the State's preliminary prior FY (FY 2021) DSH allotment or the amount of the 12 percent Limit, determined as the greater of the amount in Column C or Column H. |
| Column J | **FS FY 2022 Unadjusted DSH Allotment.**<br>This column contains the States' preliminary FY 2022 DSH allotments, determined as the lesser of the amount in Column I or Column D.<br>For states with "na" in Columns I or D, refer to the footnotes in the addendum. |
| Column K | **FS FY 2022 ARP-adjusted DSH Allotment.**<br>This column contains the States' preliminary FY 2022 ARP DSH allotments, determined by multiplying the FMAP in Column B2 by Column L. |
| Column L | **TC FY 2022 DSH Allotment.**<br>This column contains the States' preliminary TC FY 2022 DSH allotments, determined by dividing Column B1 by Column J. |

# ADDENDUM 3: Preliminary DSH Allotments for FY 2022

| A | B1 | B2 | C | D | E | F | G | H | I | J | K | L |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| STATE | FY 2022 FMAPs (Regular) /1 | FY 2022 FMAPs (FFCRA) /2 | Prior FY (2021) DSH Allotments | Prior FY (2021) DSH Allotment (Col C) x 100% + Pct Increase in CPIU: 103.3% | FY 2022 TC MAP Exp. Including DSH /3 | FY 2022 TC DSH Expenditures /3 | FY 2022 TC MAP EXP. Net Of DSH Col E - F | "12% Amount" =Col G x .12/(1-.12/Col B2)* (In FS) | Greater of Col H Or Col C (12% Limit, FY 2021 Allotment) | FY 2022 DSH Allotment MIN Col I, Col D | FY 2022 DSH FS Allotment ARP Column B2 x L | FY 2022 DSH TC Allotment Column J / B1 |
| ALABAMA | 72.37% | 78.57% | $364,983,598 | $377,028,057 | $7,672,428,000 | $392,656,000 | $7,279,772,000 | $1,031,044,049 | $1,031,044,049 | **$377,028,057** | **$409,328,374** | **$520,972,858** |
| ARIZONA | 70.01% | 76.21% | $120,177,528 | $124,143,386 | $19,761,081,000 | $173,251,000 | $19,587,830,000 | $2,789,824,372 | $2,789,824,372 | **$124,143,386** | **$135,137,372** | **$177,322,363** |
| CALIFORNIA | 50.00% | 56.20% | $1,301,181,361 | $1,344,120,346 | $128,716,431,000 | $0 | $128,716,431,000 | $19,639,448,205 | $19,639,448,205 | **$1,344,120,346** | **$1,510,791,269** | **$2,688,240,692** |
| COLORADO | 50.00% | 56.20% | $109,791,813 | $113,414,943 | $11,994,892,000 | $232,518,000 | $11,762,374,000 | $1,794,693,445 | $1,794,693,445 | **$113,414,943** | **$127,478,396** | **$226,829,886** |
| CONNECTICUT | 50.00% | 56.20% | $237,387,707 | $245,221,501 | $9,151,523,000 | $116,814,000 | $9,034,709,000 | $1,378,508,541 | $1,378,508,541 | **$245,221,501** | **$275,628,967** | **$490,443,002** |
| DISTRICT OF COLUMBIA | 70.00% | 76.20% | $72,699,985 | $75,099,085 | $3,280,965,000 | $82,528,000 | $3,198,437,000 | $455,553,083 | $455,553,083 | **$75,099,085** | **$81,750,718** | **$107,284,407** |
| FLORIDA | 61.03% | 67.23% | $237,387,707 | $245,221,501 | $32,099,745,000 | $339,322,000 | $31,760,423,000 | $4,639,333,489 | $4,639,333,489 | **$245,221,501** | **$270,133,402** | **$401,804,852** |
| GEORGIA | 66.85% | 73.05% | $318,989,730 | $329,516,391 | $14,455,584,000 | $438,155,000 | $14,017,429,000 | $2,012,723,712 | $2,012,723,712 | **$329,516,391** | **$360,077,373** | **$492,919,059** |
| ILLINOIS | 51.09% | 57.29% | $255,191,784 | $263,613,113 | $20,250,516,000 | $442,416,000 | $19,808,100,000 | $3,006,772,486 | $3,006,772,486 | **$263,613,113** | **$295,603,743** | **$515,977,908** |
| INDIANA | 66.30% | 72.50% | $253,708,112 | $262,080,480 | $15,278,261,000 | $220,500,000 | $15,057,761,000 | $2,165,330,921 | $2,165,330,921 | **$262,080,480** | **$286,588,760** | **$395,294,842** |
| KANSAS | 60.16% | 66.36% | $48,961,214 | $50,576,934 | $4,364,375,000 | $81,538,000 | $4,282,837,000 | $627,393,076 | $627,393,076 | **$50,576,934** | **$55,789,317** | **$84,070,701** |
| KENTUCKY | 72.75% | 78.95% | $172,106,088 | $177,785,589 | $15,469,264,000 | $237,815,000 | $15,231,449,000 | $2,155,380,849 | $2,155,380,849 | **$177,785,589** | **$192,937,076** | **$244,378,816** |
| LOUISIANA | 68.02% | 74.22% | $813,840,091 | $840,696,814 | $16,161,404,000 | $1,199,241,000 | $14,962,163,000 | $2,141,739,128 | $2,141,739,128 | **$840,696,814** | **$917,326,044** | **$1,235,955,328** |
| MAINE | 64.00% | 70.20% | $124,628,544 | $128,741,286 | $3,517,590,000 | $62,200,000 | $3,455,390,000 | $500,140,986 | $500,140,986 | **$128,741,286** | **$141,213,098** | **$201,158,259** |
| MARYLAND | 50.00% | 56.20% | $90,504,064 | $93,490,698 | $13,799,661,000 | $170,278,000 | $13,629,383,000 | $2,079,560,157 | $2,079,560,157 | **$93,490,698** | **$105,083,545** | **$186,981,396** |
| MASSACHUSETTS | 50.00% | 56.20% | $362,016,251 | $373,962,787 | $22,833,394,000 | $0 | $22,833,394,000 | $3,483,900,659 | $3,483,900,659 | **$373,962,787** | **$420,334,173** | **$747,925,574** |
| MICHIGAN | 65.48% | 71.68% | $314,538,710 | $324,918,487 | $22,885,274,000 | $487,838,000 | $22,397,436,000 | $3,228,113,028 | $3,228,113,028 | **$324,918,487** | **$355,683,524** | **$496,210,273** |
| MISSISSIPPI | 78.31% | 84.51% | $181,008,125 | $186,981,393 | $6,321,453,000 | $255,681,000 | $6,065,772,000 | $848,354,806 | $848,354,806 | **$186,981,393** | **$201,785,181** | **$238,770,774** |
| MISSOURI | 66.36% | 72.56% | $562,312,127 | $580,868,427 | $13,040,357,000 | $799,338,000 | $12,241,019,000 | $1,759,990,103 | $1,759,990,103 | **$580,868,427** | **$635,138,835** | **$875,329,155** |
| NEVADA | 62.59% | 68.79% | $54,895,907 | $56,707,472 | $4,981,118,000 | $78,921,000 | $4,902,197,000 | $712,566,575 | $712,566,575 | **$56,707,472** | **$62,324,764** | **$90,601,489** |
| NEW HAMPSHIRE | 50.00% | 56.20% | $190,027,104 | $196,297,998 | $2,278,897,000 | $223,516,000 | $2,055,381,000 | $313,608,359 | $313,608,359 | **$196,297,998** | **$220,638,950** | **$392,595,996** |
| NEW JERSEY | 50.00% | 56.20% | $764,091,678 | $789,306,703 | $20,954,103,000 | $763,302,000 | $20,190,801,000 | $3,080,695,972 | $3,080,695,972 | **$789,306,703** | **$887,180,734** | **$1,578,613,406** |
| NEW YORK | 50.00% | 56.20% | $1,906,520,012 | $1,969,435,172 | $87,790,431,000 | $3,813,040,000 | $83,977,391,000 | $12,813,201,921 | $12,813,201,921 | **$1,969,435,172** | **$2,213,645,133** | **$3,938,870,344** |
| NORTH CAROLINA | 67.65% | 73.85% | $350,146,865 | $361,701,712 | $19,333,672,000 | $841,300,000 | $18,492,372,000 | $2,649,626,526 | $2,649,626,526 | **$361,701,712** | **$394,851,019** | **$534,666,241** |
| OHIO | 64.10% | 70.30% | $482,193,779 | $498,106,174 | $32,592,139,000 | $761,778,000 | $31,830,361,000 | $4,605,847,777 | $4,605,847,777 | **$498,106,174** | **$546,284,930** | **$777,076,715** |
| PENNSYLVANIA | 52.68% | 58.88% | $666,169,249 | $688,152,834 | $40,478,142,000 | $964,209,000 | $39,513,933,000 | $5,955,410,516 | $5,955,410,516 | **$688,152,834** | **$769,142,727** | **$1,306,288,599** |
| RHODE ISLAND | 54.88% | 61.08% | $77,151,005 | $79,696,988 | $3,139,284,000 | $142,635,000 | $2,996,649,000 | $447,519,122 | $447,519,122 | **$79,696,988** | **$88,700,656** | **$145,220,459** |
| SOUTH CAROLINA | 70.75% | 76.95% | $388,722,368 | $401,550,206 | $6,949,070,000 | $529,979,000 | $6,419,091,000 | $912,607,949 | $912,607,949 | **$401,550,206** | **$436,739,058** | **$567,562,129** |
| TENNESSEE /4 | 66.36% | 72.56% | na | na | na | na | na | na | na | **$53,100,000** | **$58,061,121** | **$80,018,083** |

| A | B1 | B2 | C | D | E | F | G | H | I | J | K | L |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| STATE | FY 2022 FMAPs (Regular) /1 | FY 2022 FMAPs (FFCRA) /2 | Prior FY (2021) DSH Allotments | Prior FY (2021) DSH Allotment (Col C) x 100% + Pct Increase in CPIU: 103.3% | FY 2022 TC MAP Exp. Including DSH /3 | FY 2022 TC DSH Expenditures /3 | FY 2022 TC MAP EXP. Net Of DSH Col E - F | "12% Amount" =Col G x .12/(1-.12/Col B2)* (In FS) | Greater of Col H Or Col C (12% Limit, FY 2021 Allotment) | FY 2022 DSH Allotment MIN Col I, Col D | FY 2022 DSH FS Allotment ARP Column B2 x L | FY 2022 DSH TC Allotment Column J / B1 |
| TEXAS | 60.80% | 67.00% | $1,135,009,969 | $1,172,465,298 | $47,616,635,000 | $1,891,994,000 | $45,724,641,000 | $6,684,111,157 | $6,684,111,157 | **$1,172,465,298** | **$1,292,025,904** | **$1,928,396,872** |
| VERMONT | 56.47% | 62.67% | $26,706,119 | $27,587,421 | $1,734,748,000 | $22,704,000 | $1,712,044,000 | $254,100,172 | $254,100,172 | **$27,587,421** | **$30,616,321** | **$48,853,234** |
| VIRGINIA | 50.00% | 56.20% | $103,984,804 | $107,416,303 | $18,864,226,000 | $40,813,000 | $18,823,413,000 | $2,872,061,024 | $2,872,061,024 | **$107,416,303** | **$120,735,925** | **$214,832,606** |
| WASHINGTON | 50.00% | 56.20% | $219,583,628 | $226,829,888 | $22,350,501,000 | $546,307,000 | $21,804,194,000 | $3,326,866,161 | $3,326,866,161 | **$226,829,888** | **$254,956,794** | **$453,659,776** |
| WEST VIRGINIA | 74.68% | 80.88% | $80,118,350 | $82,762,256 | $4,799,860,000 | $73,091,000 | $4,726,769,000 | $666,029,750 | $666,029,750 | **$82,762,256** | **$89,633,252** | **$110,822,517** |
| TOTAL | | | **$12,386,735,376** | **$12,795,497,643** | **$694,917,024,000** | **$16,425,678,000** | **$678,491,346,000** | **$101,032,058,075** | **$101,032,058,075** | **$12,848,597,643** | **$14,243,346,457** | **$22,495,948,610** |
| LOW DSH STATES | | | | | | | | | | | | |
| ALASKA | 50.00% | 56.20% | $24,177,573 | $24,975,433 | $2,432,391,000 | $24,007,000 | $2,408,384,000 | $367,469,269.14 | $367,469,269 | **$24,975,433** | **$28,072,387** | **$49,950,866** |
| ARKANSAS | 71.62% | 77.82% | $51,201,897 | $52,891,560 | $8,620,370,000 | $50,000,000 | $8,570,370,000 | $1,215,945,658 | $1,215,945,658 | **$52,891,560** | **$57,470,276** | **$73,850,265** |
| DELAWARE | 57.72% | 63.92% | $10,745,587 | $11,100,191 | $2,598,194,000 | $0 | $2,598,194,000 | $383,844,131 | $383,844,131 | **$11,100,191** | **$12,292,519** | **$19,231,100** |
| HAWAII | 53.64% | 59.84% | $11,567,657 | $11,949,390 | $2,860,404,000 | $0 | $2,860,404,000 | $429,347,597.06 | $429,347,597 | **$11,949,390** | **$13,330,565** | **$22,277,013** |
| IDAHO | 70.21% | 76.41% | $19,510,305 | $20,154,145 | $3,311,036,000 | $25,091,000 | $3,285,945,000 | $467,776,539.26 | $467,776,539 | **$20,154,145** | **$21,933,887** | **$28,705,519** |
| IOWA | 62.14% | 68.34% | $46,742,991 | $48,285,510 | $5,813,346,000 | $72,994,000 | $5,740,352,000 | $835,560,502 | $835,560,502 | **$48,285,510** | **$53,103,182** | **$77,704,393** |
| MINNESOTA | 50.51% | 56.71% | $88,651,104 | $91,576,590 | $16,287,378,000 | $51,945,000 | $16,235,433,000 | $2,471,155,640 | $2,471,155,640 | **$91,576,590** | **$102,817,431** | **$181,303,880** |
| MONTANA | 64.90% | 71.10% | $13,472,673 | $13,917,271 | $2,245,655,000 | $91,000 | $2,245,564,000 | $324,181,930 | $324,181,930 | **$13,917,271** | **$15,246,810** | **$21,444,177** |
| NEBRASKA | 57.80% | 64.00% | $33,588,249 | $34,696,661 | $3,543,197,000 | $47,314,000 | $3,495,883,000 | $516,315,028 | $516,315,028 | **$34,696,661** | **$38,418,448** | **$60,028,825** |
| NEW MEXICO | 73.71% | 79.91% | $24,177,573 | $24,975,433 | $7,768,006,000 | $33,200,000 | $7,734,806,000 | $1,092,189,688 | $1,092,189,688 | **$24,975,433** | **$27,076,202** | **$33,883,371** |
| NORTH DAKOTA | 53.59% | 59.79% | $11,337,615 | $11,711,756 | $1,303,996,000 | $1,734,000 | $1,302,262,000 | $195,510,973 | $195,510,973 | **$11,711,756** | **$13,066,727** | **$21,854,368** |
| OKLAHOMA | 68.31% | 74.51% | $42,982,349 | $44,400,767 | $7,280,426,000 | $60,402,000 | $7,220,024,000 | $1,032,725,621 | $1,032,725,621 | **$44,400,767** | **$48,430,700** | **$64,998,927** |
| OREGON | 60.22% | 66.42% | $53,727,942 | $55,500,964 | $13,189,464,000 | $20,826,000 | $13,168,638,000 | $1,928,690,046 | $1,928,690,046 | **$55,500,964** | **$61,215,112** | **$92,163,673** |
| SOUTH DAKOTA | 58.69% | 64.89% | $13,109,317 | $13,541,924 | $1,087,980,000 | $1,423,000 | $1,086,557,000 | $159,969,787 | $159,969,787 | **$13,541,924** | **$14,972,490** | **$23,073,648** |
| UTAH | 66.83% | 73.03% | $23,285,341 | $24,053,757 | $4,138,096,000 | $51,784,000 | $4,086,312,000 | $586,773,781 | $586,773,781 | **$24,053,757** | **$26,285,289** | **$35,992,454** |
| WISCONSIN | 59.88% | 66.08% | $112,204,648 | $115,907,401 | $10,836,584,000 | $83,783,000 | $10,752,801,000 | $1,576,653,306 | $1,576,653,306 | **$115,907,401** | **$127,908,501** | **$193,566,134** |
| WYOMING | 50.00% | 56.20% | $268,640 | $277,505 | $622,491,000 | $537,000 | $621,954,000 | $94,897,235 | $94,897,235 | **$277,505** | **$311,916** | **$555,010** |
| TOTAL LOW DSH STATES | | | **$580,751,461** | **$599,916,259** | **$93,939,014,000** | **$525,131,000** | **$93,413,883,000** | **$13,679,006,731** | **$13,679,006,731** | **$599,916,258** | **$661,952,443** | **$1,000,583,626** |
| TOTAL | | | **$12,967,486,837** | **$13,395,413,903** | **$788,856,038,000** | **$16,950,809,000** | **$771,905,229,000** | **$114,711,064,806** | **$114,711,064,806** | **$13,448,513,901** | **$14,905,298,900** | **$23,496,532,235** |

FOOTNOTES:

'/1 Regular FMAP as determined under section 1905(b) of the Act.

'/2 Section 6008 of the Families First Coronavirus Response Act (FFCRA) provides a temporary 6.2 percentage point increase to each qualifying State and territory's State-specific FMAP as defined in section 1905(b) of the Act.

'/3 Expenditures based on the amounts reported by States on the Form CMS-37.

'/4 Tennessee's DSH allotment for FY 2022 determined under section 1923(f)(6)(A) of the Act.

## Key to ADDENDUM 4: Preliminary DSH Allotments for FY 2023

| The Preliminary FY 2023 DSH Allotments for the NON-Low DSH States are presented in the top section of this addendum, and the Preliminary FY 2023 DSH Allotments for the Low-DSH States are presented in the bottom section of this addendum. | |
|---|---|
| **Column** | **Description** |
| Column A | **State.** |
| Column B1 | **FY 2023 FMAPs.**<br>This column contains the States' regular FY 2023 Federal Medical Assistance Percentages. |
| Column B2 | **FY 2023 FMAPs.**<br>This column contains the States' FY 2023 Federal Medical Assistance Percentages, adjusted for the FFCRA temporary FMAP increase. |
| Column B3 | **FY 2023 FMAPs.**<br>This column contains the States' prorated FY 2023 Federal Medical Assistance Percentages. |
| Column C | **Prior FY (2022) DSH Allotments**<br>This column contains the States' prior preliminary FY 2022 DSH Allotments. |
| Column D | **Prior FY (2022) DSH Allotments (Col C) x (100 percent + Percentage Increase in CPIU): 107.6 percent.**<br>This column contains the amount in Column C increased by 1 plus the percentage increase in the CPI-U for the prior FY (107.6 percent). |
| Column E | **FY 2023 TC MAP Exp. Including DSH.**<br>This column contains the amount of the States' projected FY 2023 total computable (TC) medical assistance expenditures including DSH expenditures. |
| Column F | **FY 2023 TC DSH Expenditures.**<br>This column contains the amount of the States' projected FY 2023 total computable DSH expenditures. |
| Column G | **FY 2023 TC MAP Exp. Net of DSH.**<br>This column contains the amount of the States' projected FY 2023 total computable medical assistance expenditures net of DSH expenditures, calculated as the amount in Column E minus the amount in Column F. |
| Column H | **12 percent Amount.**<br>This column contains the amount of the "12 percent limit" in Federal share, determined in accordance with the provisions of section 1923(f)(3) of the Act. This is calculated using the prorated FMAP rate in Column B3. |
| Column I | **Greater of FY 2022 Allotment or 12 percent Limit.**<br>This column contains the greater of the State's prior preliminary FY (FY 2022) DSH allotment or the amount of the 12 percent Limit, determined as the greater of the amount in Column C or Column H. |
| Column J | **FS FY 2023 Unadjusted DSH Allotment.**<br>This column contains the States' preliminary FY 2023 DSH allotments, determined as the lesser of the amount in Column I or Column D.<br>For States with "na" in Columns I or D, refer to the footnotes in the addendum. |
| Column K | **FS FY 2023 ARP-adjusted DSH Allotment.**<br>This column contains the States' preliminary FY 2023 ARP DSH allotments, determined by multiplying the FMAP in Column B2 by Column L. |
| Column L | **TC FY 2023 DSH Allotment.**<br>This column contains the States' final TC FY 2023 DSH allotments, determined by dividing Column B1 by Column J. |

# ADDENDUM 4: Preliminary DSH Allotments for FY 2023

| A | B1 | B2 | B3 | C | D | E | F | G | H | I | J | K | L |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| STATE | FY 2023 FMAPs (Regular ) /1 | FY 2023 FMAPs (FFCRA ) /2 | FY 2023 FMAPs (Prorated ) /3 | Prior FY (2022) DSH Allotments | Prior FY (2022) DSH Allotment (Col C) x 100% + Pct Increase in CPIU: 107.6% | FY 2023 TC MAP Exp. Including DSH /4 | FY 2023 TC DSH Expenditures /4 | FY 2023 TC MAP EXP. Net Of DSH Col E - F | "12% Amount" =Col G x .12/(1-.12/Col B3)* (In FS) | Greater of Col H Or Col C (12% Limit, FY 2022 Allotment) | FY 2023 DSH Allotment MIN Col I, Col D | FY 2023 DSH FS Allotment ARP Column B2 x L | FY 2023 DSH TC Allotment Column J / B1 |
| ALABAMA | 72.43% | 78.63% | 77.41% | $377,028,057 | $405,682,189 | $7,672,428,000 | $392,656,000 | $7,279,772,000 | $1,033,848,944 | $1,033,848,944 | **$405,682,189** | **$440,408,540** | **$560,102,429** |
| ARIZONA | 69.56% | 75.76% | 74.54% | $124,143,386 | $133,578,283 | $19,761,081,000 | $173,251,000 | $19,587,830,000 | $2,801,590,615 | $2,801,590,615 | **$133,578,283** | **$145,484,340** | **$192,033,184** |
| CALIFORNIA | 50.00% | 56.20% | 54.98% | $1,344,120,346 | $1,446,273,492 | $128,716,431,000 | $0 | $128,716,431,000 | $19,758,983,021 | $19,758,983,021 | **$1,446,273,492** | **$1,625,611,405** | **$2,892,546,984** |
| COLORADO | 50.00% | 56.20% | 54.98% | $113,414,943 | $122,034,479 | $11,994,892,000 | $232,518,000 | $11,762,374,000 | $1,805,616,784 | $1,805,616,784 | **$122,034,479** | **$137,166,754** | **$244,068,958** |
| CONNECTICUT | 50.00% | 56.20% | 54.98% | $245,221,501 | $263,858,335 | $9,151,523,000 | $116,814,000 | $9,034,709,000 | $1,386,898,785 | $1,386,898,785 | **$263,858,335** | **$296,576,769** | **$527,716,670** |
| DISTRICT OF COLUMBIA | 70.00% | 76.20% | 74.98% | $75,099,085 | $80,806,615 | $3,280,965,000 | $82,528,000 | $3,198,437,000 | $456,948,594 | $456,948,594 | **$80,806,615** | **$87,963,772** | **$115,438,021** |
| FLORIDA | 60.05% | 66.25% | 65.03% | $245,221,501 | $263,858,335 | $32,099,745,000 | $339,322,000 | $31,760,423,000 | $4,673,768,612 | $4,673,768,612 | **$263,858,335** | **$291,100,994** | **$439,397,727** |
| GEORGIA | 66.02% | 72.22% | 71.00% | $329,516,391 | $354,559,637 | $14,455,584,000 | $438,155,000 | $14,017,429,000 | $2,024,240,777 | $2,024,240,777 | **$354,559,637** | **$387,856,664** | **$537,048,829** |
| ILLINOIS | 50.00% | 56.20% | 54.98% | $263,613,113 | $283,647,710 | $20,250,516,000 | $442,416,000 | $19,808,100,000 | $3,040,698,911 | $3,040,698,911 | **$283,647,710** | **$318,820,026** | **$567,295,420** |
| INDIANA | 65.66% | 71.86% | 70.64% | $262,080,480 | $281,998,596 | $15,278,261,000 | $220,500,000 | $15,057,761,000 | $2,176,730,516 | $2,176,730,516 | **$281,998,596** | **$308,626,547** | **$429,483,089** |
| KANSAS | 59.76% | 65.96% | 64.74% | $50,576,934 | $54,420,781 | $4,364,375,000 | $81,538,000 | $4,282,837,000 | $630,889,056 | $630,889,056 | **$54,420,781** | **$60,066,846** | **$91,065,564** |
| KENTUCKY | 72.17% | 78.37% | 77.15% | $177,785,589 | $191,297,294 | $15,469,264,000 | $237,815,000 | $15,231,449,000 | $2,164,457,993 | $2,164,457,993 | **$191,297,294** | **$207,731,314** | **$265,064,839** |
| LOUISIANA /1 | 67.28% | 73.48% | 72.26% | $840,696,814 | $904,589,772 | $16,161,404,000 | $1,199,241,000 | $14,962,163,000 | $2,153,031,790 | $2,153,031,790 | **$904,589,772** | **$987,949,709** | **$1,344,515,119** |
| MAINE | 63.29% | 69.49% | 68.27% | $128,741,286 | $138,525,624 | $3,517,590,000 | $62,200,000 | $3,455,390,000 | $503,081,201 | $503,081,201 | **$138,525,624** | **$152,095,838** | **$218,874,426** |
| MARYLAND | 50.00% | 56.20% | 54.98% | $93,490,698 | $100,595,991 | $13,799,661,000 | $170,278,000 | $13,629,383,000 | $2,092,217,328 | $2,092,217,328 | **$100,595,991** | **$113,069,894** | **$201,191,982** |
| MASSACHUSETTS | 50.00% | 56.20% | 54.98% | $373,962,787 | $402,383,959 | $22,833,394,000 | $0 | $22,833,394,000 | $3,505,105,299 | $3,505,105,299 | **$402,383,959** | **$452,279,570** | **$804,767,918** |
| MICHIGAN | 64.71% | 70.91% | 69.69% | $324,918,487 | $349,612,292 | $22,885,274,000 | $487,838,000 | $22,397,436,000 | $3,246,803,143 | $3,246,803,143 | **$349,612,292** | **$383,109,375** | **$540,275,525** |
| MISSISSIPPI | 77.86% | 84.06% | 82.84% | $186,981,393 | $201,191,979 | $6,321,453,000 | $255,681,000 | $6,065,772,000 | $851,203,315 | $851,203,315 | **$201,191,979** | **$217,212,917** | **$258,402,233** |
| MISSOURI | 65.81% | 72.01% | 70.79% | $580,868,427 | $625,014,427 | $13,040,357,000 | $799,338,000 | $12,241,019,000 | $1,768,778,831 | $1,768,778,831 | **$625,014,427** | **$683,897,415** | **$949,725,615** |
| NEVADA | 62.65% | 68.85% | 67.63% | $56,707,472 | $61,017,240 | $4,981,118,000 | $78,921,000 | $4,902,197,000 | $715,169,953 | $715,169,953 | **$61,017,240** | **$67,055,658** | **$97,393,839** |
| NEW HAMPSHIRE | 50.00% | 56.20% | 54.98% | $196,297,998 | $211,216,646 | $2,278,897,000 | $223,516,000 | $2,055,381,000 | $315,517,125 | $315,517,125 | **$211,216,646** | **$237,407,510** | **$422,433,292** |
| NEW JERSEY | 50.00% | 56.20% | 54.98% | $789,306,703 | $849,294,012 | $20,954,103,000 | $763,302,000 | $20,190,801,000 | $3,099,446,520 | $3,099,446,520 | **$849,294,012** | **$954,606,469** | **$1,698,588,024** |
| NEW YORK | 50.00% | 56.20% | 54.98% | $1,969,435,172 | $2,119,112,245 | $87,790,431,000 | $3,813,040,000 | $83,977,391,000 | $12,891,189,027 | $12,891,189,027 | **$2,119,112,245** | **$2,381,882,163** | **$4,238,224,490** |
| NORTH CAROLINA | 67.71% | 73.91% | 72.69% | $361,701,712 | $389,191,042 | $19,333,672,000 | $841,300,000 | $18,492,372,000 | $2,657,891,852 | $2,657,891,852 | **$389,191,042** | **$424,828,089** | **$574,791,083** |
| OHIO | 63.58% | 69.78% | 68.56% | $498,106,174 | $535,962,243 | $32,592,139,000 | $761,778,000 | $31,830,361,000 | $4,630,106,053 | $4,630,106,053 | **$535,962,243** | **$588,226,570** | **$842,973,015** |
| PENNSYLVANIA | 52.00% | 58.20% | 56.98% | $688,152,834 | $740,452,449 | $40,478,142,000 | $964,209,000 | $39,513,933,000 | $6,006,820,676 | $6,006,820,676 | **$740,452,449** | **$828,737,164** | **$1,423,947,017** |
| RHODE ISLAND | 53.96% | 60.16% | 58.94% | $79,696,988 | $85,753,959 | $3,139,284,000 | $142,635,000 | $2,996,649,000 | $451,537,255 | $451,537,255 | **$85,753,959** | **$95,607,083** | **$158,921,347** |
| SOUTH CAROLINA | 70.58% | 76.78% | 75.56% | $401,550,206 | $432,068,022 | $6,949,070,000 | $529,979,000 | $6,419,091,000 | $915,731,736 | $915,731,736 | **$432,068,022** | **$470,022,425** | **$612,167,784** |

| A | B1 | B2 | B3 | C | D | E | F | G | H | I | J | K | L |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| STATE | FY 2023 FMAPs (Regular ) /1 | FY 2023 FMAPs (FFCRA ) /2 | FY 2023 FMAPs (Prorated ) /3 | Prior FY (2022) DSH Allotments | Prior FY (2022) DSH Allotment (Col C) x 100% + Pct Increase in CPIU: 107.6% | FY 2023 TC MAP Exp. Including DSH /4 | FY 2023 TC DSH Expenditures /4 | FY 2023 TC MAP EXP. Net Of DSH Col E - F | "12% Amount" =Col G x .12/(1-.12/Col B3)* (In FS) | Greater of Col H Or Col C (12% Limit, FY 2022 Allotment) | FY 2023 DSH Allotment MIN Col I, Col D | FY 2023 DSH FS Allotment ARP Column B2 x L | FY 2023 DSH TC Allotment Column J / B1 |
| **TENNESSEE /5** | 66.10% | 72.30% | 71.08% | na | na | na | na | na | na | na | **$53,100,000** | **$58,080,635** | **$80,332,829** |
| **TEXAS** | 59.87% | 66.07% | 64.85% | $1,172,465,298 | $1,261,572,661 | $47,616,635,000 | $1,891,994,000 | $45,724,641,000 | $6,732,930,674 | $6,732,930,674 | **$1,261,572,661** | **$1,392,218,235** | **$2,107,186,673** |
| **VERMONT** | 55.82% | 62.02% | 60.80% | $27,587,421 | $29,684,065 | $1,734,748,000 | $22,704,000 | $1,712,044,000 | $255,969,788 | $255,969,788 | **$29,684,065** | **$32,981,113** | **$53,178,189** |
| **VIRGINIA** | 50.65% | 56.85% | 55.63% | $107,416,303 | $115,579,942 | $18,864,226,000 | $40,813,000 | $18,823,413,000 | $2,880,143,995 | $2,880,143,995 | **$115,579,942** | **$129,727,931** | **$228,193,370** |
| **WASHINGTON** | 50.00% | 56.20% | 54.98% | $226,829,888 | $244,068,959 | $22,350,501,000 | $546,307,000 | $21,804,194,000 | $3,347,115,016 | $3,347,115,016 | **$244,068,959** | **$274,333,510** | **$488,137,918** |
| **WEST VIRGINIA** | 74.02% | 80.22% | 79.00% | $82,762,256 | $89,052,187 | $4,799,860,000 | $73,091,000 | $4,726,769,000 | $668,810,121 | $668,810,121 | **$89,052,187** | **$96,511,300** | **$120,308,277** |
| **TOTAL** | | | | **$12,795,497,643** | **$13,767,955,464** | **$694,917,024,000** | **$16,425,678,000** | **$678,491,346,000** | **$101,643,273,306** | **$101,643,273,306** | **$13,821,055,462** | **$15,329,254,546** | **$24,325,791,678** |
| **LOW DSH STATES** | | | | | | | | | | | | | |
| **ALASKA** | 50.00% | 56.20% | 54.98% | $24,975,433 | $26,873,566 | $2,432,391,000 | $24,007,000 | $2,408,384,000 | $369,705,858.01 | $369,705,858 | **$26,873,566** | **$30,205,888** | **$53,747,132** |
| **ARKANSAS** | 71.31% | 77.51% | 76.29% | $52,891,560 | $56,911,319 | $8,620,370,000 | $50,000,000 | $8,570,370,000 | $1,220,422,821 | $1,220,422,821 | **$56,911,319** | **$61,859,435** | **$79,808,328** |
| **DELAWARE** | 58.49% | 64.69% | 63.47% | $11,100,191 | $11,943,806 | $2,598,194,000 | $0 | $2,598,194,000 | $384,481,218 | $384,481,218 | **$11,943,806** | **$13,209,862** | **$20,420,253** |
| **HAWAII** | 56.06% | 62.26% | 61.04% | $11,949,390 | $12,857,544 | $2,860,404,000 | $0 | $2,860,404,000 | $427,249,331.64 | $427,249,332 | **$12,857,544** | **$14,279,534** | **$22,935,326** |
| **IDAHO** | 70.11% | 76.31% | 75.09% | $20,154,145 | $21,685,860 | $3,311,036,000 | $25,091,000 | $3,285,945,000 | $469,319,515.56 | $469,319,516 | **$21,685,860** | **$23,603,594** | **$30,931,194** |
| **IOWA** | 63.13% | 69.33% | 68.11% | $48,285,510 | $51,955,209 | $5,813,346,000 | $72,994,000 | $5,740,352,000 | $836,175,042 | $836,175,042 | **$51,955,209** | **$57,057,732** | **$82,298,763** |
| **MINNESOTA** | 50.79% | 56.99% | 55.77% | $91,576,590 | $98,536,411 | $16,287,378,000 | $51,945,000 | $16,235,433,000 | $2,482,446,488 | $2,482,446,488 | **$98,536,411** | **$110,564,876** | **$194,007,503** |
| **MONTANA** | 64.12% | 70.32% | 69.10% | $13,917,271 | $14,974,984 | $2,245,655,000 | $91,000 | $2,245,564,000 | $326,103,325 | $326,103,325 | **$14,974,984** | **$16,422,971** | **$23,354,623** |
| **NEBRASKA** | 57.87% | 64.07% | 62.85% | $34,696,661 | $37,333,607 | $3,543,197,000 | $47,314,000 | $3,495,883,000 | $518,514,152 | $518,514,152 | **$37,333,607** | **$41,333,406** | **$64,512,886** |
| **NEW MEXICO** | 73.26% | 79.46% | 78.24% | $24,975,433 | $26,873,566 | $7,768,006,000 | $33,200,000 | $7,734,806,000 | $1,096,337,370 | $1,096,337,370 | **$26,873,566** | **$29,147,878** | **$36,682,454** |
| **NORTH DAKOTA** | 51.55% | 57.75% | 56.53% | $11,711,756 | $12,601,849 | $1,303,996,000 | $1,734,000 | $1,302,262,000 | $198,388,392 | $198,388,392 | **$12,601,849** | **$14,117,493** | **$24,445,876** |
| **OKLAHOMA** | 67.36% | 73.56% | 72.34% | $44,400,767 | $47,775,225 | $7,280,426,000 | $60,402,000 | $7,220,024,000 | $1,038,721,345 | $1,038,721,345 | **$47,775,225** | **$52,172,588** | **$70,925,215** |
| **OREGON** | 60.32% | 66.52% | 65.30% | $55,500,964 | $59,719,037 | $13,189,464,000 | $20,826,000 | $13,168,638,000 | $1,936,045,524 | $1,936,045,524 | **$59,719,037** | **$65,857,267** | **$99,003,709** |
| **SOUTH DAKOTA** | 56.74% | 62.94% | 61.72% | $13,541,924 | $14,571,110 | $1,087,980,000 | $1,423,000 | $1,086,557,000 | $161,859,073 | $161,859,073 | **$14,571,110** | **$16,163,300** | **$25,680,490** |
| **UTAH** | 65.90% | 72.10% | 70.88% | $24,053,757 | $25,881,843 | $4,138,096,000 | $51,784,000 | $4,086,312,000 | $590,302,905 | $590,302,905 | **$25,881,843** | **$28,316,857** | **$39,274,420** |
| **WISCONSIN** | 60.10% | 66.30% | 65.08% | $115,907,101 | $124,716,363 | $10,836,584,000 | $83,783,000 | $10,752,801,000 | $1,582,074,857 | $1,582,074,857 | **$124,716,363** | **$137,582,277** | **$207,514,747** |
| **WYOMING** | 50.00% | 56.20% | 54.98% | $277,505 | $298,595 | $622,491,000 | $537,000 | $621,954,000 | $95,474,823 | $95,474,823 | **$298,595** | **$335,621** | **$597,190** |
| **TOTAL LOW DSH STATES** | | | | **$599,916,258** | **$645,509,894** | **$93,939,014,000** | **$525,131,000** | **$93,413,883,000** | **$13,733,622,040** | **$13,733,622,040** | **$645,509,894** | **$712,230,581** | **$1,076,140,110** |
| **TOTAL** | | | | **$13,395,413,901** | **$14,413,465,357** | **$788,856,038,000** | **$16,950,809,000** | **$771,905,229,000** | **$115,376,895,346** | **$115,376,895,346** | **$14,466,565,356** | **$16,041,485,127** | **$25,401,931,788** |

FOOTNOTES:

/1 Regular FMAP as determined under section 1905(b) of the Act.

/2 Section 6008 of the Families First Coronavirus Response Act (FFCRA) provides a temporary FMAP increase to each qualifying state and territory's state-specific FMAP as defined in section 1905(b) of the Act. The FFCRA temporary FMAP increase is 6.2 percentage points in the first and second quarters of FY 2023, 5.0 percentage points in the third quarter of FY 2023, and 2.5 percentage points for the fourth quarter of FY 2023.

/3 Prorated to reflect the FFCRA temporary FMAP increase amount of 6.2 percentage points for the 1st and 2nd quarters, 5 percentage points for the 3rd quarter, and 2.5 percentage points for the 4th quarter of FY 2023.

/4 Expenditures based on the amounts reported by States on the Form CMS-37.

/5 Tennessee's DSH allotment for FY 2023 determined under section 1923(f)(6)(A) of the Act.

## Key to ADDENDUM 5: Final IMD DSH Limits for FY 2020

| The final FY 2020 IMD DSH Limits for the Non-Low DSH States are presented in the top section of this addendum and the preliminary FY 2020 IMD DSH Limits for the Low-DSH States are presented in the bottom section of the addendum. | |
|---|---|
| **Column** | **Description** |
| Column A | **State.** |
| Column B | **Inpatient Hospital Services FY 95 DSH Total Computable.**<br>This column contains the States' total computable FY 1995 inpatient hospital DSH expenditures as reported on the Form CMS-64 as of January 1, 1997. |
| Column C | **IMD and Mental Health Services FY 95 DSH Total Computable**<br>This column contains the total computable FY 1995 mental health facility DSH expenditures as reported on the Form CMS-64 as of January 1, 1997. |
| Column D | **Total Inpatient Hospital & IMD & Mental Health FY 95 DSH Total Computable, Col. B + C**<br>This column contains the total computation of all inpatient hospital DSH expenditures and mental health facility DSH expenditures for FY 1995 as reported on the Form CMS-64 as of January 1, 1997 (representing the sum of Column B and Column C). |
| Column E | **Applicable Percentage, Col. C/D.**<br>This column contains the "applicable percentage" representing the total Computable FY 1995 mental health facility DSH expenditures divided by total computable all inpatient hospital and mental health facility DSH expenditures for FY 1995 (the amount in Column C divided by the amount in Column D) Per section 1923(h)(2)(A)(ii)(III) of the Act, for FYs after FY 2002, the applicable percentage can be no greater than 33 percent. |
| Column F | **FY 2020 Federal Share DSH Allotment.**<br>This column contains the States' final FY 2020 ARP DSH allotments from Addendum 1, Column K. |
| Column G | **FY 2020 FMAP.** This column contains the full FFCRA FMAP rate from Addendum 1, Column B2. |
| Column H | **FY 2020 DSH Allotments in Total Computable, Col. F/G.**<br>This column contains States' FY 2020 total computable DSH allotment (determined as Column F/Column G). |
| Column I | **Applicable Percentage Applied to FY 2020 Allotments in TC, Col E x Col H.**<br>This column contains the applicable percentage of FY 2020 total computable DSH allotment (calculated as the percentage in Column E multiplied by the amount in Column H). |
| Column J | **FY 2020 TC IMD DSH Limit. Lesser of Col. I or C**<br>This column contains the total computable FY 2020 TC IMD DSH limit equal to the lesser of the amount in Column I or Column C. |
| Column K | **FY 2020 IMD DSH Limit in Federal Share, Col. G x J.**<br>This column contains the FY 2020 Federal Share IMD DSH limit determined by converting the total computable FY 2020 IMD DSH limit from Column J into a Federal share amount by multiplying it by the FY 2020 FMAP in Column G. |

## ADDENDUM 5: Final IMD DSH Limits for FY 2020

| A | B | C | D | E | F | G | H | I | J | K | L |
|---|---|---|---|---|---|---|---|---|---|---|---|
| STATE | Inpatient Hospital Services FY 95 DSH Total Computable | IMD And Mental Health Services FY 95 DSH Total Computable | Total Inpatient & IMD & Mental Health FY 95 DSH Total Computable Col B + C | Applicable Percent Col C/D | FY 2020 Allotment In FS | FY 2020 FMAPs ** | FY 2020 Allotments in TC Col F/G | Applicable Percentage Applied to FY 2020 Allotments in TC Col E x Col H | FY 2020 TC IMD Limit (Lesser Of Col I or Col C) | FY 2020 IMD Limit In FS Col G x J | MMA LOW DSH STATUS |
| ALABAMA | $413,006,229 | $4,451,770 | $417,457,999 | 1.07% | $390,567,332 | 78.17% | $499,638,394 | $5,328,141 | $4,451,770 | **$3,479,949** | N/A |
| ARIZONA | $93,916,100 | $28,474,900 | $122,391,000 | 23.27% | $128,885,500 | 76.22% | $169,096,694 | $39,341,222 | $28,474,900 | **$21,703,569** | N/A |
| CALIFORNIA | $2,189,879,543 | $1,555,919 | $2,191,435,462 | 0.07% | $1,440,914,138 | 56.20% | $2,563,904,160 | $1,820,372 | $1,555,919 | **$874,426** | N/A |
| COLORADO | $173,900,441 | $594,776 | $174,495,217 | 0.34% | $121,582,264 | 56.20% | $216,338,548 | $737,401 | $594,776 | **$334,264** | N/A |
| CONNECTICUT | $303,359,275 | $105,573,725 | $408,933,000 | 25.82% | $262,880,574 | 56.20% | $467,759,028 | $120,760,768 | $105,573,725 | **$59,332,433** | N/A |
| DISTRICT OF COLUMBIA | $39,532,234 | $6,545,136 | $46,077,370 | 14.20% | $77,969,583 | 76.20% | $102,322,287 | $14,534,538 | $6,545,136 | **$4,987,394** | N/A |
| FLORIDA | $184,468,014 | $149,714,986 | $334,183,000 | 33.00% | $257,469,118 | 67.67% | $380,477,491 | $125,557,572 | $125,557,572 | **$84,964,809** | N/A |
| GEORGIA | $407,343,557 | $0 | $407,343,557 | 0.00% | $343,228,177 | 73.50% | $466,977,111 | $0 | $0 | **$0** | N/A |
| ILLINOIS | $315,868,508 | $89,408,276 | $405,276,784 | 22.06% | $282,509,567 | 56.34% | $501,436,931 | $110,622,205 | $89,408,276 | **$50,372,623** | N/A |
| INDIANA | $79,960,783 | $153,566,302 | $233,527,085 | 33.00% | $273,496,765 | 72.04% | $379,645,703 | $125,283,082 | $125,283,082 | **$90,253,932** | N/A |
| KANSAS | $11,587,208 | $76,663,508 | $88,250,716 | 33.00% | $53,292,981 | 65.36% | $81,537,608 | $26,907,411 | $26,907,411 | **$17,586,684** | N/A |
| KENTUCKY | $158,804,908 | $37,443,073 | $196,247,981 | 19.08% | $184,200,471 | 78.02% | $236,093,913 | $45,045,465 | $37,443,073 | **$29,213,086** | N/A |
| LOUISIANA | $1,078,512,169 | $132,917,149 | $1,211,429,318 | 10.97% | $876,165,874 | 73.06% | $1,199,241,547 | $131,579,916 | $131,579,916 | **$96,132,286** | N/A |
| MAINE | $99,957,958 | $60,958,342 | $160,916,300 | 33.00% | $134,718,997 | 70.00% | $192,455,710 | $63,510,384 | $60,958,342 | **$42,670,839** | N/A |
| MARYLAND | $22,226,467 | $120,873,531 | $143,099,998 | 33.00% | $100,223,220 | 56.20% | $178,333,132 | $58,849,934 | $58,849,934 | **$33,073,663** | N/A |
| MASSACHUSETTS | $469,653,946 | $105,635,054 | $575,289,000 | 18.36% | $400,892,873 | 56.20% | $713,332,514 | $130,982,721 | $105,635,054 | **$59,366,900** | N/A |
| MICHIGAN | $133,258,800 | $304,765,552 | $438,024,352 | 33.00% | $339,882,865 | 70.26% | $483,750,164 | $159,637,554 | $159,637,554 | **$112,161,346** | N/A |
| MISSISSIPPI | $182,608,033 | $0 | $182,608,033 | 0.00% | $192,696,149 | 83.18% | $231,661,637 | $0 | $0 | **$0** | N/A |
| MISSOURI | $521,946,524 | $207,234,618 | $729,181,142 | 28.42% | $606,322,172 | 71.85% | $843,872,195 | $239,830,026 | $207,234,618 | **$148,898,073** | N/A |
| NEVADA | $73,560,000 | $0 | $73,560,000 | 0.00% | $59,329,823 | 70.13% | $84,599,776 | $0 | $0 | **$0** | N/A |
| NEW HAMPSHIRE | $92,675,916 | $94,753,948 | $187,429,864 | 33.00% | $210,433,956 | 56.20% | $374,437,644 | $123,564,423 | $94,753,948 | **$53,251,719** | N/A |
| NEW JERSEY | $736,742,539 | $357,370,461 | $1,094,113,000 | 32.66% | $846,146,844 | 56.20% | $1,505,599,366 | $491,774,378 | $357,370,461 | **$200,842,199** | N/A |
| NEW YORK | $2,418,869,368 | $605,000,000 | $3,023,869,368 | 20.01% | $2,111,259,599 | 56.20% | $3,756,689,678 | $751,618,863 | $605,000,000 | **$340,010,000** | N/A |
| NORTH CAROLINA | $193,201,966 | $236,072,627 | $429,274,593 | 33.00% | $376,880,802 | 73.23% | $514,653,560 | $169,835,675 | $169,835,675 | **$124,370,665** | N/A |

| A | B | C | D | E | F | G | H | I | J | K | L |
|---|---|---|---|---|---|---|---|---|---|---|---|
| STATE | Inpatient Hospital Services FY 95 DSH Total Computable | IMD And Mental Health Services FY 95 DSH Total Computable | Total Inpatient & IMD & Mental Health FY 95 DSH Total Computable Col B + C | Applicable Percent Col C/D | FY 2020 Allotment In FS | FY 2020 FMAPs ** | FY 2020 Allotments in TC Col F/G | Applicable Percentage Applied to FY 2020 Allotments in TC Col E x Col H | FY 2020 TC IMD Limit (Lesser Of Col I or Col C) | FY 2020 IMD Limit In FS Col G x J | MMA LOW DSH STATUS |
| OHIO | $535,731,956 | $93,432,758 | $629,164,714 | 14.85% | $521,805,626 | 69.22% | $753,836,501 | $111,946,875 | $93,432,758 | **$64,674,155** | N/A |
| PENNSYLVANIA | $388,207,319 | $579,199,682 | $967,407,001 | 33.00% | $734,204,023 | 58.45% | $1,256,123,221 | $414,520,663 | $414,520,663 | **$242,287,327** | N/A |
| RHODE ISLAND | $108,503,167 | $2,397,833 | $110,901,000 | 2.16% | $84,911,073 | 59.15% | $143,552,110 | $3,103,795 | $2,397,833 | **$1,418,318** | N/A |
| SOUTH CAROLINA | $366,681,364 | $72,076,341 | $438,757,705 | 16.43% | $416,562,734 | 76.90% | $541,694,062 | $88,986,075 | $72,076,341 | **$55,426,706** | N/A |
| TENNESSEE* | $0 | $0 | $0 | 0.00% | $58,148,612 | 71.41% | $81,429,229 | $0 | $0 | **$0** | N/A |
| TEXAS | $1,220,515,401 | $292,513,592 | $1,513,028,993 | 19.33% | $1,232,098,565 | 67.09% | $1,836,486,160 | $355,047,501 | $292,513,592 | **$196,247,369** | N/A |
| VERMONT | $19,979,252 | $9,071,297 | $29,050,549 | 31.23% | $29,340,243 | 60.06% | $48,851,554 | $15,254,340 | $9,071,297 | **$5,448,221** | N/A |
| VIRGINIA | $129,313,480 | $7,770,268 | $137,083,748 | 5.67% | $115,151,645 | 56.20% | $204,896,166 | $11,614,055 | $7,770,268 | **$4,366,891** | N/A |
| WASHINGTON | $171,725,815 | $163,836,435 | $335,562,250 | 33.00% | $243,164,530 | 56.20% | $432,677,100 | $142,783,443 | $142,783,443 | **$80,244,295** | N/A |
| WEST VIRGINIA | $66,962,606 | $18,887,045 | $85,849,651 | 22.00% | $85,464,798 | 81.14% | $105,330,044 | $23,172,759 | $18,887,045 | **$15,324,948** | N/A |
| TOTAL | **$13,402,460,846** | **$4,118,758,904** | **$17,521,219,750** | | **$13,592,801,492** | | **$21,548,730,937** | **$4,103,551,554** | **$3,556,104,381** | **$2,239,319,089** | |
| LOW DSH STATES | | | | | | | | | | | |
| ALASKA | $2,506,827 | $17,611,765 | $20,118,592 | 33.00% | $26,773,982 | 56.20% | $47,640,538 | $15,721,378 | $15,721,378 | **$8,835,414** | LOW DSH |
| ARKANSAS | $2,422,649 | $819,351 | $3,242,000 | 25.27% | $54,824,390 | 77.62% | $70,631,782 | $17,850,778 | $819,351 | **$635,980** | LOW DSH |
| DELAWARE | $0 | $7,069,000 | $7,069,000 | 33.00% | $11,721,214 | 64.06% | $18,297,243 | $6,038,090 | $6,038,090 | **$3,868,001** | LOW DSH |
| HAWAII | $0 | $0 | $0 | 0.00% | $12,718,187 | 59.67% | $21,314,206 | $0 | $0 | **$0** | LOW DSH |
| IDAHO | $2,081,429 | $0 | $2,081,429 | 0.00% | $20,916,263 | 76.54% | $27,327,232 | $0 | $0 | **$0** | LOW DSH |
| IOWA | $12,011,250 | $0 | $12,011,250 | 0.00% | $50,717,628 | 67.40% | $75,248,706 | $0 | $0 | **$0** | LOW DSH |
| MINNESOTA | $24,240,000 | $5,257,214 | $29,497,214 | 17.82% | $98,171,272 | 56.20% | $174,681,978 | $31,133,128 | $5,257,214 | **$2,954,554** | LOW DSH |
| MONTANA | $237,048 | $0 | $237,048 | 0.00% | $14,543,963 | 70.98% | $20,490,227 | $0 | $0 | **$0** | LOW DSH |
| NEBRASKA | $6,449,102 | $1,811,337 | $8,260,439 | 21.93% | $36,841,315 | 60.92% | $60,474,910 | $13,260,850 | $1,811,337 | **$1,103,467** | LOW DSH |
| NEW MEXICO | $6,490,015 | $254,786 | $6,744,801 | 3.78% | $25,851,429 | 78.91% | $32,760,651 | $1,237,539 | $254,786 | **$201,052** | LOW DSH |
| NORTH DAKOTA | $214,523 | $988,478 | $1,203,001 | 33.00% | $12,553,768 | 56.25% | $22,317,810 | $7,364,877 | $988,478 | **$556,019** | LOW DSH |
| OKLAHOMA | $20,019,969 | $3,273,248 | $23,293,217 | 14.05% | $46,324,002 | 72.22% | $64,142,899 | $9,013,595 | $3,273,248 | **$2,363,940** | LOW DSH |
| OREGON | $11,437,908 | $19,975,092 | $31,413,000 | 33.00% | $58,293,894 | 67.43% | $86,450,977 | $28,528,822 | $19,975,092 | **$13,469,205** | LOW DSH |

| A | B | C | D | E | F | G | H | I | J | K | L |
|---|---|---|---|---|---|---|---|---|---|---|---|
| STATE | Inpatient Hospital Services FY 95 DSH Total Computable | IMD And Mental Health Services FY 95 DSH Total Computable | Total Inpatient & IMD & Mental Health FY 95 DSH Total Computable Col B + C | Applicable Percent Col C/D | FY 2020 Allotment In FS | FY 2020 FMAPs ** | FY 2020 Allotments in TC Col F/G | Applicable Percentage Applied to FY 2020 Allotments in TC Col E x Col H | FY 2020 TC IMD Limit (Lesser Of Col I or Col C) | FY 2020 IMD Limit In FS Col G x J | MMA LOW DSH STATUS |
| SOUTH DAKOTA | $321,120 | $751,299 | $1,072,419 | 33.00% | $14,305,319 | 63.82% | $22,415,104 | $7,396,984 | $751,299 | **$479,479** | **LOW DSH** |
| UTAH | $3,621,116 | $934,586 | $4,555,702 | 20.51% | $25,027,095 | 74.39% | $33,643,090 | $6,901,760 | $934,586 | **$695,239** | **LOW DSH** |
| WISCONSIN | $6,609,524 | $4,492,011 | $11,101,535 | 33.00% | $122,092,745 | 65.56% | $186,230,544 | $61,456,080 | $4,492,011 | **$2,944,962** | **LOW DSH** |
| WYOMING | $0 | $0 | $0 | 0.00% | $297,489 | 56.20% | $529,340 | $0 | $0 | $0 | **LOW DSH** |
| **TOTAL LOW DSH STATES** | **$98,662,480** | **$63,238,167** | **$161,900,647** | | **$631,973,955** | | **$964,597,238** | **$205,903,881** | **$60,316,870** | **$38,107,312** | |
| **TOTAL** | **$13,501,123,326** | **$4,181,997,071** | **$17,683,120,397** | | **$14,224,775,447** | | **$22,513,328,175** | **$4,309,455,435** | **$3,616,421,251** | **$2,277,426,401** | |

FOOTNOTES:

'* Tennessee's DSH allotment for FY 2020 determined under section 1923(f)(6)(A) of the Act, is $53,100,000.

'**Section 6008 of the Families First Coronavirus Response Act (FFCRA) provides a temporary 6.2 percentage point increase to each qualifying State and territory's State-specific FMAP as defined in section 1905(b) of the Act.

## Key to ADDENDUM 6: Final IMD DSH Limits for FY 2021

| The final FY 2021 IMD DSH Limits for the Non-Low DSH States are presented in the top section of this addendum and the final FY 2021 IMD DSH Limits for the Low-DSH States are presented in the bottom section of the addendum. | |
|---|---|
| **Column** | **Description** |
| Column A | **State.** |
| Column B | **Inpatient Hospital Services FY 95 DSH Total Computable.**<br>This column contains the States' total computable FY 1995 inpatient hospital DSH expenditures as reported on the Form CMS-64 as of January 1, 1997. |
| Column C | **IMD and Mental Health Services FY 95 DSH Total Computable**<br>This column contains the total computable FY 1995 mental health facility DSH expenditures as reported on the Form CMS-64 as of January 1, 1997. |
| Column D | **Total Inpatient Hospital & IMD & Mental Health FY 95 DSH Total Computable, Col. B + C**<br>This column contains the total computation of all inpatient hospital DSH expenditures and mental health facility DSH expenditures for FY 1995 as reported on the Form CMS-64 as of January 1, 1997 (representing the sum of Column B and Column C). |
| Column E | **Applicable Percentage, Col. C/D.**<br>This column contains the "applicable percentage" representing the total Computable FY 1995 mental health facility DSH expenditures divided by total computable all inpatient hospital and mental health facility DSH expenditures for FY 1995 (the amount in Column C divided by the amount in Column D) Per section 1923(h)(2)(A)(ii)(III) of the Act, for FYs after FY 2002, the applicable percentage can be no greater than 33 percent. |
| Column F | **FY 2021 Federal Share DSH Allotment.**<br>This column contains the States' final FY 2021 ARP DSH allotments from Addendum 2, Column K. |
| Column G | **FY 2021 FMAP.** This column contains the full FFCRA FMAP rate from Addendum 2, Column B2. |
| Column H | **FY 2021 DSH Allotments in Total Computable, Col. F/G.**<br>This column contains States' final FY 2021 total computable DSH allotment (determined as Column F/Column G). |
| Column I | **Applicable Percentage Applied to FY 2021 Allotments in TC, Col E x Col H.**<br>This column contains the applicable percentage of FY 2021 total computable DSH allotment (calculated as the percentage in Column E multiplied by the amount in Column H). |
| Column J | **FY 2021 TC IMD DSH Limit. Lesser of Col. I or C.**<br>This column contains the total computable FY 2021 TC IMD DSH Limit equal to the lesser of the amount in Column I or Column C. |
| Column K | **FY 2021 IMD DSH Limit in Federal Share, Col. G x J.**<br>This column contains the FY 2021 Federal Share IMD DSH limit determined by converting the total computable FY 2021 IMD DSH limit from Column J into a Federal share amount by multiplying it by the FY 2021 FMAP in Column G. |

## ADDENDUM 6: Final IMD DSH Limits for FY 2021

| A | B | C | D | E | F | G | H | I | J | K | L |
|---|---|---|---|---|---|---|---|---|---|---|---|
| STATE | Inpatient Hospital Services FY 95 DSH Total Computable | IMD And Mental Health Services FY 95 DSH Total Computable | Total Inpatient & IMD & Mental Health FY 95 DSH Total Computable Col B + C | Applicable Percent Col C/D | FY 2021 Allotment In FS | FY 2021 FMAPs ** | FY 2021 Allotments in TC Col F/G | Applicable Percentage Applied to FY 2020 Allotments in TC Col E x Col H | FY 2021 TC IMD Limit (Lesser Of Col I or Col C) | FY 2021 IMD Limit In FS Col G x J | MMA LOW DSH STATUS |
| ALABAMA | $413,006,229 | $4,451,770 | $417,457,999 | 1.07% | $396,161,585 | 78.78% | $502,870,761 | $5,362,611 | $4,451,770 | **$3,507,104** | N/A |
| ARIZONA | $93,916,100 | $28,474,900 | $122,391,000 | 23.27% | $130,820,303 | 76.21% | $171,657,660 | $39,937,044 | $28,474,900 | **$21,700,721** | N/A |
| CALIFORNIA | $2,189,879,543 | $1,555,919 | $2,191,435,462 | 0.07% | $1,462,527,850 | 56.20% | $2,602,362,722 | $1,847,677 | $1,555,919 | **$874,426** | N/A |
| COLORADO | $173,900,441 | $594,776 | $174,495,217 | 0.34% | $123,405,998 | 56.20% | $219,583,626 | $748,462 | $594,776 | **$334,264** | N/A |
| CONNECTICUT | $303,359,275 | $105,573,725 | $408,933,000 | 25.82% | $266,823,783 | 56.20% | $474,775,414 | $122,572,179 | $105,573,725 | **$59,332,433** | N/A |
| DISTRICT OF COLUMBIA | $39,532,234 | $6,545,136 | $46,077,370 | 14.20% | $79,139,127 | 76.20% | $103,857,121 | $14,752,556 | $6,545,136 | **$4,987,394** | N/A |
| FLORIDA | $184,468,014 | $149,714,986 | $334,183,000 | 33.00% | $261,141,803 | 68.16% | $383,130,579 | $126,433,091 | $126,433,091 | **$86,176,795** | N/A |
| GEORGIA | $407,343,557 | $0 | $407,343,557 | 0.00% | $348,494,971 | 73.23% | $475,890,989 | $0 | $0 | **$0** | N/A |
| ILLINOIS | $315,868,508 | $89,408,276 | $405,276,784 | 22.06% | $286,239,450 | 57.16% | $500,768,807 | $110,474,810 | $89,408,276 | **$51,105,771** | N/A |
| INDIANA | $79,960,783 | $153,566,302 | $233,527,085 | 33.00% | $277,602,845 | 72.03% | $385,398,925 | $127,181,645 | $127,181,645 | **$91,608,939** | N/A |
| KANSAS | $11,587,208 | $76,663,508 | $88,250,716 | 33.00% | $54,047,667 | 65.88% | $82,039,568 | $27,073,057 | $27,073,057 | **$17,835,730** | N/A |
| KENTUCKY | $158,804,908 | $37,443,073 | $196,247,981 | 19.08% | $186,916,050 | 78.25% | $238,870,351 | $45,575,195 | $37,443,073 | **$29,299,205** | N/A |
| LOUISIANA | $1,078,512,169 | $132,917,149 | $1,211,429,318 | 10.97% | $888,681,511 | 73.62% | $1,207,119,684 | $132,444,299 | $132,444,299 | **$97,505,493** | N/A |
| MAINE | $99,957,958 | $60,958,342 | $160,916,300 | 33.00% | $136,760,699 | 69.89% | $195,679,925 | $64,574,375 | $60,958,342 | **$42,603,785** | N/A |
| MARYLAND | $22,226,467 | $120,873,531 | $143,099,998 | 33.00% | $101,726,568 | 56.20% | $181,008,128 | $59,732,682 | $59,732,682 | **$33,569,767** | N/A |
| MASSACHUSETTS | $469,653,946 | $105,635,054 | $575,289,000 | 18.36% | $406,906,266 | 56.20% | $724,032,502 | $132,947,462 | $105,635,054 | **$59,366,900** | N/A |
| MICHIGAN | $133,258,800 | $304,765,552 | $438,024,352 | 33.00% | $344,971,606 | 70.28% | $490,853,168 | $161,981,545 | $161,981,545 | **$113,840,630** | N/A |
| MISSISSIPPI | $182,608,033 | $0 | $182,608,033 | 0.00% | $195,440,357 | 83.96% | $232,777,939 | $0 | $0 | **$0** | N/A |
| MISSOURI | $521,946,524 | $207,234,618 | $729,181,142 | 28.42% | $615,981,080 | 71.16% | $865,628,274 | $246,013,143 | $207,234,618 | **$147,468,154** | N/A |
| NEVADA | $73,560,000 | $0 | $73,560,000 | 0.00% | $60,272,757 | 69.50% | $86,723,392 | $0 | $0 | **$0** | N/A |
| NEW HAMPSHIRE | $92,675,916 | $94,753,948 | $187,429,864 | 33.00% | $213,590,465 | 56.20% | $380,054,208 | $125,417,889 | $94,753,948 | **$53,251,719** | N/A |
| NEW JERSEY | $736,742,539 | $357,370,461 | $1,094,113,000 | 32.66% | $858,839,046 | 56.20% | $1,528,183,356 | $499,150,993 | $357,370,461 | **$200,842,199** | N/A |
| NEW YORK | $2,418,869,368 | $605,000,000 | $3,023,869,368 | 20.01% | $2,142,928,493 | 56.20% | $3,813,040,024 | $762,893,146 | $605,000,000 | **$340,010,000** | N/A |
| NORTH CAROLINA | $193,201,966 | $236,072,627 | $429,274,593 | 33.00% | $382,356,221 | 73.60% | $519,505,734 | $171,436,892 | $171,436,892 | **$126,177,553** | N/A |
| OHIO | $535,731,956 | $93,432,758 | $629,164,714 | 14.85% | $529,177,928 | 69.83% | $757,808,862 | $112,536,782 | $93,432,758 | **$65,244,095** | N/A |

| A | B | C | D | E | F | G | H | I | J | K | L |
|---|---|---|---|---|---|---|---|---|---|---|---|
| STATE | Inpatient Hospital Services FY 95 DSII Total Computable | IMD And Mental Health Services FY 95 DSH Total Computable | Total Inpatient & IMD & Mental Health FY 95 DSII Total Computable Col B + C | Applicable Percent Col C/D | FY 2021 Allotment In FS | FY 2021 FMAPs ** | FY 2021 Allotments in TC Col F/G | Applicable Percentage Applied to FY 2020 Allotments in TC Col E x Col II | FY 2021 TC IMD Limit (Lesser Of Col I or Col C) | FY 2021 IMD Limit In FS Col G x J | MMA LOW DSII STATUS |
| PENNSYLVANIA | S388,207,319 | S579,199,682 | $967,407,001 | 33.00% | $745,292,800 | 58.40% | $1,276,186,301 | $421,141,479 | $421,141,479 | **$245,946,624** | N/A |
| RHODE ISLAND | S108,503,167 | $2,397,833 | $110,901,000 | 2.16% | $85,994,344 | 60.29% | $142,634,507 | $3,083,955 | $2,397,833 | **$1,445,654** | N/A |
| SOUTH CAROLINA | S366,681,364 | $72,076,341 | $438,757,705 | 16.43% | $422,844,960 | 76.83% | $550,364,389 | $90,410,381 | $72,076,341 | **$55,376,253** | N/A |
| TENNESSEE* | $0 | $0 | $0 | 0.00% | $58,080,635 | 72.30% | S80,332,829 | $0 | $0 | **$0** | N/A |
| TEXAS | $1,220,515,401 | S292,513,592 | $1,513,028,993 | 19.33% | $1,248,859,861 | 68.01% | $1,836,288,576 | $355,009,302 | $292,513,592 | **$198,938,494** | N/A |
| VERMONT | $19,979,252 | $9,071,297 | S29,050,549 | 31.23% | $29,740,349 | 60.77% | S48,939,196 | $15,281,707 | $9,071,297 | **$5,512,627** | N/A |
| VIRGINIA | S129,313,480 | $7,770,268 | $137,083,748 | 5.67% | $116,878,920 | 56.20% | $207,969,608 | $11,788,265 | $7,770,268 | **$4,366,891** | N/A |
| WASHINGTON | S171,725,815 | S163,836,435 | $335,562,250 | 33.00% | $246,811,998 | 56.20% | $439,167,256 | $144,925,194 | $144,925,194 | **$81,447,959** | N/A |
| WEST VIRGINIA | $66,962,606 | $18,887,045 | S85,849,651 | 22.00% | $86,742,350 | 81.19% | $106,838,712 | $23,504,668 | $18,887,045 | **$15,334,392** | N/A |
| TOTAL | **$13,402,460,846** | **$4,118,758,904** | **$17,521,219,750** | | **$13,792,200,648** | | **$21,812,343,093** | **$4,156,232,490** | **$3,573,499,018** | **$2,255,011,971** | |
| LOW DSH STATES | | | | | | | | | | | |
| ALASKA | $2,506,827 | $17,611,765 | S20,118,592 | 33.00% | $27,175,592 | 56.20% | S48,355,146 | $15,957,198 | $15,957,198 | **$8,967,945** | LOW DSH |
| ARKANSAS | $2,422,649 | $819,351 | $3,242,000 | 25.27% | $55,658,611 | 77.43% | S71,882,489 | $18,166,869 | $819,351 | **$634,423** | LOW DSII |
| DELAWARE | $0 | $7,069,000 | $7,069,000 | 33.00% | $11,899,426 | 63.94% | S18,610,300 | $6,141,399 | $6,141,399 | **$3,926,810** | LOW DSH |
| HAWAII | $0 | $0 | $0 | 0.00% | $12,920,344 | 59.22% | S21,817,535 | $0 | $0 | **$0** | LOW DSH |
| IDAHO | $2,081,429 | $0 | $2,081,429 | 0.00% | $21,228,298 | 76.61% | S27,709,565 | $0 | $0 | **$0** | LOW DSH |
| IOWA | $12,011,250 | $0 | S12,011,250 | 0.00% | $51,436,214 | 67.95% | S75,697,151 | $0 | $0 | **$0** | LOW DSII |
| MINNESOTA | $24,240,000 | $5,257,214 | S29,497,214 | 17.82% | $99,643,841 | 56.20% | $177,302,208 | $31,600,125 | $5,257,214 | **$2,954,554** | LOW DSH |
| MONTANA | $237,048 | $0 | $237,048 | 0.00% | $14,746,005 | 71.80% | S20,537,611 | $0 | $0 | **$0** | LOW DSH |
| NEBRASKA | $6,449,102 | $1,811,337 | $8,260,439 | 21.93% | $37,275,997 | 62.67% | S59,479,811 | $13,042,646 | $1,811,337 | **$1,135,165** | LOW DSH |
| NEW MEXICO | $6,490,015 | $254,786 | $6,744,801 | 3.78% | $26,218,152 | 79.66% | S32,912,569 | $1,243,278 | $254,786 | **$202,963** | LOW DSH |
| NORTH DAKOTA | $214,523 | $988,478 | $1,203,001 | 33.00% | $12,679,089 | 58.60% | S21,636,670 | $7,140,101 | $988,478 | **$579,248** | LOW DSH |
| OKLAHOMA | $20,019,969 | $3,273,248 | S23,293,217 | 14.05% | $46,901,904 | 74.19% | S63,218,634 | $8,883,713 | $3,273,248 | **$2,428,423** | LOW DSH |
| OREGON | $11,437,908 | $19,975,092 | S31,413,000 | 33.00% | $59,203,176 | 67.04% | S88,310,227 | $29,142,375 | $19,975,092 | **$13,391,302** | LOW DSH |
| SOUTH DAKOTA | $321,120 | $751,299 | $1,072,419 | 33.00% | $14,503,925 | 64.48% | S22,493,681 | $7,422,915 | $751,299 | **$484,438** | LOW DSH |

| A | B | C | D | E | F | G | H | I | J | K | L |
|---|---|---|---|---|---|---|---|---|---|---|---|
| **STATE** | **Inpatient Hospital Services FY 95 DSH Total Computable** | **IMD And Mental Health Services FY 95 DSH Total Computable** | **Total Inpatient & IMD & Mental Health FY 95 DSH Total Computable** Col B + C | **Applicable Percent** Col C/D | **FY 2021 Allotment** In FS | **FY 2021 FMAPs** ** | **FY 2021 Allotments in TC** Col F/G | **Applicable Percentage Applied to FY 2020 Allotments in TC** Col E x Col H | **FY 2021 TC IMD Limit (Lesser Of Col I or Col C)** | **FY 2021 IMD Limit In FS** Col G x J | **MMA LOW DSH STATUS** |
| **UTAH** | $3,621,116 | $934,586 | $4,555,702 | 20.51% | $25,423,509 | 73.72% | $34,486,583 | $7,074,799 | $934,586 | **$688,977** | **LOW DSH** |
| **WISCONSIN** | $6,609,524 | $4,492,011 | $11,101,535 | 33.00% | $123,922,162 | 65.57% | $188,992,164 | $62,367,414 | $4,492,011 | **$2,945,412** | **LOW DSH** |
| **WYOMING** | $0 | $0 | $0 | 0.00% | $301,951 | 56.20% | $537,280 | $0 | $0 | **$0** | **LOW DSH** |
| **TOTAL LOW DSH STATES** | **$98,662,480** | **$63,238,167** | **$161,900,647** | | **$641,138,198** | | **$973,979,623** | **$208,182,833** | **$60,655,999** | **$38,339,660** | |
| **TOTAL** | **$13,501,123,326** | **$4,181,997,071** | **$17,683,120,397** | | **$14,433,338,845** | | **$22,786,322,716** | **$4,364,415,323** | **$3,634,155,018** | **$2,293,351,631** | |

FOOTNOTES:

'* Tennessee's DSH allotment for FY 2021 determined under section 1923(f)(6)(A) of the Act, is $53,100,000.

'**Section 6008 of the Families First Coronavirus Response Act (FFCRA) provides a temporary 6.2 percentage point increase to each qualifying State and territory's State-specific FMAP as defined in section 1905(b) of the Act.

## Key to ADDENDUM 7: Preliminary IMD DSH Limits for FY 2022

| The preliminary FY 2022 IMD DSH Limits for the Non-Low DSH States are presented in the top section of this addendum and the preliminary FY 2022 IMD DSH Limits for the Low-DSH States are presented in the bottom section of the addendum. | |
|---|---|
| **Column** | **Description** |
| Column A | **State.** |
| Column B | **Inpatient Hospital Services FY 95 DSH Total Computable.**<br>This column contains the States' total computable FY 1995 inpatient hospital DSH expenditures as reported on the Form CMS-64 as of January 1, 1997. |
| Column C | **IMD and Mental Health Services FY 95 DSH Total Computable**<br>This column contains the total computable FY 1995 mental health facility DSH expenditures as reported on the Form CMS-64 as of January 1, 1997. |
| Column D | **Total Inpatient Hospital & IMD & Mental Health FY 95 DSH Total Computable, Col. B + C**<br>This column contains the total computation of all inpatient hospital DSH expenditures and mental health facility DSH expenditures for FY 1995 as reported on the Form CMS-64 as of January 1, 1997 (representing the sum of Column B and Column C). |
| Column E | **Applicable Percentage, Col. C/D.**<br>This column contains the "applicable percentage" representing the total Computable FY 1995 mental health facility DSH expenditures divided by total computable all inpatient hospital and mental health facility DSH expenditures for FY 1995 (the amount in Column C divided by the amount in Column D) Per section 1923(h)(2)(A)(ii)(III) of the Act, for FYs after FY 2002, the applicable percentage can be no greater than 33 percent. |
| Column F | **FY 2022 Federal Share DSH Allotment.**<br>This column contains the States' preliminary FY 2022 ARP DSH allotments from Addendum 3, Column K. |
| Column G | **FY 2022 FMAP.** This column contains the full FFCRA FMAP rate from Addendum 3, Column B2. |
| Column H | **FY 2022 DSH Allotments in Total Computable, Col. F/G.**<br>This column contains States' FY 2022 total computable DSH allotment (determined as Column F/Column G). |
| Column I | **Applicable Percentage Applied to FY 2022 Allotments in TC, Col E x Col H.**<br>This column contains the applicable percentage of FY 2022 total computable DSH allotment (calculated as the percentage in Column E multiplied by the amount in Column H). |
| Column J | **FY 2022 TC IMD DSH Limit. Lesser of Col. I or C.**<br>This column contains the total computable FY 2022 TC IMD DSH limit equal to the lesser of the amount in Column I or Column C. |
| Column K | **FY 2022 IMD DSH Limit in Federal Share, Col. G x J.**<br>This column contains the FY 2020 Federal Share IMD DSH limit determined by converting the total computable FY 2022 IMD DSH limit from Column J into a Federal share amount by multiplying it by the FY 2022 FMAP in Column G. |

## ADDENDUM 7: Preliminary IMD DSH Limits for FY 2022

| A | B | C | D | E | F | G | H | I | J | K | L |
|---|---|---|---|---|---|---|---|---|---|---|---|
| STATE | Inpatient Hospital Services FY 95 DSH Total Computable | IMD And Mental Health Services FY 95 DSH Total Computable | Total Inpatient & IMD & Mental Health FY 95 DSH Total Computable Col B + C | Applicable Percent Col C/D | FY 2022 Allotment In FS | FY 2022 FMAPs ** | FY 2022 Allotments in TC Col F/G | Applicable Percentage Applied to FY 2022 Allotments in TC Col E x Col H | FY 2022 TC IMD Limit (Lesser Of Col I or Col C) | FY 2022 IMD Limit In FS Col G x J | MMA LOW DSH STATUS |
| ALABAMA | $413,006,229 | $4,451,770 | $417,457,999 | 1.07% | **$409,328,374** | 78.57% | $520,972,858 | $5,555,652 | $4,451,770 | **$3,497,756** | N/A |
| ARIZONA | $93,916,100 | $28,474,900 | $122,391,000 | 23.27% | **$135,137,372** | 76.21% | $177,322,363 | $41,254,966 | $28,474,900 | **$21,700,721** | N/A |
| CALIFORNIA | $2,189,879,543 | $1,555,919 | $2,191,435,462 | 0.07% | **$1,510,791,269** | 56.20% | $2,688,240,692 | $1,908,651 | $1,555,919 | **$874,426** | N/A |
| COLORADO | $173,900,441 | $594,776 | $174,495,217 | 0.34% | **$127,478,396** | 56.20% | $226,829,886 | $773,161 | $594,776 | **$334,264** | N/A |
| CONNECTICUT | $303,359,275 | $105,573,725 | $408,933,000 | 25.82% | **$275,628,967** | 56.20% | $490,443,002 | $126,617,061 | $105,573,725 | **$59,332,433** | N/A |
| DISTRICT OF COLUMBIA | $39,532,234 | $6,545,136 | $46,077,370 | 14.20% | **$81,750,718** | 76.20% | $107,284,407 | $15,239,391 | $6,545,136 | **$4,987,394** | N/A |
| FLORIDA | $184,468,014 | $149,714,986 | $334,183,000 | 33.00% | **$270,133,402** | 67.23% | $401,804,852 | $132,595,601 | $132,595,601 | **$89,144,023** | N/A |
| GEORGIA | $407,343,557 | $0 | $407,343,557 | 0.00% | **$360,077,373** | 73.05% | $492,919,059 | $0 | $0 | **$0** | N/A |
| ILLINOIS | $315,868,508 | $89,408,276 | $405,276,784 | 22.06% | **$295,603,743** | 57.29% | $515,977,908 | $113,830,096 | $89,408,276 | **$51,222,001** | N/A |
| INDIANA | $79,960,783 | $153,566,302 | $233,527,085 | 33.00% | **$286,588,760** | 72.50% | $395,294,842 | $130,447,298 | $130,447,298 | **$94,574,291** | N/A |
| KANSAS | $11,587,208 | $76,663,508 | $88,250,716 | 33.00% | **$55,789,317** | 66.36% | $84,070,701 | $27,743,331 | $27,743,331 | **$18,410,475** | N/A |
| KENTUCKY | $158,804,908 | $37,443,073 | $196,247,981 | 19.08% | **$192,937,076** | 78.95% | $244,378,816 | $46,626,181 | $37,443,073 | **$29,561,306** | N/A |
| LOUISIANA | $1,078,512,169 | $132,917,149 | $1,211,429,318 | 10.97% | **$917,326,044** | 74.22% | $1,235,955,328 | $135,608,125 | $132,917,149 | **$98,651,108** | N/A |
| MAINE | $99,957,958 | $60,958,342 | $160,916,300 | 33.00% | **$141,213,098** | 70.20% | $201,158,259 | $66,382,226 | $60,958,342 | **$42,792,756** | N/A |
| MARYLAND | $22,226,467 | $120,873,531 | $143,099,998 | 33.00% | **$105,083,545** | 56.20% | $186,981,396 | $61,703,861 | $61,703,861 | **$34,677,570** | N/A |
| MASSACHUSETTS | $469,653,946 | $105,635,054 | $575,289,000 | 18.36% | **$420,334,173** | 56.20% | $747,925,574 | $137,334,728 | $105,635,054 | **$59,366,900** | N/A |
| MICHIGAN | $133,258,800 | $304,765,552 | $438,024,352 | 33.00% | **$355,683,524** | 71.68% | $496,210,273 | $163,749,390 | $163,749,390 | **$117,375,563** | N/A |
| MISSISSIPPI | $182,608,033 | $0 | $182,608,033 | 0.00% | **$201,785,181** | 84.51% | $238,770,774 | $0 | $0 | **$0** | N/A |
| MISSOURI | $521,946,524 | $207,234,618 | $729,181,142 | 28.42% | **$635,138,835** | 72.56% | $875,329,155 | $248,770,151 | $207,234,618 | **$150,369,439** | N/A |
| NEVADA | $73,560,000 | $0 | $73,560,000 | 0.00% | **$62,324,764** | 68.79% | $90,601,489 | $0 | $0 | **$0** | N/A |
| NEW HAMPSHIRE | $92,675,916 | $94,753,948 | $187,429,864 | 33.00% | **$220,638,950** | 56.20% | $392,595,996 | $129,556,679 | $94,753,948 | **$53,251,719** | N/A |
| NEW JERSEY | $736,742,539 | $357,370,461 | $1,094,113,000 | 32.66% | **$887,180,734** | 56.20% | $1,578,613,406 | $515,622,976 | $357,370,461 | **$200,842,199** | N/A |
| NEW YORK | $2,418,869,368 | $605,000,000 | $3,023,869,368 | 20.01% | **$2,213,645,133** | 56.20% | $3,938,870,344 | $788,068,619 | $605,000,000 | **$340,010,000** | N/A |
| NORTH CAROLINA | $193,201,966 | $236,072,627 | $429,274,593 | 33.00% | **$394,851,019** | 73.85% | $534,666,241 | $176,439,860 | $176,439,860 | **$130,300,836** | N/A |
| OHIO | $535,731,956 | $93,432,758 | $629,164,714 | 14.85% | **$546,284,930** | 70.30% | $777,076,715 | $115,398,113 | $93,432,758 | **$65,683,229** | N/A |

| A | B | C | D | E | F | G | H | I | J | K | L |
|---|---|---|---|---|---|---|---|---|---|---|---|
| STATE | Inpatient Hospital Services FY 95 DSH Total Computable | IMD And Mental Health Services FY 95 DSH Total Computable | Total Inpatient & IMD & Mental Health FY 95 DSH Total Computable Col B + C | Applicable Percent Col C/D | FY 2022 Allotment In FS | FY 2022 FMAPs ** | FY 2022 Allotments in TC Col F/G | Applicable Percentage Applied to FY 2022 Allotments in TC Col E x Col H | FY 2022 TC IMD Limit (Lesser Of Col I or Col C) | FY 2022 IMD Limit In FS Col G x J | MMA LOW DSH STATUS |
| PENNSYLVANIA | $388,207,319 | $579,199,682 | $967,407,001 | 33.00% | **$769,142,727** | 58.88% | $1,306,288,599 | $431,075,238 | $431,075,238 | **$253,817,100** | N/A |
| RHODE ISLAND | $108,503,167 | $2,397,833 | $110,901,000 | 2.16% | **$88,700,656** | 61.08% | $145,220,459 | $3,139,867 | $2,397,833 | **$1,464,596** | N/A |
| SOUTH CAROLINA | $366,681,364 | $72,076,341 | $438,757,705 | 16.43% | **$436,739,058** | 76.95% | $567,562,129 | $93,235,517 | $72,076,341 | **$55,462,744** | N/A |
| TENNESSEE* | $0 | $0 | $0 | 0.00% | **$58,061,121** | 72.56% | $80,018,083 | $0 | $0 | **$0** | N/A |
| TEXAS | $1,220,515,401 | $292,513,592 | $1,513,028,993 | 19.33% | **$1,292,025,904** | 67.00% | $1,928,396,872 | $372,816,581 | $292,513,592 | **$195,984,107** | N/A |
| VERMONT | $19,979,252 | $9,071,297 | $29,050,549 | 31.23% | **$30,616,321** | 62.67% | $48,853,234 | $15,254,865 | $9,071,297 | **$5,684,982** | N/A |
| VIRGINIA | $129,313,480 | $7,770,268 | $137,083,748 | 5.67% | **$120,735,925** | 56.20% | $214,832,606 | $12,177,278 | $7,770,268 | **$4,366,891** | N/A |
| WASHINGTON | $171,725,815 | $163,836,435 | $335,562,250 | 33.00% | **$254,956,794** | 56.20% | $453,659,776 | $149,707,726 | $149,707,726 | **$84,135,742** | N/A |
| WEST VIRGINIA | $66,962,606 | $18,887,045 | $85,849,651 | 22.00% | **$89,633,252** | 80.88% | $110,822,517 | $24,381,111 | $18,887,045 | **$15,275,842** | N/A |
| TOTAL | **$13,402,460,846** | **$4,118,758,904** | **$17,521,219,750** | | **$14,243,346,457** | | **$22,495,948,610** | **$4,283,014,298** | **$3,607,528,585** | **$2,283,152,413** | |
| LOW DSH STATES | | | | | | | | | | | |
| ALASKA | $2,506,827 | $17,611,765 | $20,118,592 | 33.00% | **$28,072,387** | 56.20% | $49,950,866 | $16,483,786 | $16,483,786 | **$9,263,888** | LOW DSH |
| ARKANSAS | $2,422,649 | $819,351 | $3,242,000 | 25.27% | **$57,470,276** | 77.82% | $73,850,265 | $18,664,185 | $819,351 | **$637,619** | LOW DSH |
| DELAWARE | $0 | $7,069,000 | $7,069,000 | 33.00% | **$12,292,519** | 63.92% | $19,231,100 | $6,346,263 | $6,346,263 | **$4,056,531** | LOW DSH |
| HAWAII | $0 | $0 | $0 | 0.00% | **$13,330,565** | 59.84% | $22,277,013 | $0 | $0 | **$0** | LOW DSH |
| IDAHO | $2,081,429 | $0 | $2,081,429 | 0.00% | **$21,933,887** | 76.41% | $28,705,519 | $0 | $0 | **$0** | LOW DSH |
| IOWA | $12,011,250 | $0 | $12,011,250 | 0.00% | **$53,103,182** | 68.34% | $77,704,393 | $0 | $0 | **$0** | LOW DSH |
| MINNESOTA | $24,240,000 | $5,257,214 | $29,497,214 | 17.82% | **$102,817,431** | 56.71% | $181,303,880 | $32,313,333 | $5,257,214 | **$2,981,366** | LOW DSH |
| MONTANA | $237,048 | $0 | $237,048 | 0.00% | **$15,246,810** | 71.10% | $21,444,177 | $0 | $0 | **$0** | LOW DSH |
| NEBRASKA | $6,449,102 | $1,811,337 | $8,260,439 | 21.93% | **$38,418,448** | 64.00% | $60,028,825 | $13,163,033 | $1,811,337 | **$1,159,256** | LOW DSH |
| NEW MEXICO | $6,490,015 | $254,786 | $6,744,801 | 3.78% | **$27,076,202** | 79.91% | $33,883,371 | $1,279,950 | $254,786 | **$203,599** | LOW DSH |
| NORTH DAKOTA | $214,523 | $988,478 | $1,203,001 | 33.00% | **$13,066,727** | 59.79% | $21,854,368 | $7,211,942 | $988,478 | **$591,011** | LOW DSH |
| OKLAHOMA | $20,019,969 | $3,273,248 | $23,293,217 | 14.05% | **$48,430,700** | 74.51% | $64,998,927 | $9,133,887 | $3,273,248 | **$2,438,897** | LOW DSH |
| OREGON | $11,437,908 | $19,975,092 | $31,413,000 | 33.00% | **$61,215,112** | 66.42% | $92,163,673 | $30,414,012 | $19,975,092 | **$13,267,456** | LOW DSH |
| SOUTH DAKOTA | $321,120 | $751,299 | $1,072,419 | 33.00% | **$14,972,490** | 64.89% | $23,073,648 | $7,614,304 | $751,299 | **$487,518** | LOW DSH |

| A | B | C | D | E | F | G | H | I | J | K | L |
|---|---|---|---|---|---|---|---|---|---|---|---|
| **STATE** | **Inpatient Hospital Services FY 95 DSH Total Computable** | **IMD And Mental Health Services FY 95 DSH Total Computable** | **Total Inpatient & IMD & Mental Health FY 95 DSH Total Computable** Col B + C | **Applicable Percent** Col C/D | **FY 2022 Allotment** In FS | **FY 2022 FMAPs** ** | **FY 2022 Allotments in TC** Col F/G | **Applicable Percentage Applied to FY 2022 Allotments in TC** Col E x Col H | **FY 2022 TC IMD Limit (Lesser Of Col I or Col C)** | **FY 2022 IMD Limit In FS** Col G x J | **MMA LOW DSH STATUS** |
| **UTAH** | $3,621,116 | $934,586 | $4,555,702 | 20.51% | **$26,285,289** | 73.03% | $35,992,454 | $7,383,723 | $934,586 | **$682,528** | **LOW DSH** |
| **WISCONSIN** | $6,609,524 | $4,492,011 | $11,101,535 | 33.00% | **$127,908,501** | 66.08% | $193,566,134 | $63,876,824 | $4,492,011 | **$2,968,321** | **LOW DSH** |
| **WYOMING** | $0 | $0 | $0 | 0.00% | **$311,916** | 56.20% | $555,010 | $0 | $0 | **$0** | **LOW DSH** |
| **TOTAL LOW DSH STATES** | **$98,662,480** | **$63,238,167** | **$161,900,647** | | **$661,952,443** | | **$1,000,583,626** | **$213,885,242** | **$61,387,451** | **$38,737,990** | |
| **TOTAL** | **$13,501,123,326** | **$4,181,997,071** | **$17,683,120,397** | | **$14,905,298,900** | | **$23,496,532,235** | **$4,496,899,540** | **$3,668,916,036** | **$2,321,890,403** | |

FOOTNOTES:

'* Tennessee's DSH allotment for FY 2022 determined under section 1923(f)(6)(A) of the Act, is $53,100,000.

'**Section 6008 of the Families First Coronavirus Response Act (FFCRA) provides a temporary 6.2 percentage point increase to each qualifying State and territory's State-specific FMAP as defined in section 1905(b) of the Act.

## Key to ADDENDUM 8: Preliminary IMD DSH Limits for FY 2023

| The preliminary FY 2023 IMD DSH Limits for the Non-Low DSH States are presented in the top section of this addendum and the preliminary FY 2023 IMD DSH Limits for the Low-DSH States are presented in the bottom section of the addendum. | |
|---|---|
| **Column** | **Description** |
| Column A | **State.** |
| Column B | **Inpatient Hospital Services FY 95 DSH Total Computable.**<br>This column contains the States' total computable FY 1995 inpatient hospital DSH expenditures as reported on the Form CMS-64 as of January 1, 1997. |
| Column C | **IMD and Mental Health Services FY 95 DSH Total Computable**<br>This column contains the total computable FY 1995 mental health facility DSH expenditures as reported on the Form CMS-64 as of January 1, 1997. |
| Column D | **Total Inpatient Hospital & IMD & Mental Health FY 95 DSH Total Computable, Col. B + C**<br>This column contains the total computation of all inpatient hospital DSH expenditures and mental health facility DSH expenditures for FY 1995 as reported on the Form CMS-64 as of January 1, 1997 (representing the sum of Column B and Column C). |
| Column E | **Applicable Percentage, Col. C/D.**<br>This column contains the "applicable percentage" representing the total Computable FY 1995 mental health facility DSH expenditures divided by total computable all inpatient hospital and mental health facility DSH expenditures for FY 1995 (the amount in Column C divided by the amount in Column D) Per section 1923(h)(2)(A)(ii)(III) of the Act, for FYs after FY 2002, the applicable percentage can be no greater than 33 percent. |
| Column F | **FY 2023 Federal Share DSH Allotment.**<br>This column contains the States' preliminary FY 2023 ARP DSH allotments from Addendum 4, Column K. |
| Column G | **FY 2023 FMAP.** This column contains the full FFCRA FMAP rate from Addendum 4, Column B2. |
| Column H | **FY 2023 DSH Allotments in Total Computable, Col. F/G.**<br>This column contains States' FY 2023 total computable DSH allotment (determined as Column F/Column G). |
| Column I | **Applicable Percentage Applied to FY 2023 Allotments in TC, Col E x Col H.**<br>This column contains the applicable percentage of FY 2023 total computable DSH allotment (calculated as the percentage in Column E multiplied by the amount in Column H). |
| Column J | **FY 2023 TC IMD DSH Limit. Lesser of Col. I or C.**<br>This column contains the total computable FY 2023 TC IMD DSH limit equal to the lesser of the amount in Column I or Column C. |
| Column K | **FY 2023 IMD DSH Limit in Federal Share, Col. G x J.**<br>This column contains the FY 2023 Federal Share IMD DSH limit determined by converting the total computable FY 2023 IMD DSH limit from Column J into a Federal share amount by multiplying it by the FY 2021 FMAP in Column G. |

## ADDENDUM 8: Preliminary IMD DSH Limit for Fiscal Year: 2023

| A | B | C | D | E | F | G | H | I | J | K | L |
|---|---|---|---|---|---|---|---|---|---|---|---|
| STATE | Inpatient Hospital Services FY 95 DSH Total Computable | IMD And Mental Health Services FY 95 DSH Total Computable | Total Inpatient & IMD & Mental Health FY 95 DSH Total Computable Col B + C | Applicable Percent Col C/D | FY 2023 Allotment In FS | FY 2023 FMAPs ** | FY 2023 Allotments in TC Col F/G | Applicable Percentage Applied to FY 2023 Allotments in TC Col E x Col H | FY 2023 TC IMD Limit (Lesser Of Col I or Col C) | FY 2023 IMD Limit In FS Col G x J | MMA LOW DSH STATUS |
| ALABAMA | $413,006,229 | $4,451,770 | $417,457,999 | 1.07% | **$440,408,540** | 78.63% | $560,102,429 | $5,972,929 | $4,451,770 | **$3,500,427** | N/A |
| ARIZONA | $93,916,100 | $28,474,900 | $122,391,000 | 23.27% | **$145,484,340** | 75.76% | $192,033,184 | $44,677,515 | $28,474,900 | **$21,572,584** | N/A |
| CALIFORNIA | $2,189,879,543 | $1,555,919 | $2,191,435,462 | 0.07% | **$1,625,611,405** | 56.20% | $2,892,546,984 | $2,053,708 | $1,555,919 | **$874,426** | N/A |
| COLORADO | $173,900,441 | $594,776 | $174,495,217 | 0.34% | **$137,166,754** | 56.20% | $244,068,958 | $831,922 | $594,776 | **$334,264** | N/A |
| CONNECTICUT | $303,359,275 | $105,573,725 | $408,933,000 | 25.82% | **$296,576,769** | 56.20% | $527,716,670 | $136,239,958 | $105,573,725 | **$59,332,433** | N/A |
| DISTRICT OF COLUMBIA | $39,532,234 | $6,545,136 | $46,077,370 | 14.20% | **$87,963,772** | 76.20% | $115,438,021 | $16,397,584 | $6,545,136 | **$4,987,394** | N/A |
| FLORIDA | $184,468,014 | $149,714,986 | $334,183,000 | 33.00% | **$291,100,994** | 66.25% | $439,397,727 | $145,001,250 | $145,001,250 | **$96,063,328** | N/A |
| GEORGIA | $407,343,557 | $0 | $407,343,557 | 0.00% | **$387,856,664** | 72.22% | $537,048,829 | $0 | $0 | **$0** | N/A |
| ILLINOIS | $315,868,508 | $89,408,276 | $405,276,784 | 22.06% | **$318,820,026** | 56.20% | $567,295,420 | $125,151,273 | $89,408,276 | **$50,247,451** | N/A |
| INDIANA | $79,960,783 | $153,566,302 | $233,527,085 | 33.00% | **$308,626,547** | 71.86% | $429,483,089 | $141,729,419 | $141,729,419 | **$101,846,761** | N/A |
| KANSAS | $11,587,208 | $76,663,508 | $88,250,716 | 33.00% | **$60,066,846** | 65.96% | $91,065,564 | $30,051,636 | $30,051,636 | **$19,822,059** | N/A |
| KENTUCKY | $158,804,908 | $37,443,073 | $196,247,981 | 19.08% | **$207,731,314** | 78.37% | $265,064,839 | $50,572,964 | $37,443,073 | **$29,344,136** | N/A |
| LOUISIANA | $1,078,512,169 | $132,917,149 | $1,211,429,318 | 10.97% | **$987,949,709** | 73.48% | $1,344,515,119 | $147,519,227 | $132,917,149 | **$97,667,521** | N/A |
| MAINE | $99,957,958 | $60,958,342 | $160,916,300 | 33.00% | **$152,095,838** | 69.49% | $218,874,426 | $72,228,560 | $60,958,342 | **$42,359,952** | N/A |
| MARYLAND | $22,226,467 | $120,873,531 | $143,099,998 | 33.00% | **$113,069,894** | 56.20% | $201,191,982 | $66,393,354 | $66,393,354 | **$37,313,065** | N/A |
| MASSACHUSETTS | $469,653,946 | $105,635,054 | $575,289,000 | 18.36% | **$452,279,570** | 56.20% | $804,767,918 | $147,772,168 | $105,635,054 | **$59,366,900** | N/A |
| MICHIGAN | $133,258,800 | $304,765,552 | $438,024,352 | 33.00% | **$383,109,375** | 70.91% | $540,275,525 | $178,290,923 | $178,290,923 | **$126,426,094** | N/A |
| MISSISSIPPI | $182,608,033 | $0 | $182,608,033 | 0.00% | **$217,212,917** | 84.06% | $258,402,233 | $0 | $0 | **$0** | N/A |
| MISSOURI | $521,946,524 | $207,234,618 | $729,181,142 | 28.42% | **$683,897,415** | 72.01% | $949,725,615 | $269,913,762 | $207,234,618 | **$149,229,648** | N/A |
| NEVADA | $73,560,000 | $0 | $73,560,000 | 0.00% | **$67,055,658** | 68.85% | $97,393,839 | $0 | $0 | **$0** | N/A |
| NEW HAMPSHIRE | $92,675,916 | $94,753,948 | $187,429,864 | 33.00% | **$237,407,510** | 56.20% | $422,433,292 | $139,402,986 | $94,753,948 | **$53,251,719** | N/A |
| NEW JERSEY | $736,742,539 | $357,370,461 | $1,094,113,000 | 32.66% | **$954,606,469** | 56.20% | $1,698,588,024 | $554,810,321 | $357,370,461 | **$200,842,199** | N/A |
| NEW YORK | $2,418,869,368 | $605,000,000 | $3,023,869,368 | 20.01% | **$2,381,882,163** | 56.20% | $4,238,224,490 | $847,961,834 | $605,000,000 | **$340,010,000** | N/A |
| NORTH CAROLINA | $193,201,966 | $236,072,627 | $429,274,593 | 33.00% | **$424,828,089** | 73.91% | $574,791,083 | $189,681,057 | $189,681,057 | **$140,193,269** | N/A |
| OHIO | $535,731,956 | $93,432,758 | $629,164,714 | 14.85% | **$588,226,570** | 69.78% | $842,973,015 | $125,183,902 | $93,432,758 | **$65,197,379** | N/A |

| A | B | C | D | E | F | G | H | I | J | K | L |
|---|---|---|---|---|---|---|---|---|---|---|---|
| STATE | Inpatient Hospital Services FY 95 DSH Total Computable | IMD And Mental Health Services FY 95 DSH Total Computable | Total Inpatient & IMD & Mental Health FY 95 DSH Total Computable Col B + C | Applicable Percent Col C/D | FY 2023 Allotment In FS | FY 2023 FMAPs ** | FY 2023 Allotments in TC Col F/G | Applicable Percentage Applied to FY 2023 Allotments in TC Col E x Col H | FY 2023 TC IMD Limit (Lesser Of Col I or Col C) | FY 2023 IMD Limit In FS Col G x J | MMA LOW DSH STATUS |
| PENNSYLVANIA | $388,207,319 | $579,199,682 | $967,407,001 | 33.00% | **$828,737,164** | 58.20% | $1,423,947,017 | $469,902,516 | $469,902,516 | **$273,483,264** | N/A |
| RHODE ISLAND | $108,503,167 | $2,397,833 | $110,901,000 | 2.16% | **$95,607,083** | 60.16% | $158,921,347 | $3,436,099 | $2,397,833 | **$1,442,536** | N/A |
| SOUTH CAROLINA | $366,681,364 | $72,076,341 | $438,757,705 | 16.43% | **$470,022,425** | 76.78% | $612,167,784 | $100,563,052 | $72,076,341 | **$55,340,215** | N/A |
| TENNESSEE* | $0 | $0 | $0 | 0.00% | **$58,080,635** | 72.30% | $80,332,829 | $0 | $0 | **$0** | N/A |
| TEXAS | $1,220,515,401 | $292,513,592 | $1,513,028,993 | 19.33% | **$1,392,218,235** | 66.07% | $2,107,186,673 | $407,381,977 | $292,513,592 | **$193,263,730** | N/A |
| VERMONT | $19,979,252 | $9,071,297 | $29,050,549 | 31.23% | **$32,981,113** | 62.02% | $53,178,189 | $16,605,371 | $9,071,297 | **$5,626,018** | N/A |
| VIRGINIA | $129,313,480 | $7,770,268 | $137,083,748 | 5.67% | **$129,727,931** | 56.85% | $228,193,370 | $12,934,601 | $7,770,268 | **$4,417,397** | N/A |
| WASHINGTON | $171,725,815 | $163,836,435 | $335,562,250 | 33.00% | **$274,333,510** | 56.20% | $488,137,918 | $161,085,513 | $161,085,513 | **$90,530,058** | N/A |
| WEST VIRGINIA | $66,962,606 | $18,887,045 | $85,849,651 | 22.00% | **$96,511,300** | 80.22% | $120,308,277 | $26,467,992 | $18,887,045 | **$15,151,187** | N/A |
| TOTAL | **$13,402,460,846** | **$4,118,758,904** | **$17,521,219,750** | | **$15,329,254,546** | | **$24,325,791,678** | **$4,636,215,375** | **$3,716,201,949** | **$2,339,037,414** | |
| LOW DSH STATES | | | | | | | | | | | |
| ALASKA | $2,506,827 | $17,611,765 | $20,118,592 | 33.00% | **$30,205,888** | 56.20% | $53,747,132 | $17,736,554 | $17,611,765 | **$9,897,812** | LOW DSH |
| ARKANSAS | $2,422,649 | $819,351 | $3,242,000 | 25.27% | **$61,859,435** | 77.51% | $79,808,328 | $20,169,967 | $819,351 | **$635,079** | LOW DSH |
| DELAWARE | $0 | $7,069,000 | $7,069,000 | 33.00% | **$13,209,862** | 64.69% | $20,420,253 | $6,738,684 | $6,738,684 | **$4,359,254** | LOW DSH |
| HAWAII | $0 | $0 | $0 | 0.00% | **$14,279,534** | 62.26% | $22,935,326 | $0 | $0 | **$0** | LOW DSH |
| IDAHO | $2,081,429 | $0 | $2,081,429 | 0.00% | **$23,603,594** | 76.31% | $30,931,194 | $0 | $0 | **$0** | LOW DSH |
| IOWA | $12,011,250 | $0 | $12,011,250 | 0.00% | **$57,057,732** | 69.33% | $82,298,763 | $0 | $0 | **$0** | LOW DSH |
| MINNESOTA | $24,240,000 | $5,257,214 | $29,497,214 | 17.82% | **$110,564,876** | 56.99% | $194,007,503 | $34,577,468 | $5,257,214 | **$2,996,086** | LOW DSH |
| MONTANA | $237,048 | $0 | $237,048 | 0.00% | **$16,422,971** | 70.32% | $23,354,623 | $0 | $0 | **$0** | LOW DSH |
| NEBRASKA | $6,449,102 | $1,811,337 | $8,260,439 | 21.93% | **$41,333,406** | 64.07% | $64,512,886 | $14,146,291 | $1,811,337 | **$1,160,524** | LOW DSH |
| NEW MEXICO | $6,490,015 | $254,786 | $6,744,801 | 3.78% | **$29,147,878** | 79.46% | $36,682,454 | $1,385,686 | $254,786 | **$202,453** | LOW DSH |
| NORTH DAKOTA | $214,523 | $988,478 | $1,203,001 | 33.00% | **$14,117,493** | 57.75% | $24,445,876 | $8,067,139 | $988,478 | **$570,846** | LOW DSH |
| OKLAHOMA | $20,019,969 | $3,273,248 | $23,293,217 | 14.05% | **$52,172,588** | 73.56% | $70,925,215 | $9,966,671 | $3,273,248 | **$2,407,801** | LOW DSH |
| OREGON | $11,437,908 | $19,975,092 | $31,413,000 | 33.00% | **$65,857,267** | 66.52% | $99,003,709 | $32,671,224 | $19,975,092 | **$13,287,431** | LOW DSH |
| SOUTH DAKOTA | $321,120 | $751,299 | $1,072,419 | 33.00% | **$16,163,300** | 62.94% | $25,680,490 | $8,474,562 | $751,299 | **$472,868** | LOW DSH |

| A | B | C | D | E | F | G | H | I | J | K | L |
|---|---|---|---|---|---|---|---|---|---|---|---|
| STATE | Inpatient Hospital Services FY 95 DSH Total Computable | IMD And Mental Health Services FY 95 DSH Total Computable | Total Inpatient & IMD & Mental Health FY 95 DSH Total Computable Col B + C | Applicable Percent Col C/D | FY 2023 Allotment In FS | FY 2023 FMAPs ** | FY 2023 Allotments in TC Col F/G | Applicable Percentage Applied to FY 2023 Allotments in TC Col E x Col H | FY 2023 TC IMD Limit (Lesser Of Col I or Col C) | FY 2023 IMD Limit In FS Col G x J | MMA LOW DSH STATUS |
| UTAH | $3,621,116 | $934,586 | $4,555,702 | 20.51% | $28,316,857 | 72.10% | $39,274,420 | $8,057,007 | $934,586 | $673,837 | LOW DSH |
| WISCONSIN | $6,609,524 | $4,492,011 | $11,101,535 | 33.00% | $137,582,277 | 66.30% | $207,514,747 | $68,479,867 | $4,492,011 | $2,978,203 | LOW DSH |
| WYOMING | $0 | $0 | $0 | 0.00% | $335,621 | 56.20% | $597,190 | $0 | $0 | $0 | LOW DSH |
| TOTAL LOW DSH STATES | $98,662,480 | $63,238,167 | $161,900,647 | | $712,230,581 | | $1,076,140,110 | $230,471,118 | $62,907,851 | $39,642,194 | |
| TOTAL | $13,501,123,326 | $4,181,997,071 | $17,683,120,397 | | $16,041,485,127 | | $25,401,931,788 | $4,866,686,493 | $3,779,109,800 | $2,378,679,608 | |

FOOTNOTES:

* Tennessee's DSH allotment for FY 2023 determined under section 1923(f)(6)(A) of the Act, is $53,100,000.

**Section 6008 of the Families First Coronavirus Response Act (FFCRA) provides a temporary 6.2 percentage point increase to each qualifying State and territory's State-specific FMAP as defined in section 1905(b) of the Act.

[FR Doc. 2023–07927 Filed 4–13–23; 8:45 am]

BILLING CODE 4120–01–C

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Medicare & Medicaid Services

**[CMS–1797–N]**

# Medicare Program; Meeting Announcement for the Medicare Advisory Panel on Clinical Diagnostic Laboratory Tests

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

**ACTION:** Notice.

**SUMMARY:** This notice announces the public meeting dates for the Medicare Advisory Panel on Clinical Diagnostic Laboratory Tests (the Panel) on Wednesday, July 19, 2023 and Thursday, July 20, 2023. The purpose of the Panel is to advise the Secretary of the Department of Health and Human Services and the Administrator of the Centers for Medicare & Medicaid Services on issues related to clinical diagnostic laboratory tests.

**DATES:** *Meeting Dates:* The virtual meeting of the Panel is scheduled for Wednesday, July 19, 2023 from 9:00 a.m. to 5:00 p.m., Eastern Daylight Time (E.D.T.) and Thursday, July 20, 2023, from 9:00 a.m. to 5:00 p.m., E.D.T. The Panel is also expected to virtually participate in the Clinical Laboratory Fee Schedule (CLFS) Annual Public Meeting for Calendar Year (CY) 2024 on Thursday June 22, 2023 in order to gather information and ask questions to presenters. Notice of the CLFS Annual Public Meeting for CY 2024 is published elsewhere in this issue of the **Federal Register**.

*Deadline for Meeting Registration:* All stand-by speakers for the Panel meeting must register electronically to our CDLT Panel dedicated email box, *CDLTPanel@cms.hhs.gov* by June 1, 2023. Registration is not required for non-speakers. The public may view this meeting via webinar, or listen-only via teleconference.

*Webinar and Teleconference Meeting Information:* Teleconference dial-in instructions, and related webinar details will be posted on the meeting agenda, which will be available on the CMS website approximately 2 weeks prior to the meeting at *https://www.cms.gov/Regulations-and-Guidance/Guidance/FACA/AdvisoryPanelonClinicalDiagnosticLaboratoryTests.html.* A preliminary agenda is described in section II of this notice.

**ADDRESSES:** The Panel meeting will be held *virtually* and *will not* occur at the campus of the Centers for Medicare & Medicaid Services (CMS), Central Building, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

**FOR FURTHER INFORMATION CONTACT:** The CLFS Policy Team via email, *CDLTPanel@cms.hhs.gov;* or Rasheeda Arthur, (410) 786–3434. The CMS Press Office, for press inquiries, (202) 690–6145.

**SUPPLEMENTARY INFORMATION:**

## I. Background

The Medicare Advisory Panel on Clinical Diagnostic Laboratory Tests (CDLTs) (the Panel) is authorized by section 1834A(f)(1) of the Social Security Act (the Act) (42 U.S.C. 1395m–1), as established by section 216(a) of the Protecting Access to Medicare Act of 2014 (PAMA) (Pub. L. 113–93), enacted on April 1, 2014. The Panel is subject to the Federal Advisory Committee Act (FACA), as amended (5 U.S.C. Appendix 2), which sets forth standards for the formation and use of advisory panels.

Section 1834A(f)(1) of the Act directs the Secretary of the Department of Health and Human Services (the Secretary) to consult with an expert outside advisory panel established by the Secretary, composed of an appropriate selection of individuals with expertise in issues related to clinical diagnostic laboratory tests, which may include the development, validation, performance, and application of such tests. Such individuals may include molecular pathologists, researchers, and individuals with expertise in laboratory science or health economics.

The Panel will provide input and recommendations to the Secretary and the Administrator of the Centers for Medicare & Medicaid Services (CMS), on the following:

- The establishment of payment rates under section 1834A of the Act for new clinical diagnostic laboratory tests, including whether to use ''crosswalking'' or ''gapfilling'' processes to determine payment for a specific new test.
- The factors used in determining coverage and payment processes for new clinical diagnostic laboratory tests.
- Other aspects of the payment system under section 1834A of the Act.

A notice announcing the establishment of the Panel and soliciting nominations for members was published in the October 27, 2014 **Federal Register** (79 FR 63919 through 63920). In the August 7, 2015 **Federal Register** (80 FR 47491), we announced membership appointments to the Panel along with the first public meeting date for the Panel, which was held on August 26, 2015. Subsequent meetings of the Panel and membership appointments were also announced in the **Federal Register**.

## II. Agenda

The Agenda for the July 19 and July 20, 2023 Panel meeting will provide for discussion and comment on the following topics as designated in the Panel's charter:

- Calendar Year (CY) 2024 Clinical Laboratory Fee Schedule (CLFS) new and reconsidered test codes, which will be posted on the CMS website at *https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/ClinicalLabFeeSched/Laboratory_Public_Meetings.html.*
- Other CY 2024 CLFS issues designated in the Panel's charter and further described on our Agenda.

A detailed Agenda will be posted approximately 2 weeks before the meeting, on the CMS website at *https://www.cms.gov/Regulations-and-Guidance/Guidance/FACA/AdvisoryPanelonClinicalDiagnosticLaboratoryTests.html.* The Panel will make recommendations to the Secretary and the Administrator of CMS regarding crosswalking and gapfilling for new and reconsidered laboratory tests discussed during the CLFS Annual Public Meeting for CY 2024. The Panel will also provide input on other CY 2024 CLFS issues that are designated in the Panel's charter and specified on the meeting agenda.

## III. Meeting Participation

This meeting is open to the public. Stand-by speakers may participate in the meeting via teleconference and webinar. A stand-by speaker is an individual who will speak on behalf of a company or organization if the Panel has any questions during the meeting about technical information described in the public comments or presentation previously submitted or presented by the organization or company at the recent CLFS Annual Public Meeting for CY 2023 on June 22, 2023. The public may also view or listen-only to the meeting via teleconference and webinar.

## IV. Registration Instructions for Stand-by Speakers

Beginning May 1, 2023 and ending June 27, 2023 at 5:00 p.m. E.D.T., registration to serve as a stand-by speaker may be completed by sending an email to the following resource box *CDLTPanel@cms.hhs.gov.* The subject of the email should state ''Stand-by Speaker Registration for CDLT Panel Meeting.'' In the email, all of the

following information must be submitted when registering:

- Stand-by Speaker name.
- Organization or company name.
- Email addresses that will be used by the speaker in order to connect to the virtual meeting.
- New or Reconsidered Code (s) for which the company or organization you are representing submitted a comment or presentation.

Registration details may not be revised once they are submitted. If registration details require changes, a new registration entry must be submitted by the date specified in the **DATES** section of this notice. Additionally, registration information must reflect individual- level content and not reflect an organization entry. Also, each individual may only register one person at a time. That is, one individual may not register multiple individuals at the same time.

After registering, a confirmation email will be sent upon receipt of the registration. The email will provide information to the speaker in preparation for the meeting. Registration is only required for stand-by speakers and must be submitted by the deadline specified in the **DATES** section of this notice. Note: No registration is required for participants who plan to view the Panel meeting via webinar or listen via teleconference.

### V. Panel Recommendations and Discussions

The Panel's recommendations will be posted approximately 2 weeks after the meeting on the CMS website at *https://www.cms.gov/Regulations*-and-*Guidance/Guidance/FACA/AdvisoryPanelonClinicalDiagnosticLaboratoryTests.html.*

### VI. Special Accommodations

Individuals viewing or listening to the meeting who are hearing or visually impaired and have special requirements, or a condition that requires special assistance, should send an email to the resource box (*CDLTPanel@cms.hhs.gov*). The deadline for submitting this request is listed in the **DATES** section of this notice.

### VII. Copies of the Charter

The Secretary's Charter for the Medicare Advisory Panel on CDLT's is available on the CMS website at *http://cms.gov/Regulations-and-Guidance/Guidance/FACA/AdvisoryPanelonClinicalDiagnosticLaboratoryTests.html* or you may obtain a copy of the charter by submitting a request to the contact listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice.

### VIII. Collection of Information Requirements

This document does not impose information collection requirements, that is, reporting, recordkeeping or third-party disclosure requirements. Consequently, there is no need for review by the Office of Management and Budget under the authority of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

The Administrator of CMS, Chiquita Brooks-LaSure, having reviewed and approved this document, authorizes Evell J. Barco Holland, who is the **Federal Register** Liaison, to electronically sign this document for purposes of publication in the **Federal Register**.

Dated: April 11, 2023.

**Evell J. Barco Holland,**

*Federal Register Liaison, Centers for Medicare & Medicaid Services.*

[FR Doc. 2023–07913 Filed 4–13–23; 8:45 am]

**BILLING CODE 4120–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Medicare & Medicaid Services

**[CMS–1796–N]**

## Medicare Program; Public Meeting on June 22, 2023 Regarding New and Reconsidered Clinical Diagnostic Laboratory Test Codes for the Clinical Laboratory Fee Schedule for Calendar Year 2024

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

**ACTION:** Notice.

**SUMMARY:** This notice announces a public meeting to receive comments and recommendations (including data on which recommendations are based) on the appropriate basis for establishing payment amounts for new or substantially revised Healthcare Common Procedure Coding System codes being considered for Medicare payment under the Clinical Laboratory Fee Schedule for calendar year 2024. This meeting also provides a forum for those who submitted certain reconsideration requests regarding final determinations made last year on new test codes and for the public to provide comment on the requests.

**DATES:**

*CLFS Annual Public Meeting Date:* The virtual meeting is scheduled for Thursday, June 22, 2023 from 9:00 a.m. to 5:00 p.m., E.D.T.

*Deadline for Submission of Presentations and Written Comments:* All presenters for the CLFS Annual Public Meeting must register and submit their presentations electronically to our CLFS dedicated email box, *CLFS_Annual_Public_Meeting@cms.hhs.gov,* by June 1, 2023 at 5:00 p.m., E.D.T. All written comments (non-presenter comments) must also be submitted electronically to our CLFS dedicated email box, *CLFS_Annual_Public_Meeting@cms.hhs.gov,* by June 1, 2023, at 5:00 p.m., E.D.T. Any presentations or written comments received after that date and time will not be included in the meeting and will not be reviewed.

*Deadline for Submitting Requests for Special Accommodations:* Requests for special accommodations must be received no later than June 1, 2023 at 5:00 p.m. E.D.T.

*Publication of Proposed Determinations:* We intend to publish our proposed determinations for new test codes and our proposed determinations for reconsidered codes (as described later in section II, ''Format'' of this notice) for CY 2024 by early September 2023.

*Deadline for Submission of Written Comments Related to Proposed Determinations:* Comments in response to the proposed determinations will be due by early October 2023.

**ADDRESSES:** The CLFS Annual Public Meeting will be held virtually and will not occur at the campus of the Centers for Medicare & Medicaid Services (CMS), Central Building, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

*Where to Submit Written Comments:* Interested parties should submit all written comments on presentations and proposed determinations electronically to our CLFS dedicated email box, *CLFS_Annual_Public_Meeting@cms.hhs.gov* (the specific date for the publication of these determinations and the deadline for submitting comments regarding these determinations will be published on the CMS website).

**FOR FURTHER INFORMATION CONTACT:** The CLFS Policy Team and submit all inquiries to the CLFS dedicated email box, *CLFS_Annual_Public_Meeting@cms.hhs.gov* with the subject entitled ''CLFS Annual Public Meeting Inquiry.''

**SUPPLEMENTARY INFORMATION:**

### I. Background

Section 531(b) of the Medicare, Medicaid, and SCHIP Benefits Improvement and Protection Act of 2000 (BIPA) (Pub. L. 106–554) required

the Secretary of the Department of Health and Human Services (the Secretary) to establish procedures for coding and payment determinations for new clinical diagnostic laboratory tests under Part B of title XVIII of the Social Security Act (the Act) that permit public consultation in a manner consistent with the procedures established for implementing coding modifications for International Classification of Diseases, Tenth Revision, Clinical Modification (ICD–10–CM). The procedures and Clinical Laboratory Fee Schedule (CLFS) public meeting announced in this notice for new tests are in accordance with the procedures published on November 23, 2001 in the **Federal Register** (66 FR 58743) to implement section 531(b) of BIPA.

Section 942(b) of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA) (Pub. L. 108–173) added section 1833(h)(8) of the Act. Section 1833(h)(8)(A) of the Act requires the Secretary to establish by regulation procedures for determining the basis for, and amount of, payment for any clinical diagnostic laboratory test (CDLT) for which a new or substantially revised Healthcare Common Procedure Coding System (HCPCS) code is assigned on or after January 1, 2005. A code is considered to be substantially revised if there is a substantive change to the definition of the test or procedure to which the code applies (for example, a new analyte or a new methodology for measuring an existing analyte-specific test). (See section 1833(h)(8)(E)(ii) of the Act and 42 CFR 414.502)).

Section 1833(h)(8)(B) of the Act sets forth the process for determining the basis for, and the amount of, payment for new tests. Pertinent to this notice, sections 1833(h)(8)(B)(i) and (ii) of the Act require the Secretary to make available to the public a list that includes any such test for which establishment of a payment amount is being considered for a year and, on the same day that the list is made available, cause to have published in the **Federal Register** notice of a meeting to receive comments and recommendations (including data on which recommendations are based) from the public on the appropriate basis for establishing payment amounts for the tests on such list. This list of codes for which the establishment of a payment amount under the CLFS is being considered for Calendar Year (CY) 2024 will be posted on the Centers for Medicare & Medicaid Services (CMS) website concurrent with the publication of this notice and may be updated prior to the CLFS Annual Public Meeting. The CLFS Annual Public Meeting list of codes can be found on the CMS website at *http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/ClinicalLabFeeSched/index.html?redirect=/ClinicalLabFeeSched/.* Section 1833(h)(8)(B)(iii) of the Act requires that we convene the public meeting not less than 30 days after publication of the notice in the **Federal Register**. The CLFS requirements regarding public consultation are codified at 42 CFR 414.506.

Two bases of payment are used to establish payment amounts for new CDLTs. The first basis, called ''crosswalking,'' is used when a new CDLT is determined to be comparable to an existing test, multiple existing test codes, or a portion of an existing test code. New CDLTs that were assigned new or substantially revised codes prior to January 1, 2018, are subject to provisions set forth under § 414.508(a). For a new CDLT that is assigned a new or significantly revised code on or after January 1, 2018, CMS assigns to the new CDLT code the payment amount established under § 414.507 of the comparable existing CDLT. Payment for the new CDLT code is made at the payment amount established under § 414.507. (See § 414.508(b)(1)).

The second basis, called ''gapfilling,'' is used when no comparable existing CDLT is available. When using this method, instructions are provided to each Medicare Administrative Contractor (MAC) to determine a payment amount for its Part B geographic area for use in the first year. In the first year, for a new CDLT that is assigned a new or substantially revised code on or after January 1, 2018, the MAC-specific amounts are established using the following sources of information, if available: (1) charges for the test and routine discounts to charges; (2) resources required to perform the test; (3) payment amounts determined by other payers; (4) charges, payment amounts, and resources required for other tests that may be comparable or otherwise relevant; and (5) other criteria CMS determines appropriate. In the second year, the test code is paid at the median of the MAC-specific amounts. (See § 414.508(b)(2)).

Under section 1833(h)(8)(B)(iv) of the Act and § 414.506(d)(1) CMS, taking into account the comments and recommendations (and accompanying data) received at the CLFS Annual Public Meeting, develops and makes available to the public a list of proposed determinations with respect to the appropriate basis for establishing a payment amount for each code, an explanation of the reasons for each determination, the data on which the determinations are based, and a request for public written comments on the proposed determinations. Under section 1833(h)(8)(B)(v) of the Act and § 414.506(d)(2), taking into account the comments received on the proposed determinations during the public comment period, CMS then develops and makes available to the public a list of final determinations of payment amounts for tests along with the rationale for each determination, the data on which the determinations are based, and responses to comments and suggestions received from the public.

Section 216(a) of the Protecting Access to Medicare Act of 2014 (PAMA) (Pub. L. 113–93) added section 1834A to the Act. The statute requires extensive revisions to the Medicare payment, coding, and coverage requirements for CDLTs. Pertinent to this notice, section 1834A(c)(3) of the Act requires the Secretary to consider recommendations from the expert outside advisory panel established under section 1834A(f)(1) of the Act when determining payment using crosswalking or gapfilling processes. In addition, section 1834A(c)(4) of the Act requires the Secretary to make available to the public an explanation of the payment rates for the new test codes, including an explanation of how the gapfilling criteria and panel recommendations are applied. These requirements are codified in § 414.506(d) and (e).

After the final determinations have been posted on the CMS website, the public may request reconsideration of the basis and amount of payment for a new CDLT as set forth in § 414.509. Pertinent to this notice, those requesting that we reconsider the basis for payment or the payment amount as set forth in § 414.509(a) and (b), may present their reconsideration requests at the following year's CLFS Annual Public Meeting provided the requestor made the request to present at the CLFS Annual Public Meeting in the written reconsideration request. For purposes of this notice, we refer to these codes as the ''reconsidered codes.'' The public may comment on the reconsideration requests. (See the CY 2008 Physician Fee Schedule final rule with comment period published in the **Federal Register** on November 27, 2007 (72 FR 66275 through 66280) for more information on these procedures.)

## II. Format

We are following our usual process, including an annual public meeting to determine the appropriate basis and payment amount for new and reconsidered codes under the CLFS for

CY 2024. The public meeting will be conducted virtually and will not occur on-site at the CMS Central Building.

This meeting is open to the public. Registration is only required for those interested in presenting public comments during the meeting. During the virtual meeting, registered persons from the public may discuss and make recommendations for specific new and reconsidered codes for the CY 2024 CLFS.

The Medicare Advisory Panel on Clinical Diagnostic Laboratory Tests (Advisory Panel on CDLTs) will participate in this CLFS Annual Public Meeting by gathering information and asking questions to presenters, and will hold its next public meeting, virtually on July 19 and 20, 2023. The public meeting for the Advisory Panel on CDLTs will focus on the discussion of and recommendations for test codes presented during the June 22, 2023 CLFS Annual Public Meeting. The Panel meeting also will address any other CY 2024 CLFS issues that are designated in the Panel's charter and specified on the meeting agenda. The announcement for the next meeting of the Advisory Panel on CDLTs is included in a separate notice published elsewhere in this issue of the **Federal Register**.

Due to time constraints, presentations must be brief, lasting no longer than 10 minutes. Written presentations must be electronically submitted to CMS on or before June 1, 2023. Presentation slots will generally be assigned based upon chronological order of receipt of presentation materials. In the event there is not enough time for presentations by everyone who is interested in presenting, we will only accept written presentations from those who submitted written presentations within the submission window and were unable to present due to time constraints. Presentations should be sent via email to our CLFS dedicated email box, *CLFS_Annual_Public_Meeting@cms.hhs.gov.* In addition, individuals may also submit requests after the CLFS Annual Public Meeting to obtain electronic versions of the presentations. Requests for electronic copies of the presentations after the public meeting should be sent via email to our CLFS dedicated email box, noted above.

Presenters should submit all presentations using a standard PowerPoint template that is available on the CMS website, at *https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/ClinicalLabFeeSched/Laboratory_Public_Meetings.html,* under the ''Meeting Notice and Agenda'' heading.

For reconsidered and new codes, presenters should address all of the following five items:

(1) Reconsidered or new code(s) with the most current code descriptor.

(2) Test purpose and method with a brief comment on how the new test is different from other similar analyte or methodologies found in tests already on the CLFS.

(3) Test costs.

(4) Charges.

(5) Recommendation with rationale for one of the two bases (crosswalking or gapfilling) for determining payment for reconsidered and new tests.

Additionally, presenters should provide the data on which their recommendations are based. Presentations regarding reconsidered and new test codes that do not address the above five items for presenters may be considered incomplete and may not be considered by CMS when making a determination. However, we may request missing information following the meeting to prevent a recommendation from being considered incomplete.

Taking into account the comments and recommendations (and accompanying data) received at the CLFS Annual Public Meeting, we intend to post our proposed determinations with respect to the appropriate basis for establishing a payment amount for each new test code and our proposed determinations with respect to the reconsidered codes along with an explanation of the reasons for each determination, the data on which the determinations are based, and a request for public written comments on these determinations on our website by early September 2023. This website can be accessed at *http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/ClinicalLabFeeSched/index.html?redirect=/ClinicalLabFeeSched/.* Interested parties may submit written comments on the proposed determinations for new and reconsidered codes by early October 2023, electronically to our CLFS dedicated email box, *CLFS_Annual_Public_Meeting@cms.hhs.gov* (the specific date for the publication of the determinations on the CMS website, as well as the deadline for submitting comments regarding the determinations, will be published on the CMS website). Final determinations for new test codes to be included for payment on the CLFS for CY 2024 and reconsidered codes will be posted our website in November 2023, along with the rationale for each determination, the data on which the determinations are based, and responses to comments and suggestions received from the public. The final determinations with respect to reconsidered codes are not subject to further reconsideration. With respect to the final determinations for new test codes, the public may request reconsideration of the basis and amount of payment as set forth in § 414.509.

## III. Registration Instructions

The Division of Ambulatory Services in the CMS Center for Medicare is coordinating the CLFS Annual Public Meeting registration. Beginning May 1, 2023 and ending June 1, 2023, registration may be completed by presenters only. Individuals who intend to view and/or listen to the meeting do not need to register. Presenter registration may be completed by sending an email to our CLFS dedicated email box, *CLFS_Annual_Public_Meeting@cms.hhs.gov.* The subject of the email should state ''Presenter Registration for CY 2024 CLFS Annual Laboratory Meeting.'' All of the following information must be submitted when registering:

- Speaker name.
- Organization or company name.
- Telephone numbers.
- Email address that will be used by the presenter in order to connect to the virtual meeting.
- New or Reconsidered Code (s) for which presentation is being submitted.
- Presentation.

Registration details may not be revised once they are submitted. If registration details require changes, a new registration entry must be submitted by the date specified in the **DATES** section of this notice. Additionally, registration information must reflect individual-level content and not reflect an organization entry. Also, each individual may only register one person at a time. That is, one individual may not register multiple individuals at the same time.

After registering, a confirmation email will be sent upon receipt of the registration. The email will provide information to the presenter in preparation for the meeting. Registration is only required for individuals giving a presentation during the meeting. Presenters must register by the deadline specified in the **DATES** section of this notice.

If you are not presenting during the CLFS Annual Public Meeting, you may view the meeting via webinar or listen-only by teleconference. If you would like to listen to or view the meeting, teleconference dial-in and webinar information will appear on the final CLFS Annual Public Meeting agenda, which will be posted on the CMS

website when available at *http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/ClinicalLabFeeSched/index.html?redirect=/ClinicalLabFeeSched/.*

### IV. Special Accommodations

Individuals viewing or listening to the meeting who are hearing or visually impaired and have special requirements, or a condition that requires special assistance, should send an email to the resource box (*CDLT_Annual_Public_Meeting@cms.hhs.gov*). The deadline for submitting this request is listed in the **DATES** section of this notice.

### V. Collection of Information Requirements

This document does not impose information collection requirements, that is, reporting, recordkeeping or third-party disclosure requirements. Consequently, there is no need for review by the Office of Management and Budget under the authority of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

The Administrator of CMS, Chiquita Brooks-LaSure, having reviewed and approved this document, authorizes Evell J. Barco Holland, who is the Federal Register Liaison, to electronically sign this document for purposes of publication in the **Federal Register**.

Dated: April 11, 2023.

**Evell J. Barco Holland,**

*Federal Register Liaison, Centers for Medicare & Medicaid Services.*

[FR Doc. 2023–07909 Filed 4–13–23; 8:45 am]

**BILLING CODE 4120–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Medicare & Medicaid Services

**[CMS–3438–PN]**

### Medicare and Medicaid Programs: Application From the Accreditation Commission for Healthcare (ACHC) for Continued CMS-Approval of Its Hospital Accreditation Program

**AGENCY:** Centers for Medicare & Medicaid Services, HHS.

**ACTION:** Notice with comment.

**SUMMARY:** This notice acknowledges the receipt of an application from the Accreditation Commission for Healthcare for continued recognition as a national accrediting organization for hospitals that wish to participate in the Medicare or Medicaid programs.

**DATES:** To be assured consideration, comments must be received at one of the addresses provided below, by May 15, 2023.

**ADDRESSES:** In commenting, please refer to file code CMS–3438–PN.

Comments, including mass comment submissions, must be submitted in one of the following three ways (please choose only one of the ways listed):

1. *Electronically.* You may submit electronic comments on this regulation to *https://www.regulations.gov.* Follow the ''Submit a comment'' instructions.

2. *By regular mail.* You may mail written comments to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–3438–PN, P.O. Box 8010, Baltimore, MD 21244–8010.

Please allow sufficient time for mailed comments to be received before the close of the comment period.

3. *By express or overnight mail.* You may send written comments to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–3438–PN, Mail Stop C4–26–05, 7500 Security Boulevard, Baltimore, MD 21244–1850.

For information on viewing public comments, see the beginning of the **SUPPLEMENTARY INFORMATION** section.

**FOR FURTHER INFORMATION CONTACT:** Danielle Adams, (410) 786–8818; or Lillian Williams, (410) 786–8636.

**SUPPLEMENTARY INFORMATION:** *Inspection of Public Comments:* All comments received before the close of the comment period are available for viewing by the public, including any personally identifiable or confidential business information that is included in a comment. We post all comments received before the close of the comment period on the following website as soon as possible after they have been received: *https://www.regulations.gov.* Follow the search instructions on that website to view public comments. CMS will not post on *Regulations.gov* public comments that make threats to individuals or institutions or suggest that the individual will take actions to harm the individual. CMS continues to encourage individuals not to submit duplicative comments. We will post acceptable comments from multiple unique commenters even if the content is identical or nearly identical to other comments.

### I. Background

Under the Medicare program, eligible beneficiaries may receive covered services from a hospital provided certain requirements are met. Sections 1861(e) of the Social Security Act (the Act), establish distinct criteria for facilities seeking designation as a hospital. Regulations concerning provider agreements are at 42 CFR part 489 and those pertaining to activities relating to the survey and certification of facilities are at 42 CFR part 488. The regulations at 42 CFR part 482 specify the minimum conditions that a hospital must meet to participate in the Medicare program.

Generally, to enter into an agreement, a hospital must first be certified by a state survey agency (SA) as complying with the conditions or requirements set forth in part 482 of our regulations. Thereafter, the hospital is subject to regular surveys by a SA to determine whether it continues to meet these requirements. There is an alternative, however, to surveys by SAs.

Section 1865(a)(1) of the Act provides that, if a provider entity demonstrates through accreditation by a Centers for Medicare & Medicaid Services (CMS) approved national accrediting organization (AO) that all applicable Medicare conditions are met or exceeded, we will deem those provider entities as having met the requirements. Accreditation by an AO is voluntary and is not required for Medicare participation.

If an AO is recognized by the Secretary of the Department of Health and Human Services (the Secretary) as having standards for accreditation that meet or exceed Medicare requirements, any provider entity accredited by the national accrediting body's approved program would be deemed to meet the Medicare conditions. A national AO applying for approval of its accreditation program under part 488, subpart A, must provide CMS with reasonable assurance that the AO requires the accredited provider entities to meet requirements that are at least as stringent as the Medicare conditions. Our regulations concerning the approval of AOs are set forth at §§ 488.4, 488.5 and 488.5(e)(2)(i). The regulations at § 488.5(e)(2)(i) require AOs to reapply for continued approval of its accreditation program every 6 years or sooner as determined by CMS.

The Accreditation Commission for Healthcare's (ACHC) current term of approval for their hospital accreditation program expires September 25, 2023.

### II. Approval of Deeming Organizations

Section 1865(a)(2) of the Act and our regulations at § 488.5 require that our findings concerning review and approval of a national AO's

requirements consider, among other factors, the applying AO's requirements for accreditation; survey procedures; resources for conducting required surveys; capacity to furnish information for use in enforcement activities; monitoring procedures for provider entities found not in compliance with the conditions or requirements; and ability to provide CMS with the necessary data for validation.

Section 1865(a)(3)(A) of the Act further requires that we publish, within 60 days of receipt of an organization's complete application, a notice identifying the national accrediting body making the request, describing the nature of the request, and providing at least a 30-day public comment period. We have 210 days from the receipt of a complete application to publish notice of approval or denial of the application.

The purpose of this notice is to inform the public of ACHC's request for continued approval of its hospital accreditation program. This notice also solicits public comment on whether ACHC's requirements meet or exceed the Medicare conditions of participation (CoPs) for hospitals.

## III. Evaluation of Deeming Authority Request

ACHC submitted all the necessary materials to enable us to make a determination concerning its request for continued approval of its hospital accreditation program. This application was determined to be complete on February 27, 2023. Under section 1865(a)(2) of the Act and our regulations at § 488.5 (Application and re-application procedures for national accrediting organizations), our review and evaluation of ACHC will be conducted in accordance with, but not necessarily limited to, the following factors:

- The equivalency of ACHC's standards for hospitals as compared with CMS' hospital CoPs.
- ACHC's survey process to determine the following:

++ The composition of the survey team, surveyor qualifications, and the ability of the organization to provide continuing surveyor training.

++ The comparability of ACHC's processes to those of state agencies, including survey frequency, and the ability to investigate and respond appropriately to complaints against accredited facilities.

++ ACHC's processes and procedures for monitoring a hospital found out of compliance with ACHC's program requirements. These monitoring procedures are used only when ACHC identifies noncompliance. If noncompliance is identified through validation reviews or complaint surveys, the SA monitors corrections as specified at § 488.9.

++ ACHC's capacity to report deficiencies to the surveyed facilities and respond to the facility's plan of correction in a timely manner.

++ ACHC's capacity to provide CMS with electronic data and reports necessary for effective validation and assessment of the organization's survey process.

++ The adequacy of ACHC's staff and other resources, and its financial viability.

++ ACHC's capacity to adequately fund required surveys.

++ ACHC's policies with respect to whether surveys are announced or unannounced, to assure that surveys are unannounced.

++ ACHC's policies and procedures to avoid conflicts of interest, including the appearance of conflicts of interest, involving individuals who conduct surveys or participate in accreditation decisions.

++ ACHC's agreement to provide CMS with a copy of the most current accreditation survey together with any other information related to the survey as we may require (including corrective action plans).

## IV. Collection of Information Requirements

This document does not impose information collection requirements, that is, reporting, recordkeeping or third party disclosure requirements. Consequently, there is no need for review by the Office of Management and Budget under the authority of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

## V. Response to Comments

Because of the large number of public comments we normally receive on **Federal Register** documents, we are not able to acknowledge or respond to them individually. We will consider all comments we receive by the date and time specified in the **DATES** section of this preamble, and, when we proceed with a subsequent document, we will respond to the comments in the preamble to that document.

The Administrator of the Centers for Medicare & Medicaid Services (CMS), Chiquita Brooks-LaSure, having reviewed and approved this document, authorizes Evell J. Barco Holland, who is the Federal Register Liaison, to electronically sign this document for purposes of publication in the **Federal Register**.

Dated: April 11, 2023.

**Evell J. Barco Holland,**

*Federal Register Liaison, Centers for Medicare & Medicaid Services.*

[FR Doc. 2023–07930 Filed 4–13–23; 8:45 am]

**BILLING CODE 4120–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2019–D–5422]**

### Peripheral Percutaneous Transluminal Angioplasty and Specialty Catheters—Premarket Notification (510(k)) Submissions; Guidance for Industry and Food and Drug Administration Staff; Availability

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice of availability.

**SUMMARY:** The Food and Drug Administration (FDA or Agency) is announcing the availability of a final guidance entitled ''Peripheral Percutaneous Transluminal Angioplasty (PTA) and Specialty Catheters—Premarket Notification (510(k)) Submissions.'' FDA is issuing this final guidance document to provide recommendations for 510(k) submissions for peripheral percutaneous transluminal angioplasty (PTA) balloons and specialty catheters (*e.g.,* infusion catheters, PTA balloon catheters for in-stent restenosis (ISR), scoring/cutting balloons).

**DATES:** The announcement of the guidance is published in the **Federal Register** on April 14, 2023.

**ADDRESSES:** You may submit either electronic or written comments on Agency guidances at any time as follows:

*Electronic Submissions*

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact

information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*

• If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

*Written/Paper Submissions*

Submit written/paper submissions as follows:

• *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

• For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

*Instructions:* All submissions received must include the Docket No. FDA–2019–D–5422 for ''Peripheral Percutaneous Transluminal Angioplasty and Specialty Catheters—Premarket Notification (510(k)) Submissions.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

• Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

*Docket:* For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

You may submit comments on any guidance at any time (see 21 CFR 10.115(g)(5)). An electronic copy of the guidance document is available for download from the internet. See the **SUPPLEMENTARY INFORMATION** section for information on electronic access to the guidance. Submit written requests for a single hard copy of the guidance document entitled ''Peripheral Percutaneous Transluminal Angioplasty (PTA) and Specialty Catheters—Premarket Notification (510(k)) Submissions'' to the Office of Policy, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 5431, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your request.

**FOR FURTHER INFORMATION CONTACT:** Eleni Whatley, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 2267, Silver Spring, MD 20993–0002, 301–796–6372.

**SUPPLEMENTARY INFORMATION:**

## I. Background

FDA is issuing this guidance to clarify FDA's recommendations for testing and information to include in 510(k) submissions for PTA catheters and specialty catheters to promote consistency across submissions. These devices are catheter-based devices intended to treat lesions in the peripheral vasculature. This guidance expands on FDA's current thinking for testing of PTA balloon catheters and specialty catheters (*e.g.,* infusion catheters, PTA balloon catheters for ISR, scoring/cutting balloons), and provides specific recommendations regarding performance testing and anatomy-specific assessments. This document supplements other FDA documents regarding the specific content requirements of premarket submissions.

A notice of availability of the draft guidance appeared in the **Federal Register** of January 13, 2020 (85 FR 1812). FDA considered comments received and revised the guidance as appropriate in response to the comments, including addition of details and clarification for non-clinical test recommendations, and minor revisions to ensure consistency with FDA-recognized consensus standards and other FDA guidances.

This guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The guidance represents the current thinking of FDA on ''Peripheral Percutaneous Transluminal Angioplasty (PTA) and Specialty Catheters—Premarket Notification (510(k)) Submissions.'' It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations.

## II. Electronic Access

Persons interested in obtaining a copy of the guidance may do so by downloading an electronic copy from the internet. A search capability for all Center for Devices and Radiological Health guidance documents is available at *https://www.fda.gov/medical-devices/device-advice-comprehensive-regulatory-assistance/guidance-documents-medical-devices-and-radiation-emitting-products.* This guidance document is also available at *https://www.regulations.gov* and *https://www.fda.gov/regulatory-information/search-fda-guidance-documents.* Persons unable to download an electronic copy of ''Peripheral Percutaneous Transluminal Angioplasty (PTA) and Specialty Catheters—Premarket Notification (510(k)) Submissions'' may send an email request to *CDRH-Guidance@fda.hhs.gov* to receive an electronic copy of the document. Please use the document number GUI00016018 and complete title to identify the guidance you are requesting.

## III. Paperwork Reduction Act of 1995

While this guidance contains no new collection of information, it does refer to previously approved FDA collections of information. Therefore, clearance by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3521) is not required for this guidance. The previously approved collections of information are subject to review by

OMB under the PRA. The collections of information in the following FDA regulations, guidance, and forms have been approved by OMB as listed in the following table:

| 21 CFR part or guidance | Topic | OMB control No. |
|---|---|---|
| 807, subpart E | Premarket notification | 0910–0120 |
| 812 | Investigational Device Exemption | 0910–0078 |
| "Requests for Feedback and Meetings for Medical Device Submissions: The Q-Submission Program". | Q-submissions | 0910–0756 |
| 800, 801, and 809 | Medical Device Labeling Regulations | 0910–0485 |
| 50, 56 | Protection of Human Subjects and Institutional Review Boards | 0910–0130 |
| 58 | Good Laboratory Practice (GLP) Regulations for Nonclinical Laboratory Studies. | 0910–0119 |

Dated: April 10, 2023.

**Lauren K. Roth,**

*Associate Commissioner for Policy.*

[FR Doc. 2023–07896 Filed 4–13–23; 8:45 am]

**BILLING CODE 4164–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Health Resources and Services Administration

### Agency Information Collection Activities: Proposed Collection: Public Comment Request; Information Collection Request Title: Nurse Corps Supplemental Funding Evaluation

**AGENCY:** Health Resources and Services Administration (HRSA), Department of Health and Human Services.

**ACTION:** Notice.

**SUMMARY:** In compliance with the requirement for opportunity for public comment on proposed data collection projects of the Paperwork Reduction Act of 1995, HRSA announces plans to submit an Information Collection Request (ICR), described below, to the Office of Management and Budget (OMB). Prior to submitting the ICR to OMB, HRSA seeks comments from the public regarding the burden estimate, below, or any other aspect of the ICR.

**DATES:** Comments on this ICR should be received no later than June 13, 2023.

**ADDRESSES:** Submit your comments to *paperwork@hrsa.gov* or mail the HRSA Information Collection Clearance Officer, Room 14N136B, 5600 Fishers Lane, Rockville, Maryland 20857.

**FOR FURTHER INFORMATION CONTACT:** To request more information on the proposed project or to obtain a copy of the data collection plans and draft instruments, email *paperwork@hrsa.gov* or call Samantha Miller, the Acting HRSA Information Collection Clearance Officer, at 301–594–4394.

**SUPPLEMENTARY INFORMATION:** When submitting comments or requesting information, please include the ICR title for reference.

*Information Collection Request Title:* Nurse Corps Supplemental Funding Evaluation, *OMB No.* 0915–xxxx—New.

*Abstract:* The objective of Nurse Corps Loan Repayment Program (LRP) and Scholarship Program (SP) is to lessen the financial burden of those pursuing nursing careers in the hope of increasing nursing workforce participation in underserved areas. The programs support HRSA's overall mission to improve health outcomes and achieve health equity through access to quality services by optimizing the distribution of the nursing workforce. The Nurse Corps LRP reimburses educational loans for nurses who serve a minimum 2-year commitment in a critical shortage facility or work as nurse faculty in accredited schools of nursing. The Nurse Corps SP similarly pays for educational expenses of nursing students who agree to a minimum 2-year service commitment in critical shortage facilities upon graduation.

HRSA last conducted a comprehensive evaluation of the Nurse Corps Programs in 2006. This notice describes plans for conducting an updated program evaluation to understand more recent program successes and challenges, including how the COVID–19 pandemic effected the programs. Additionally, HRSA seeks to understand the impact of additional funding for the Nurse Corps Programs from the American Rescue Plan Act of 2021. The evaluation will seek information from participants and alumni of the Nurse Corps Programs from 2017 through 2023 and will assess program outcomes from before, during, and after the COVID–19 pandemic, as well as the impact of the American Rescue Plan funds. This mixed-methods evaluation will have three major components: analysis of existing information, a national survey of Nurse Corps participants and alumni, and in-depth interviews (IDIs) with participants and alumni.

The national survey of Nurse Corps participants will target the following groups of respondents: LRP clinical nurse participants and alumni, LRP nurse faculty participants and alumni, SP participants (both in school and completing service obligation) and alumni. The survey will be designed and delivered via web and telephone, with reminders and a web address and a personal identification number for the survey sent by both mail and email. The survey will be conducted on a census of participants from 2017 through 2023, an estimated 7,302 participants. The survey will be tested with a small number of program participants to ensure that respondents are interpreting items as intended. An interview will be completed with each respondent during which the interviewer will ask for more in-depth explanations about the participants' understanding and response to the survey questions. Each question will be tested on no more than nine Nurse Corps participants.

As part of a comprehensive questionnaire design process, questions will be limited and refined to collect information not available through other sources. Any data collected will not be duplicative of that collected by HRSA for program monitoring. The questions will cover satisfaction with the program and service obligation site, intention to remain at the site, actual location of current practice (for alumni), training on preparedness for disasters and disease outbreaks in schools of nursing and on site, types of services provided on site, panel size and visit load, and the impact of the COVID–19 pandemic on service delivery. The survey will display only questions relevant to their programs and timeframes. Participation in the survey is voluntary, and participants will complete the survey one time.

The IDIs will be conducted with 54 participants and alumni representing the range of respondent groups: 18 IDIs

will be conducted with LRP participants and alumni, 18 IDIs will be conducted with LRP nurse faculty participants and alumni, and 21 IDIs will be conducted with SP participants (both in school and completing their service obligation) and alumni. One-on-one IDIs with Nurse Corps participants and alumni will enrich the evaluation by eliciting data on the Nurse Corps experience that are more nuanced than what is feasible to collect through the survey alone. The 45-minute virtual IDIs will be conducted after the survey with a sample of current program participants and alumni. Recruitment approaches for the IDIs will include a survey question asking respondents if they would be willing to participate in an IDI as well as direct recruiting from the census of program participants and alumni via email. The IDIs will ask specifically about the process of and motivation for applying to the program, details about the Nurse Corps site experience, site-level resiliency strategies and whether they were successful, and experience working through the COVID–19 pandemic at Nurse Corps sites.

*Need and Proposed Use of the Information:* The information collected through the surveys and IDIs will fill gaps in the existing information available from other sources. Specific topics for data collection that are critical for evaluating the Nurse Corps Programs are discussed below.

(1) *Impact of the Programs on longer-term decisions to remain in the nursing workforce at a Nurse Corps site or in another underserved area.* Understanding the long-range decisions of participants is critical to understanding the success of the Nurse Corps Programs, as its goal is to affect longer-term change in the nursing workforce distribution.

(2) *Experience and satisfaction with program participation, from the application phase through the service obligation phase.* Participants and alumni are the only source of information about their experience and satisfaction with the program, which are important evaluation outcomes that will be used to inform future programming efforts.

(3) *Details of service provision and experience with COVID–19.* The COVID–19 pandemic impacted the Nurse Corps Programs and the nursing workforce in different ways. On one hand, enhanced funding for the programs resulting from the pandemic led to increases in the annual number of participants. On the other, the pandemic fundamentally reshaped the work environment for nurses, leading to increased stress, risk of illness, and changes in how care is delivered. The survey will focus on the experiences of those serving before, during, and after the pandemic to understand how the pandemic shaped participants' decisions to remain in the nursing workforce and in critical shortage facilities.

*Likely Respondents:* Nurse Corps LRP clinical participants and alumni (from 2017 through 2023), LRP nurse faculty participants and alumni (from 2017 through 2023), SP participants and alumni (from 2017 through 2023).

*Burden Statement:* Burden in this context means the time expended by persons to generate, maintain, retain, disclose, or provide the information requested. This includes the time needed to review instructions; to develop, acquire, install, and utilize technology and systems for the purpose of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information; to search data sources; to complete and review the collection of information; and to transmit or otherwise disclose the information. The total annual burden hours estimated for this ICR are summarized in the table below.

Total Estimated Annualized Burden Hours:

| Form name | Number of respondents | Number of responses per respondent | Total responses | Average burden per response (in hours) | Total burden hours |
|---|---|---|---|---|---|
| **In-depth Interviews (IDIs)** | | | | | |
| LRP Clinical Nurses | 18 | 1 | 18 | 0.75 | 13.50 |
| LRP Nurse Faculty | 18 | 1 | 18 | 0.75 | 13.50 |
| SP Students | 21 | 1 | 21 | 0.75 | 15.75 |
| Total | 57 | | 57 | | 42.75 |
| **Web-based Surveys with Telephone Nonresponse Follow-up** | | | | | |
| Nurse Corps Loan Repayment Program—Clinical Nurse Participants and Alumni | 5,082 | 1 | 5,082 | 0.42 | 2,134.44 |
| Nurse Corps Loan Repayment Program—Nurse Faculty Participants and Alumni | 804 | 1 | 804 | 0.42 | 337.68 |
| Nurse Corps Scholarship Program—Participants and Alumni | 1,416 | 1 | 1,416 | 0.42 | 594.72 |
| Total | 7,302 | | 7,302 | | 3,066.84 |

HRSA specifically requests comments on: (1) the necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

**Maria G. Button,**

*Director, Executive Secretariat.*

[FR Doc. 2023–07889 Filed 4–13–23; 8:45 am]

**BILLING CODE 4165–15–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

**[Document Identifier OS–0990–0278]**

## Agency Information Collection Request, 60-Day Public Comment Request

**AGENCY:** Office of the Secretary, HHS.

**ACTION:** Notice.

**SUMMARY:** In compliance with the requirement of the Paperwork Reduction Act of 1995, the Office of the Secretary (OS), Department of Health and Human Services, is publishing the following summary of a proposed collection for public comment.

**DATES:** Comments on the ICR must be received on or before June 13, 2023.

**ADDRESSES:** Submit your comments to *Sherrette.Funn@hhs.gov* or by calling (202) 795–7714.

**FOR FURTHER INFORMATION CONTACT:** When submitting comments or requesting information, please include the document identifier 0990–0278–60D and project title for reference, to Sherrette A. Funn, email: *Sherrette.Funn@hhs.gov,* or call (202) 795–7714 the Reports Clearance Officer.

**SUPPLEMENTARY INFORMATION:** Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

*Title of the Collection:* Federalwide Assurance (FWA) Form.

*Type of Collection:* Extension.

**OMB No. 0990–0278**

*Abstract:* The Office of the Assistant Secretary for Health, Office for Human Research Protections (OHRP), is requesting a three-year extension of the OMB No. 0990–0278, Federalwide Assurance (FWA) Form, with no changes in the collected information. The purpose of the FWA form is to provide a simplified procedure for institutions engaged in research conducted or supported by the Department of Health and Human Services (HHS) to satisfy the assurance requirements of (1) Section 491(a) of the Public Health Service Act (the PHS Act) (42 U.S.C. 289); and (2) HHS regulations for the protection of human subjects at 45 CFR 46.103.

*Likely Respondents:* Institutions engaged in HHS-conducted or—supported research involving human subjects.

ANNUALIZED BURDEN HOUR TABLE

| Form name | Number of respondents | Number of responses per respondent | Hours per response | Response burden hours |
|---|---|---|---|---|
| Federalwide Assurance (FWA) | 14,000 | 2.0 | 30/60 | 14,000 |
| Total | | | | 14,000 |

**Sherrette A. Funn,**

*Paperwork Reduction Act Reports Clearance Officer, Office of the Secretary.*

[FR Doc. 2023–07908 Filed 4–13–23; 8:45 am]

**BILLING CODE 4150–28–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute of Neurological Disorders and Stroke; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting of the Board of Scientific Counselors, National Institute of Neurological Disorders and Stroke.

The meeting will be closed to the public as indicated below in accordance with the provisions set forth in section 552b(c)(6), Title 5 U.S.C., as amended for the review, discussion, and evaluation of individual intramural programs and projects conducted by the National Institute of Neurological Disorders and Stroke, including consideration of personnel qualifications and performance, and the competence of individual investigators, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* Board of Scientific Counselors, National Institute of Neurological Disorders and Stroke.

*Date:* May 7–9, 2023.

*Time:* May 7, 2023, 2:00 p.m. to 7:30 p.m.; May 8, 2023, 8:30 a.m. to 9:00 p.m.; May 9, 2023, 9:00 a.m. to 12:30 p.m.

*Agenda:* To review and evaluate personnel qualifications and performance, and competence of individual investigators.

*Place:* The Bethesdan Hotel, 8120 Wisconsin Avenue, Bethesda, Maryland 20814.

*Contact Person:* Jeffrey S. Diamond, Ph.D., Acting Scientific Director, c/o Caren Collins, National Institute of Neurological Disorders and Stroke, NIH, Building 35, Room GF–149, Bethesda, MD 20892, 301–435–1896, *diamondj@ninds.nih.gov; collinsca@ninds.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.853, Clinical Research Related to Neurological Disorders; 93.854, Biological Basis Research in the Neurosciences, National Institutes of Health, HHS)

Dated: April 10, 2023.

**Tyeshia M. Roberson-Curtis,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2023–07893 Filed 4–13–23; 8:45 am]

**BILLING CODE 4140–01–P**

## INTERNATIONAL TRADE COMMISSION

**[Investigation No. 337–TA–1290]**

### Certain Refrigerator Water Filtration Devices and Components Thereof; Notice of Commission Final Determination To Issue a Limited Exclusion Order and Cease and Desist Orders; Termination of the Investigation

**AGENCY:** U.S. International Trade Commission.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given that the U.S. International Trade Commission has determined to issue a limited exclusion order (''LEO'') barring entry of certain infringing refrigerator water filtration devices and components thereof that are imported by or on behalf of: Freshlab LLC of Gainesville, Florida; Isave Strategic Marketing Group LLC d/b/a Isave of New York, New York; GT Sourcing Inc. d/b/a GT Sourcing of Monsey, New York; Refresh Filters LLC d/b/a Refresh My Water of New York, New York; All Filters LLC d/b/a Allfilters of Salt Lake City, Utah; Jiangsu Angkua Environmental Technical Co., Ltd. of Nantong, China (''Jiangsu''); Shenzen Hangling E-Commerce Co. Ltd d/b/a Best Belvita of Elmhurst, Illinois;

Qinghaishunzexiaofangjianceyouxiang Ongsi d/b/a Ezeey of Xining City, China; and Zhang Ping d/b/a Ice Water Filter of Dongyang, China (collectively, ''Defaulting Respondents''). The Commission has also determined to issue cease and desist orders (''CDOs'') against all of the Defaulting Respondents except Jiangsu. The investigation is terminated.

**FOR FURTHER INFORMATION CONTACT:** Houda Morad, Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 708–4716. Copies of non-confidential documents filed in connection with this investigation may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.* For help accessing EDIS, please email *EDIS3Help@usitc.gov.* General information concerning the Commission may also be obtained by accessing its internet server at *https://www.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

**SUPPLEMENTARY INFORMATION:** On January 21, 2022, the Commission instituted this investigation under section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337 (''section 337''), based on a complaint filed by LG Electronics Inc. of Seoul, Republic of Korea, and LG Electronics Alabama, Inc. of Huntsville, Alabama (collectively, ''Complainants''). *See* 87 FR 3331–33 (Jan. 21, 2022). The complaint, as supplemented, alleges a violation of section 337 based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain refrigerator water filtration devices and components thereof by reason of infringement of certain claims of U.S. Patent Nos. 10,653,984 (''the '984 patent''); 10,639,570 (''the '570 patent''); and 10,188,972 (''the '972 patent''). *See id.* In addition to the Defaulting Respondents, the notice of investigation names the following respondents: (1) Qingdao Ecopure Filter Co., Ltd of Qingdao, China; Qingdao Maxwell Commercial and Trading Company Ltd of Qingdao Chengyang, China; and Qingdao Uniwell Trading Co., Ltd. of Qingdao, China (collectively, ''First Settling Respondents''); (2) Express Parts LLC of Keyport, New Jersey; Ningbo Haishu Keze Replacement Equipment Co., Ltd. of Ningboshi, China; Ningbo Bichun Technology Co., Ltd. (formerly Ningbo Haishu Bichun Technology Co., Ltd.) of Ningbo City, China; Ningbo Haishu Shun'anjie Water Purification Equipment LLC of Ningbo, China; Shenzhen Yu Tian Qi Technology Co., Ltd. of Shenzhen, China; and AGA Imports LLC d/b/a ClearWater Filters of Lakewood, New Jersey (collectively, ''Second Settling Respondents''); (4) JJ Imports LLC of Elmwood Park, New Jersey (''JJ Imports''); (5) Aicuiying of Shenzhen, China; Liu Qi of Luliang City, China; Lvliangshilishiquhuiliwujinbaihuoshan Ghang of Luliang, China; and Zhenpingxianjiaxuanyazhubaofuzhu Anggongyipinyouxia of Wuhanshi, China (collectively, ''Unserved Respondents''); (6) Yunda H&H Tech (Tianjin) Co., LTD. of Tianjinshi, China; Tianjin Tianchuang Best Pure Environmental Science And Technology Co. Ltd. of Tianjin, China; Top Pure (Usa) Inc. of Pico Rivera, California; and W&L Trading LLC of Frisco, Texas (collectively, ''Third Settling Respondents''); and (7) Pursafet Water Filter (Wuhan) Inc. of Wuhan, China (''Pursafet''). *See id.* The Office of Unfair Import Investigations (''OUII'') is also a party to the investigation. *See id.*

On September 16, 2022, the Commission partially terminated the investigation as to the '972 patent. *See* Order No. 31 (Aug. 16, 2022), *unreviewed by* Comm'n Notice (Sept. 16, 2022). On October 3, 2022, the Commission partially terminated the investigation as to claims 2–8 of the '570 patent. *See* Order No. 35 (Sept. 19, 2022), *unreviewed by* Comm'n Notice (Oct. 3, 2022). Accordingly, claims 1–7 of the '984 patent and claims 1 and 9 of the '570 patent (collectively, ''Asserted Claims'') remain in the investigation.

On April 12, 2022, the Commission terminated the investigation as to JJ Imports based on the entry of a consent order. *See* Order No. 14 (Mar. 30, 2022), *unreviewed by* Comm'n Notice (Apr. 12, 2022). On October 20, 2022, November 8, 2022, and February 2, 2023, the Commission terminated the investigation as to the First, Second, and Third Settling Respondents, respectively. *See* Order No. 37 (Sept. 28, 2022), *unreviewed by* Comm'n Notice (Oct. 20, 2022); Order No. 38 (Oct. 7, 2022), *unreviewed by* Comm'n Notice (Nov. 8, 2022); Order No. 47 (Jan. 4, 2023), *unreviewed by* Comm'n Notice (Feb. 2, 2023). On December 2, 2022, the Commission partially terminated the investigation as to the Unserved Respondents based on the withdrawal of the complaint as to those respondents. *See* Order No. 39 (Nov. 2, 2022), *unreviewed by* Comm'n Notice (Dec. 2, 2022). On December 21, 2022, the Commission partially terminated the investigation as to Pursafet for good cause based on dissolution of the corporation. *See* Order No. 43 (Dec. 2, 2022), *unreviewed by* Comm'n Notice (Dec. 21, 2022). Accordingly, only the Defaulting Respondents remain in the investigation.

On June 28, August 29, and December 2, 2022, the Commission found the Defaulting Respondents in default pursuant to Commission Rule 210.16 (19 CFR 210.16) for failure to respond to the complaint and notice of investigation and to orders to show cause. *See* Order No. 22 (June 3, 2022), *unreviewed by* Comm'n Notice (June 28, 2022); Order No. 28 (July 28, 2022), *unreviewed by* Comm'n Notice (Aug. 29, 2022); Order No. 40 (Nov. 2, 2022), *unreviewed by* Comm'n Notice (Dec. 2, 2022).

On January 11, 2023, Complainants filed a declaration under Commission Rule 210.16(c), 19 CFR 210.16(c) (''Declaration''), requesting the immediate entry of an LEO prohibiting the importation of infringing articles imported by or on behalf of the Defaulting Respondents and CDOs against all of the Defaulting Respondents except Jiangsu. Complainants indicated pursuant to Commission Rule 210.16(c)(2) that they are not seeking a general exclusion order.

On February 2, 2023, the Commission issued a notice requesting written submissions on remedy, the public interest and bonding from the parties and from any other interested third-party or government agencies. *See* 88 FR 8315–17 (Feb. 8, 2023) (''Remedy Notice'').

On February 13, 2023, Complainants and OUII filed submissions in response to the Remedy Notice, arguing that the public interest does not preclude issuance the requested LEO and CDOs. Complainants also sought a bond during the period of Presidential review in the amount of one hundred percent (100%) of the entered value of the infringing articles. On February 21, 2023, Complainants and OUII filed a reply to each other's submissions.

When the conditions in section 337(g)(1)(A)–(E) (19 U.S.C. 1337(g)(1)(A)–(E)) have been satisfied, section 337(g)(1) and Commission Rule 210.16(c) direct the Commission, upon request, to issue a limited exclusion order or a cease and desist order or both against a respondent found in default, based on the allegations regarding a violation of section 337 in the complaint, which are presumed to be true, unless after consideration of the public interest factors in section

337(g)(1), it finds that such relief should not issue.

Having examined the record of this investigation, including the parties' submissions in response to the Remedy Notice, the Commission has determined pursuant to subsection 337(g)(1) that the appropriate remedy in this investigation is: (1) an LEO prohibiting the unlicensed entry of certain refrigerator water filtration devices and components thereof that are imported by or on behalf of the Defaulting Respondents and that infringe the Asserted Claims; and (2) CDOs against all of the Defaulting Respondents except Jiangsu. The Commission has also determined that the public interest factors enumerated in subsection 337(g)(1) do not preclude the issuance of the LEO and CDOs. The Commission has further determined that the bond during the period of Presidential review pursuant to section 337(j) (19 U.S.C. 1337(j)) shall be in the amount of one hundred percent (100%) of the entered value of the infringing articles.[1] *See Certain Centrifuge Utility Platform & Falling Film Evaporator Sys. & Components Thereof,* Inv. No. 337–TA–1311, Comm'n Notice at 4–5 (Mar. 23, 2023). The investigation is terminated.

The Commission's vote for this determination took place on April 11, 2023.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in part 210 of the Commission's Rules of Practice and Procedure (19 CFR part 210).

While temporary remote operating procedures are in place in response to COVID–19, the Office of the Secretary is not able to serve parties that have not retained counsel or otherwise provided a point of contact for electronic service. Accordingly, pursuant to Commission Rules 201.16(a) and 210.7(a)(1) (19 CFR 201.16(a), 210.7(a)(1)), the Commission orders that the Complainant(s) complete service for any party/parties without a method of electronic service noted on the attached Certificate of Service and shall file proof of service on the Electronic Document Information System (EDIS).

[1] Commissioner Schmidtlein finds that section 337 does not authorize respondents subject to remedial relief under subsection 337(g)(1) to import infringing products under bond during the Presidential review period for the reasons explained in *Certain Centrifuge Utility Platform and Falling Film Evaporator Systems and Components Thereof,* Inv. No. 337–TA–1311, Comm'n Notice at 5, n.5 (March 23, 2023). She therefore would not permit the Defaulting Respondents to import infringing products under bond during the Presidential review period.

By order of the Commission.

Issued: April 11, 2023.

**Lisa Barton,**

*Secretary to the Commission.*

[FR Doc. 2023–07932 Filed 4–13–23; 8:45 am]

**BILLING CODE 7020–02–P**

## INTERNATIONAL TRADE COMMISSION

**[USITC SE–23–020]**

### Sunshine Act Meetings

**AGENCY HOLDING THE MEETING:** United States International Trade Commission.

**TIME AND DATE:** April 27, 2023 at 9:30 a.m.

**PLACE:** Room 101, 500 E Street SW, Washington, DC 20436, Telephone: (202) 205–2000.

**STATUS:** Open to the public.

**MATTERS TO BE CONSIDERED:**

1. *Agendas for future meetings:* none.
2. Minutes.
3. Ratification List.
4. Commission vote on Inv. Nos. 731–TA–1588–1590 (Final)(Certain Preserved Mushrooms from the Netherlands, Poland, and Spain). The Commission currently is scheduled to complete and file its determinations and views of the Commission on May 11, 2023.
5. *Outstanding action jackets:* none.

**CONTACT PERSON FOR MORE INFORMATION:** Sharon Bellamy, Acting Hearings and Information Officer, 202–205–2000.

The Commission is holding the meeting under the Government in the Sunshine Act, 5 U.S.C. 552(b). In accordance with Commission policy, subject matter listed above, not disposed of at the scheduled meeting, may be carried over to the agenda of the following meeting.

By order of the Commission.

Issued: April 12, 2023.

**Lisa Barton,**

*Secretary to the Commission.*

[FR Doc. 2023–08035 Filed 4–12–23; 4:15 pm]

**BILLING CODE 7020–02–P**

## INTERNATIONAL TRADE COMMISSION

### Agency Information Collection Activities; Submission for OMB Review; Renewal of Generic Clearance; Comment Request

**AGENCY:** International Trade Commission.

**ACTION:** Notice and comment request.

**SUMMARY:** Consistent with the Paperwork Reduction Act of 1995 the U.S. International Trade Commission (Commission) has submitted a proposal for the collection of information to the Office of Management and Budget (OMB) for approval. The proposed information collection is a three-year extension of the current generic clearance (approved by OMB under Control No. 3117–0016) under which the Commission can issue information collections for import injury investigations and reviews that it is required to conduct under the Tariff Act of 1930, the Trade Act of 1974, and other trade remedy statutes that require or authorize the Commission to make findings or determinations. These investigations and reviews include: antidumping duty, countervailing duty, safeguards, other import competition, market disruption, interference with programs of the U.S. Department of Agriculture, and cross-border long-haul trucking. A full list of all the investigations and reviews associated with this generic clearance and their associated statutory authorities is available in the Commission's supporting statement to this **Federal Register** notice. Any comments submitted to OMB on the proposed information collection should be specific, indicating which part of the questionnaires or study plan are objectionable, describing the issue in detail, and including specific revisions or language changes. The Commission did not receive any comments in response to the 60-day notice that it published in the **Federal Register** on January 5, 2023.

**DATES:** Comments solicited under this notice must be submitted on or before May 15, 2023.

*Comments:* Comments about the proposal should be provided to the Office of Management and Budget, Office of Information and Regulatory Affairs through the Information Collection Review Dashboard at *https://www.reginfo.gov.* All comments should be specific, indicating which part of the renewal request is objectionable, describing the concern in detail, and including specific suggested revisions or language changes. Provide copies of any comments that you submit to OMB to Nancy Snyder, Director, Office of Analysis and Research Services, U.S. International Trade Commission at *Nancy.Snyder@usitc.gov* and Nannette Christ, Director, Office of Investigations, U.S. International Trade Commission at *Nannete.Christ@usitc.gov.*

**FOR FURTHER INFORMATION CONTACT:** You may obtain copies of the proposed collection of information and supporting documentation from Stamen

Borisson, Office of Investigations, U.S. International Trade Commission at *stamen.borisson@usitc.gov,* 202–205–3125, or Zachary Coughlin, Statistical and Data Services Division, U.S. International Trade Commission, at *zachary.coughlin@usitc.gov,* 202–205–3435. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal at 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. You may also obtain general information concerning the Commission by accessing its website (*http://www.usitc.gov*).

**SUPPLEMENTARY INFORMATION:**

(1) The generic clearance generally covers the collections of six types of forms, as follows: U.S. producers' questionnaire; U.S. importers' questionnaire; U.S. purchasers' questionnaire; Foreign producers'/exporters' questionnaire; Administrative Protective Order (APO) application form; and Notice of Institution (NOI) for five-year reviews.

(2) The types of items contained within actual information collections issued under this generic clearance are largely determined by statute; however, questions are modified to match the specific facts of each investigation or review. Case-specific factors such as the nature of the industry, the relevant economic and legal issues, the ability of respondents to supply the data, as well as the availability of data from secondary sources are all taken into consideration in each investigation and review.

(3) Once the data are collected from the relevant entities in an information collection under this generic clearance, Commission staff consolidates the information collected into compilations, summaries, and statistical aggregations that are then used as the basis for the Commission's determinations or recommendations in the particular investigation or review. Affirmative Commission determinations in antidumping and countervailing duty investigations result in the imposition of duties on imports entering the United States, as determined by the U.S. Department of Commerce, which are in addition to any normal customs duties. If the Commission makes an affirmative determination in a five-year review, the existing antidumping or countervailing duty order remains in place. The President or the U.S. Trade Representative may use the data developed in global and bilateral safeguard, market disruption, interference with U.S. Department of Agriculture program, and cross-border long-haul trucking investigations to determine the type of relief, if any, to be provided to domestic industries.

Parties' submissions of the Commission's APO application form for inclusion on the APO are the basis for determining whether those parties are granted access to business proprietary or confidential business information. The submissions made to the Commission in response to the notices of institution of five-year reviews are the basis for the Commission's determination whether to conduct a full or expedited review.

(4) Likely respondents are businesses (including foreign businesses) or farms that produce, import, purchase, or sell products under investigation. The Commission estimates that information collections issued under the requested generic clearance will impose an average annual burden of 409,250 hours on 12,935 respondents over the next three-year generic clearance period.

(5) No new record keeping burden is known to result from the proposed collection of information.

(6) Note that, in addition to the generic clearance public comment process, for every individual antidumping and countervailing duty final investigation or full five-year review, Commission questionnaires are made available to the public on the Commission's Electronic Document Information System (EDIS) and parties specifically subject to the Commission investigation or review are requested to comment on the case-specific information collections prior to their issuance as part of the Commission's investigatory procedures.

By order of the Commission.

Issued: April 11, 2023.

**Lisa Barton,**

*Secretary to the Commission.*

[FR Doc. 2023–07914 Filed 4–13–23; 8:45 am]

**BILLING CODE 7020–02–P**

## INTERNATIONAL TRADE COMMISSION

**[Investigation No. 337–TA–1358]**

### Certain LED Landscape Lighting Devices, Components Thereof, and Products Containing Same; Institution of Investigation

**AGENCY:** U.S. International Trade Commission.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on March 10, 2023, under section 337 of the Tariff Act of 1930, as amended, on behalf of Wangs Alliance Corporation d/b/a WAC Lighting of Port Washington, New York. A supplement was filed on March 23, 2023. The complaint, as supplemented, alleges violations of section 337 based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain LED landscape lighting devices, components thereof, and products containing same by reason of the infringement of certain claims of U.S. Patent No. 10,920,971 (the ''971 Patent''), U.S. Patent No. 10,969,088 (the ''088 Patent''), and 11,274,816 (the ''816 Patent''). The complaint further alleges that an industry in the United States exists as required by the applicable Federal Statute. The complainant requests that the Commission institute an investigation and, after the investigation, issue a limited exclusion order and a cease and desist order.

**ADDRESSES:** The complaint, except for any confidential information contained therein, may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.* For help accessing EDIS, please email *EDIS3Help@usitc.gov.* Hearing impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at (202) 205–2000. General information concerning the Commission may also be obtained by accessing its internet server at *https://www.usitc.gov.*

**FOR FURTHER INFORMATION CONTACT:** Katherine Hiner, Office of the Secretary, Docket Services Division, U.S. International Trade Commission, telephone (202) 205–1802.

**SUPPLEMENTARY INFORMATION:** *Authority:* The authority for institution of this investigation is contained in section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, and in section 210.10 of the Commission's Rules of Practice and Procedure, 19 CFR 210.10 (2022).

*Scope of Investigation:* Having considered the complaint, the U.S. International Trade Commission, on April 10, 2023, *ordered that*—

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, an investigation be instituted to determine whether there is a violation of subsection (a)(1)(B) of

section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain products identified in paragraph (2) by reason of infringement of one or more of claims 1–5, 7–12, and 14 of the '971 patent; claims 1–5, 7–11, and 13–16 of the '088 patent; and claims 1–5 of the '816 patent; and whether an industry in the United States exists as required by subsection (a)(2) of section 337;

(2) Pursuant to section 210.10(b)(1) of the Commission's Rules of Practice and Procedure, 19 CFR 210.10(b)(1), the plain language description of the accused products or category of accused products, which defines the scope of the investigation, is ''LED landscape devices, lights, fixtures, components thereof, and products containing the same, specifically LED circuits, LED drivers, LED modules, housings, mechanical housings, driver housings, optics, lenses, dimming knobs, and stakes'';

(3) For the purpose of the investigation so instituted, the following are hereby named as parties upon which this notice of investigation shall be served:

(a) The complainant is: Wangs Alliance Corporation d/b/a, WAC Lighting, 44 Harbor Park Drive, Port Washington, New York 11050.

(b) The respondent is the following entity alleged to be in violation of section 337, and is the party upon which the complaint is to be served: Hinkley Lighting, Inc., 33000 Pin Oak Parkway, Avon Lake, Ohio 44012.

(4) For the investigation so instituted, the Chief Administrative Law Judge, U.S. International Trade Commission, shall designate the presiding Administrative Law Judge.

The Office of Unfair Import Investigations is not participating as a party to this investigation.

Responses to the complaint and the notice of investigation must be submitted by the named respondent in accordance with section 210.13 of the Commission's Rules of Practice and Procedure, 19 CFR 210.13. Pursuant to 19 CFR 201.16(e) and 210.13(a), as amended in 85 FR 15798 (March 19, 2020), such responses will be considered by the Commission if received not later than 20 days after the date of service by the complainant of the complaint and the notice of investigation. Extensions of time for submitting responses to the complaint and the notice of investigation will not be granted unless good cause therefor is shown.

Failure of the respondent to file a timely response to each allegation in the complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint and this notice, and to authorize the administrative law judge and the Commission, without further notice to the respondent, to find the facts to be as alleged in the complaint and this notice and to enter an initial determination and a final determination containing such findings, and may result in the issuance of an exclusion order or a cease and desist order or both directed against the respondent.

By order of the Commission.

Issued: April 10, 2023.

**Lisa Barton,**

*Secretary to the Commission.*

[FR Doc. 2023–07871 Filed 4–13–23; 8:45 am]

**BILLING CODE 7020–02–P**

## INTERNATIONAL TRADE COMMISSION

**[Investigation No. 731–TA–663 (Fifth Review)]**

### Paper Clips From China

### Determination

On the basis of the record [1] developed in the subject five-year review, the United States International Trade Commission (''Commission'') determines, pursuant to the Tariff Act of 1930 (''the Act''), that revocation of the antidumping duty order on paper clips from China would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.

### Background

The Commission instituted this review on September 1, 2022 (87 FR 53783) and determined on December 5, 2022, that it would conduct an expedited review (88 FR 14391, March 8, 2023).

The Commission made this determination pursuant to section 751(c) of the Act (19 U.S.C. 1675(c)). It completed and filed its determination in this review on April 11, 2023.

The views of the Commission are contained in USITC Publication 5418 (April 2023), entitled *Paper Clips from China: Investigation No. 731–TA–663 (Fifth Review).*

By order of the Commission.

Issued: April 11, 2023.

**Lisa Barton,**

*Secretary to the Commission.*

[FR Doc. 2023–07918 Filed 4–13–23; 8:45 am]

**BILLING CODE 7020–02–P**

[1] The record is defined in § 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR 207.2(f)).

## INTERNATIONAL TRADE COMMISSION

**[USITC SE–23–019]**

### Sunshine Act Meetings

**AGENCY HOLDING THE MEETING:** United States International Trade Commission.

**TIME AND DATE:** April 26, 2023 at 11 a.m.

**PLACE:** Room 101, 500 E Street SW, Washington, DC 20436, Telephone: (202) 205–2000.

**STATUS:** Open to the public.

**MATTERS TO BE CONSIDERED:**

1. *Agendas for future meetings:* none.
2. Minutes.
3. Ratification List.
4. Commission vote on Inv. No. 731–TA–696 (Fifth Review) (Pure Magnesium from China). The Commission currently is scheduled to complete and file its determinations and views of the Commission on May 15, 2023.
5. *Outstanding action jackets:* none.

**CONTACT PERSON FOR MORE INFORMATION:** Sharon Bellamy, Acting Hearings and Information Officer, 202–205–2000.

The Commission is holding the meeting under the Government in the Sunshine Act, 5 U.S.C. 552(b). In accordance with Commission policy, subject matter listed above, not disposed of at the scheduled meeting, may be carried over to the agenda of the following meeting.

By order of the Commission.

Issued: April 12, 2023.

**Lisa Barton,**

*Secretary to the Commission.*

[FR Doc. 2023–08068 Filed 4–12–23; 4:15 pm]

**BILLING CODE 7020–02–P**

## INTERNATIONAL TRADE COMMISSION

**[Investigation Nos. 701–TA–476 and 731–TA–1179 (Second Review)]**

### Multilayered Wood Flooring From China; Scheduling of Expedited Five-Year Reviews

**AGENCY:** United States International Trade Commission.

**ACTION:** Notice.

**SUMMARY:** The Commission hereby gives notice of the scheduling of expedited reviews pursuant to the Tariff Act of

1930 (''the Act'') to determine whether revocation of the antidumping duty and countervailing duty orders on multilayered wood flooring from China would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time.

**DATES:** March 6, 2023.

**FOR FURTHER INFORMATION CONTACT:** (Lawrence Jones (202) 205–3358)), Office of Investigations, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server (*https://www.usitc.gov*). The public record for this proceeding may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.*

**SUPPLEMENTARY INFORMATION:**

*Background.*—On March 6, 2023, the Commission determined that the domestic interested party group response to its notice of institution (87 FR 73784, December 1, 2022) of the subject five-year reviews was adequate and that the respondent interested party group response was inadequate. The Commission did not find any other circumstances that would warrant conducting full reviews.[1] Accordingly, the Commission determined that it would conduct expedited reviews pursuant to section 751(c)(3) of the Tariff Act of 1930 (19 U.S.C. 1675(c)(3)).

For further information concerning the conduct of these reviews and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A and B (19 CFR part 201), and part 207, subparts A, D, E, and F (19 CFR part 207).

*Staff report.*—A staff report containing information concerning the subject matter of the reviews has been placed in the nonpublic record, and will be made available to persons on the Administrative Protective Order service list for these reviews on May 17, 2023. A public version will be issued thereafter, pursuant to § 207.62(d)(4) of the Commission's rules.

*Written submissions.*—As provided in § 207.62(d) of the Commission's rules, interested parties that are parties to the reviews and that have provided individually adequate responses to the notice of institution,[2] and any party other than an interested party to the reviews may file written comments with the Secretary on what determination the Commission should reach in the reviews. Comments are due on or before May 25, 2023 and may not contain new factual information. Any person that is neither a party to the five-year reviews nor an interested party may submit a brief written statement (which shall not contain any new factual information) pertinent to the reviews by May 25, 2023. However, should the Department of Commerce (''Commerce'') extend the time limit for its completion of the final results of its reviews, the deadline for comments (which may not contain new factual information) on Commerce's final results is three business days after the issuance of Commerce's results. If comments contain business proprietary information (BPI), they must conform with the requirements of §§ 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's *Handbook on Filing Procedures,* available on the Commission's website at *https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf,* elaborates upon the Commission's procedures with respect to filings.

In accordance with §§ 201.16(c) and 207.3 of the rules, each document filed by a party to the reviews must be served on all other parties to the reviews (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

*Determination.*—The Commission has determined these reviews are extraordinarily complicated and therefore has determined to exercise its authority to extend the review period by up to 90 days pursuant to 19 U.S.C. 1675(c)(5)(B).

*Authority:* These reviews are being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to § 207.62 of the Commission's rules.

By order of the Commission.

Issued: April 11, 2023.

**Lisa Barton,**

*Secretary to the Commission.*

[FR Doc. 2023–07911 Filed 4–13–23; 8:45 am]

**BILLING CODE 7020–02–P**

[1] A record of the Commissioners' votes, the Commission's statement on adequacy, and any individual Commissioner's statements will be available from the Office of the Secretary and at the Commission's website.

[2] The Commission has found the responses submitted by the American Manufacturers of Multilayered Wood Flooring, an ad hoc association, on behalf of three domestic producers of multilayered wood flooring (AHF Products, LLC, Mohawk Industries, Inc., and Mullican Flooring, L.P.) to be individually adequate. Comments from other interested parties will not be accepted (*see* 19 CFR 207.62(d)(2)).

## DEPARTMENT OF JUSTICE

### Notice of Lodging of Proposed Consent Decree Under the Comprehensive Environmental Response, Compensation, and Liability Act

On April 7, 2023, the Department of Justice lodged a proposed Consent Decree with the United States District Court for the Southern District of California in the lawsuit entitled *United States* v. *County of San Diego, California,* Civil Action No. 3:22–cv–01753–JO–NLS.

This case relates to releases or threats of releases of hazardous substances at or from the Ramona Burn Dump Site, in San Diego County, California, in the Palomar Ranger District of the Cleveland National Forest. The case involves claims under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (''CERCLA''), for, among others, injunctive relief and recovery of the United States' past and future response costs. The settlement resolves the United States' claims by requiring the County to: (1) undertake a non-time-critical removal action to address site contamination; (2) reimburse the United States' past response costs; and (3) reimburse the United States' future response costs.

The publication of this notice opens a period for public comment on the Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and should refer to *United States* v. *County of San Diego, California,* DJ# 90–11–3–11691. All comments must be submitted no later than thirty (30) days after the publication date of this notice. Comments may be submitted either by email or by mail:

| *To submit comments:* | *Send them to:* |
|---|---|
| By email ..... | *pubcomment-ees.enrd@usdoj.gov.* |
| By mail ..... | Assistant Attorney General, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611. |

During the public comment period, the Consent Decree may be examined and downloaded at this Justice

Department website: *https://www.justice.gov/enrd/consent-decrees.* We will provide a paper copy of the Consent Decree upon written request and payment of reproduction costs. Please mail your request and payment to: Consent Decree Library, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

Please enclose a check or money order for $15.75 (63 pages at 25 cents per page reproduction cost) payable to the United States Treasury.

**Lori Jonas,**

*Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.*

[FR Doc. 2023–07851 Filed 4–13–23; 8:45 am]

**BILLING CODE 4410–15–P**

## DEPARTMENT OF LABOR

### Employment and Training Administration

### Public Meeting of the Advisory Committee on Apprenticeship (ACA)

**AGENCY:** Employment and Training Administration (ETA), Labor.

**ACTION:** Notice of a public meeting.

**SUMMARY:** Pursuant to the Federal Advisory Committee Act (FACA), notice is hereby given to announce a public meeting of the ACA. All meetings of the ACA are open to the public.

**DATES:** The meeting will be held on Wednesday, May 10, 2023, at the Laborers International Union of North America (LIUNA) Chicagoland Laborers' District Council Training and Apprentice Fund (CLTAF) located at 5700 West Homer Street, Chicago, Illinois 60639. The meeting will begin at approximately 9 a.m. Central Daylight Time (CDT) and adjourn at approximately 5 p.m. CDT. Any updates to the agenda and meeting logistics will be posted on the Office of Apprenticeship's website at: *https://www.apprenticeship.gov/advisory-committee-apprenticeship/meetings.*

**FOR FURTHER INFORMATION CONTACT:** The Designated Federal Officer, Mr. John V. Ladd, Administrator, Office of Apprenticeship, Employment and Training Administration, U.S. Department of Labor, 200 Constitution Avenue NW, Room C–5321, Washington, DC 20210; Email: *AdvisoryCommitteeonApprenticeship@dol.gov;* Telephone: (202) 693–2796 (this is not a toll-free number).

**SUPPLEMENTARY INFORMATION:** The ACA is a discretionary committee reestablished by the Secretary of Labor on May 4, 2021, in accordance with FACA (5 U.S.C. App. 2 § 10), as amended in 5 U.S.C. App. 2, and its implementing regulations (41 CFR 101–6 and 102–3). The first meeting of the ACA was held on Wednesday, October 6, 2021; the second meeting of the ACA was held on Wednesday, January 26, 2022; the third meeting of the ACA was held on Monday, May 16, 2022; the fourth meeting of the ACA was held on Tuesday, September 27, 2022; the fifth meeting of the ACA was held on Thursday, January 12, 2023; and the sixth meeting of the ACA was held on Thursday, March 30, 2023. All past meeting materials are posted here: *https://www.apprenticeship.gov/advisory-committee-apprenticeship/meetings.* All meetings are open to the public. To promote greater access, webinar and audio conference technology will be used to support public participation in the meeting. In-person space for the meeting is limited. Please send an email to *advisorycommitteeonapprenticeship@dol.gov* if you plan to attend the meeting in-person, no later than Wednesday, April 26, 2023. Members of the public that are unable to join the meeting in-person are encouraged to join the meeting virtually. Both the in-person and virtual login instructions will be posted prominently on the Office of Apprenticeship's website at: *https://www.apprenticeship.gov/advisory-committee-apprenticeship/meetings.* If individuals have special needs and/or disabilities that will require special accommodations, please contact Kenya Huckaby at (202) 693–3795 or via email at *huckaby.kenya@dol.gov* no later than Wednesday, April 26, 2023.

*Instructions to Attend the Meeting In-Person:* Send an email to *advisorycommitteeonapprenticeship@dol.gov* no later than Wednesday, April 26, 2023, to request to attend the meeting in-person. As outlined above, LIUNA CLTAF is located at 5700 West Homer Street, Chicago, Illinois 60639. To attend the meeting in person, upon arrival at the LIUNA CLTAF, members of the public will need to use the driveway and follow the signage to the entrance. Limited public park is available.

*Instructions to Attend the Meeting Virtually:* Virtual meeting participants have two options to access the meeting. Virtual meeting participants can access the meeting by computer or by phone. To access the meeting by computer, meeting participants will use the meeting link and event password posted on the Office of Apprenticeship's website at: *https://www.apprenticeship.gov/advisory-committee-apprenticeship/meetings.* To access the meeting by phone, meeting participants will use the dial-in number posted on the Office of Apprenticeship's website at: *https://www.apprenticeship.gov/advisory-committee-apprenticeship/meetings.*

Any member of the public who wishes to file written data or comments pertaining to the agenda may do so by sending the data or comments to Mr. John V. Ladd via email at *AdvisoryCommitteeonApprenticeship@dol.gov* using the subject line ''May 2023 ACA Meeting.'' Such submissions will be included in the record for the meeting if received by Thursday, April 26, 2023. See below regarding members of the public wishing to speak at the ACA meeting.

*Purpose of the Meeting and Topics To Be Discussed:* The primary purpose of the May 2023 ACA meeting is to focus on pre-apprenticeship in promoting equity in apprenticeship and highlight current innovations within traditional apprenticeship programs. The ACA will also discuss and finalize the Issue papers, a deliverable discussed at the March meeting. Anticipated agenda topics for this meeting include the following:

- Call to Order
- Remarks from ETA Leadership and Other Apprenticeship Stakeholders
- Insights on Apprenticeship Site Visits
- Apprentice Panel
- Update on Year-One Interim Report
- Final Biennial Report and Two-Year Accomplishments
- Subcommittee Report Outs:
  - Final Issue Papers
- Public Comment
- Adjourn

The agenda and meeting logistics may be updated should priority items come before the ACA between the time of this publication and the scheduled date of the ACA meeting. All meeting updates will be posted to the Office of Apprenticeship's website at: *https://www.apprenticeship.gov/advisory-committee-apprenticeship/meetings.* Any member of the public who wishes to speak at the meeting should indicate the nature of the intended presentation and the amount of time needed by furnishing a written statement to the Designated Federal Officer, Mr. John V. Ladd, via email at *AdvisoryCommitteeonApprenticeship@dol.gov,* by Thursday, April 26, 2023. The Chairperson will announce at the beginning of the meeting the extent to

which time will permit the granting of such requests.

**Brent Parton,**

*Acting Assistant Secretary for Employment and Training, Labor.*

[FR Doc. 2023–07865 Filed 4–13–23; 8:45 am]

**BILLING CODE 4510–FR–P**

## DEPARTMENT OF LABOR

### Agency Information Collection Activities; Submission for OMB Review; Comment Request; Petition for Classifying Labor Surplus Areas

**ACTION:** Notice of availability; request for comments.

**SUMMARY:** The Department of Labor (DOL) is submitting this Employment and Training Administration (ETA)-sponsored information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). Public comments on the ICR are invited.

**DATES:** The OMB will consider all written comments that the agency receives on or before May 15, 2023.

**ADDRESSES:** Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

*Comments are invited on:* (1) whether the collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (2) if the information will be processed and used in a timely manner; (3) the accuracy of the agency's estimates of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (4) ways to enhance the quality, utility and clarity of the information collection; and (5) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

**FOR FURTHER INFORMATION CONTACT:** Mara Blumenthal by telephone at 202–693–8538, or by email at *DOL_PRA_PUBLIC@dol.gov.*

**SUPPLEMENTARY INFORMATION:** Under Executive Orders (E.O.) 12073 and 10582, the Secretary of Labor is required to classify labor surplus areas (LSAs) for the use of federal agencies in directing procurement activities and in locating new plants or facilities in areas of high unemployment. DOL issues an annual list of Labor Surplus Areas (LSA) to be used by federal and state entities in a number of actions such as procurement and property transfer. The annual LSA list is updated during the year based upon petitions submitted to DOL by State Workforce Agencies requesting additional areas for LSA certification. This collection provides the processes by which States can submit petitions for additional LSA certification. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on January 23, 2023 (88 FR 4031).

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless the OMB approves it and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid OMB Control Number. *See* 5 CFR 1320.5(a) and 1320.6.

DOL seeks PRA authorization for this information collection for three (3) years. OMB authorization for an ICR cannot be for more than three (3) years without renewal. The DOL notes that information collection requirements submitted to the OMB for existing ICRs receive a month-to-month extension while they undergo review.

*Agency:* DOL–ETA.

*Title of Collection:* Petition for Classifying Labor Surplus Areas.

*OMB Control Number:* 1205–0207.

*Affected Public:* State, Local, and Tribal Governments.

*Total Estimated Number of Respondents:* 3.

*Total Estimated Number of Responses:* 3.

*Total Estimated Annual Time Burden:* 9 hours.

*Total Estimated Annual Other Costs Burden:* $0.

(Authority: 44 U.S.C. 3507(a)(1)(D))

Dated: April 10, 2023.

**Mara Blumenthal,**

*Senior PRA Analyst.*

[FR Doc. 2023–07867 Filed 4–13–23; 8:45 am]

**BILLING CODE 4510–FN–P**

## DEPARTMENT OF LABOR

### Agency Information Collection Activities; Submission for OMB Review; Comment Request; Workforce Information Grants to States (WIGS)

**ACTION:** Notice of availability; request for comments.

**SUMMARY:** The Department of Labor (DOL) is submitting this Employment and Training Administration (ETA)-sponsored information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). Public comments on the ICR are invited.

**DATES:** The OMB will consider all written comments that the agency receives on or before May 15, 2023.

**ADDRESSES:** Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

*Comments are invited on:* (1) whether the collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (2) if the information will be processed and used in a timely manner; (3) the accuracy of the agency's estimates of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (4) ways to enhance the quality, utility and clarity of the information collection; and (5) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

**FOR FURTHER INFORMATION CONTACT:** Mara Blumenthal by telephone at 202–693–8538, or by email at *DOL_PRA_PUBLIC@dol.gov.*

**SUPPLEMENTARY INFORMATION:** This collection of information is necessary to comply with the reporting requirements of section 308 of Workforce Innovation and Opportunity Act (WIOA). The statute requires the Secretary of Labor to oversee the development, maintenance, and continuous improvement of a nationwide Workforce and Labor Market Information System (workforce information) system. The information collection ensures the Secretary meets

WIOA requirements, and the states complete grant deliverables such as state economic analyses or special workforce information, economic studies, and the annual performance report. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on January 23, 2023 (88 FR 4037).

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless the OMB approves it and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid OMB Control Number. *See* 5 CFR 1320.5(a) and 1320.6.

DOL seeks PRA authorization for this information collection for three (3) years. OMB authorization for an ICR cannot be for more than three (3) years without renewal. The DOL notes that information collection requirements submitted to the OMB for existing ICRs receive a month-to-month extension while they undergo review.

*Agency:* DOL–ETA.

*Title of Collection:* Workforce Information Grants to States (WIGS).

*OMB Control Number:* 1205–0417.

*Affected Public:* State, Local, and Tribal Governments.

*Total Estimated Number of Respondents:* 54.

*Total Estimated Number of Responses:* 162.

*Total Estimated Annual Time Burden:* 31,228 hours.

*Total Estimated Annual Other Costs Burden:* $0.

(Authority: 44 U.S.C. 3507(a)(1)(D))

Dated: April 10, 2023.

**Mara Blumenthal,**

*Senior PRA Analyst.*

[FR Doc. 2023–07866 Filed 4–13–23; 8:45 am]

**BILLING CODE 4510–FN–P**

## DEPARTMENT OF LABOR

### Mine Safety and Health Administration

### Petition for Modification of Application of Existing Mandatory Safety Standards

**AGENCY:** Mine Safety and Health Administration, Labor.

**ACTION:** Notice.

**SUMMARY:** This notice is a summary of a petition for modification submitted to the Mine Safety and Health Administration (MSHA) by the party listed below.

**DATES:** All comments on the petition must be received by MSHA's Office of Standards, Regulations, and Variances on or before May 15, 2023.

**ADDRESSES:** You may submit comments identified by Docket No. MSHA–2023–0010 by any of the following methods:

1. *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments for MSHA–2023–0010.

2. *Fax:* 202–693–9441.

3. *Email: petitioncomments@dol.gov.*

4. *Regular Mail or Hand Delivery:* MSHA, Office of Standards, Regulations, and Variances, 201 12th Street South, Suite 4E401, Arlington, Virginia 22202–5452.

*Attention:* S. Aromie Noe, Director, Office of Standards, Regulations, and Variances. Persons delivering documents are required to check in at the receptionist's desk in Suite 4E401. Individuals may inspect copies of the petition and comments during normal business hours at the address listed above. Before visiting MSHA in person, call 202–693–9455 to make an appointment, in keeping with the Department of Labor's COVID–19 policy. Special health precautions may be required.

**FOR FURTHER INFORMATION CONTACT:** S. Aromie Noe, Office of Standards, Regulations, and Variances at 202–693–9440 (voice), *Petitionsformodification@dol.gov* (email), or 202–693–9441 (fax). [These are not toll-free numbers.]

**SUPPLEMENTARY INFORMATION:** Section 101(c) of the Federal Mine Safety and Health Act of 1977 and Title 30 of the Code of Federal Regulations (CFR) part 44 govern the application, processing, and disposition of petitions for modification.

#### I. Background

Section 101(c) of the Federal Mine Safety and Health Act of 1977 (Mine Act) allows the mine operator or representative of miners to file a petition to modify the application of any mandatory safety standard to a coal or other mine if the Secretary of Labor determines that:

1. An alternative method of achieving the result of such standard exists which will at all times guarantee no less than the same measure of protection afforded the miners of such mine by such standard; or

2. The application of such standard to such mine will result in a diminution of safety to the miners in such mine.

In addition, sections 44.10 and 44.11 of 30 CFR establish the requirements for filing petitions for modification.

#### II. Petition for Modification

*Docket Number:* M–2023–003–C.

*Petitioner:* Marion County Coal Resources, Inc., 151 Johnnycake Road, Metz, West Virginia 26585.

*Mine:* Marion County Mine, MSHA ID No. 46–01433, located in Marion County, West Virginia.

*Regulation Affected:* 30 CFR 75.1700, Oil and gas wells.

*Modification Request:* The petitioner requests a modification of 30 CFR 75.1700 to permit mining within the 300 feet diameter safety barrier of two unconventional gas wells in the Marcellus shale.

The petitioner states that:

(a) The Marion County Mine desires to plug two unconventional gas wells in the Marcellus shale so that they may be mined through. These are:

(1) The Jones 2H Marcellus Gas Well American Petroleum Institute (API) #: 47–049–02184 (2H); and

(2) The Jones 3H Marcellus Gas Well API #: 47–049–02184 (3H).

(b) The Marion County Mine is accessed through one slope and eight airshafts. The mine operates one longwall, an advancing gate section, and a mains section utilizing continuous mining machines. The mine liberates 9,000,000 cubic feet of methane per day.

(c) On July 5, 2018, MSHA and Marion County entered into a settlement concerning the contest of certain conditions in a Proposed Decision and Order (PDO) concerning 30 CFR 75.1700 at docket No. 2017–MSA–06. That agreement specifically excluded certain types of wells as follows: Unconventional wells in the Marcellus and Utica, and all other unconventional shale oil and gas wells are not subject to this modification.

The petitioner proposes the following alternative method:

(a) The following shall require District Manager approval.

(1) The mine operator shall maintain a safety barrier of 300 feet in diameter around the Jones 2H and 3H gas wells until the District Manager approves to proceed with mining.

(2) Prior to mining within the safety barrier around these wells, the mine operator shall provide to the District Manager a sworn affidavit or declaration executed by the company official who is in charge of health and safety at the mine stating that all mandatory procedures in the PDO for cleaning out, preparing, and plugging each gas well have been completed. The affidavit or declaration shall be accompanied by all

logs, electronic or otherwise, described in section (b)(7) and any other records the District Manager requires.

(3) This petition applies to all types of underground coal mining at the mine.

(b) The following mandatory procedures shall be followed when cleaning out and preparing the Jones 2H and 3H gas wells prior to plugging:

(1) The mine operator shall test for gas emissions inside the hole before cleaning out, preparing, and plugging gas wells. The District Manager shall be contacted if the well is actively producing gas.

(2) Since these wells are unconventional and greater than 4,000 feet in depth, a diligent effort shall be made to remove all the casing in the well and clean the well down to the original arrowset packer installed just above the ''kick off point'' in the well. The mine operator shall completely clean out the well from the surface to at least the same arrowset packer originally installed. The mine operator shall provide the District Manager with all information it possesses concerning the geological nature of the strata and the pressure of the well. The mine operator shall make a diligent effort to remove all material from the entire diameter of the well, wall to wall.

(3) Since these wells are no longer producing and are being cleaned and prepared subject to the PDO, the operator must attempt to remove all of the casing using a diligent effort and comply with all other applicable provisions of the PDO.

(4) To make a diligent effort to remove the casing, the operator shall pull a minimum of 150 percent of the casing string weight and/or have made at least three attempts to spear the casing for the required minimum pull effort. The operator shall keep a record of these efforts, including casing length and weight, and make the record available for MSHA review.

(5) Perforations or rips are required at least every 50 feet from 400 feet below the base of the coal seam up to 100 feet above the uppermost mineable coal seam. The mine operator shall take appropriate steps to ensure that the annulus between the casing and the well walls are filled with expanding (minimum 0.5 percent expansion upon setting) cement and contain no voids.

(6) Jet/sand cutting is one method for cutting, ripping, or perforating the casing with three or more strings of casing in the coal seam in preparation for mining. This method uses compressed nitrogen gas and sand to cut the well casings. On active wells, cuts start at 200 feet above the bottom of the casing at 200 feet intervals, to 200 feet below the bottom of the coal seam.

(7) The mine operator shall prepare down-hole logs for each well. Logs shall consist of a caliper survey, a bond log if appropriate, a deviation survey, and a gamma survey for determining the top, bottom, and thickness of all coal seams down to the coal seam to be mined or the lowest mineable coal seam, whichever is lower, potential hydrocarbon producing strata, and the location of any existing bridge plug. In addition, a log shall be maintained describing: the depth of each material encountered; the nature of each material encountered; bit size and type used to drill each portion of the hole; length and type of each material used to plug the well; length of casings removed, perforated or ripped, or left in place; any sections where casing was cut or milled; and other pertinent information concerning cleaning and sealing the well. Invoices, work-orders, and other records relating to all work on the well shall be maintained as part of this journal and provided to MSHA upon request.

(8) The mine operator shall make a diligent effort to remove the casing down to the arrowset packer installed just above the ''kick off point'' (where the well transitions from vertical to horizontal). If the entire vertical casing above the existing packer can be removed, the mine operator shall prepare the well for plugging and use seals described in section (b)(10).

(9) If the District Manager concludes that the completely cleaned-out well is emitting excessive amounts of gas, the mine operator shall place additional mechanical bridge plugs in the well.

(10) The mechanical bridge plug shall be placed in a competent stratum at least 400 feet below the base of the lowest mineable coal seam, but above the top of the uppermost hydrocarbon-producing stratum, unless the District Manager requires a greater distance based on the geological strata or the pressure within the well. The mine operator shall provide the District Manager with all information they possess concerning the geological nature of the strata and the pressure of the well. If it is not possible to set a mechanical bridge plug, an appropriately sized packer may be used. The mine operator shall document what has been done to ''kill the well'' and plug the hydrocarbon producing strata.

(11) If the upper-most hydrocarbon-producing stratum is within 300 feet of the base of the coal seam, the mine operator shall properly place mechanical bridge plugs as described in section (b)(10) to isolate the hydrocarbon-producing stratum from the expanding cement plug.

(12) The mine operator shall place a minimum of 400 feet of expanding cement below the coal seam, unless the District Manager requires a greater distance based the geological strata or to the pressure within the well.

(c) The following mandatory procedures shall be followed for plugging the Jones 2H and 3H gas wells to the surface, after completely cleaning out the well:

(1) Cement shall be used as a plugging material.

(2) The mine operator shall pump cement slurry down the well to form a plug which runs from the original arrowset packer installed just above the ''kick off point'' in the well to 400 feet below the coal seam. The cement will be placed in the well under a pressure of at least 200 pounds per square inch. The mine operator shall pump expanding cement slurry down the well to form a plug which runs from 400 feet below the coal seam to the surface. The District Manager can modify the cementing plan based on the geological strata or the pressure within the well.

(3) The mine operator shall embed steel turnings or other small magnetic particles in the top of the cement near the surface to serve as a permanent magnetic monument of the well. In the alternative, a 4-inch or larger diameter casing, set in cement, shall extend at least 36 inches above the ground level with the API well number engraved or welded on the casing. When the hole cannot be marked with a physical monument (*e.g.,* prime farmland), high-resolution GPS coordinates (one-half meter resolution) are required.

(d) The following alternate procedures shall be followed for preparing and plugging or re-plugging the Jones 2H and 3H gas wells:

(1) If it is not possible to remove all the casing, the mine operator shall notify the District Manager before any other work is performed.

(2) If the well cannot be cleaned out or the casing removed, the mine operator shall prepare the well from the surface to at least 400 feet below the base of the coal seam, unless the District Manager requires cleaning out and removal of casing to a greater depth based on the geological strata or the pressure within the well.

(3) If the casing cannot be removed from the total depth, the well shall be filled with cement from the lowest possible depth to 400 feet below the coal seam, and the other applicable provisions in the PDO shall apply.

(4) If the casing cannot be removed, the casing shall be perforated from 400

feet below the coal seam, the annuli shall be cemented or otherwise filled, and the other applicable provisions in the PDO shall apply.

(5) If the casing cannot be removed, the casing shall be cut, milled, perforated, or ripped at sufficient intervals to facilitate the removal of any remaining casing in the coal seam by the mining equipment. Any casing which remains shall be cut, perforated, or ripped to permit the injection of cement into voids within and around the well. All casing remaining at the coal seam shall be cut, perforated, or ripped at least every 5 feet from 10 feet below the coal seam to 10 feet above the coal seam.

(6) If the mine operator, using a casing bond log, can demonstrate to the District Manager's satisfaction that all annuli in the well are already adequately sealed with cement, the mine operator shall not be required to perforate or rip the casing for that particular well. When multiple casing and tubing strings are present in the coal horizon(s), any remaining casing shall be ripped or perforated and filled with expanding cement as indicated above. An acceptable casing bond log for each casing and tubing string can be used in lieu of ripping or perforating multiple strings.

(e) The following mandatory procedures shall be followed when mining within a 100-foot diameter barrier around the Jones 2H and 3H gas wells:

(1) A representative of the mine operator, a representative of the miners, the appropriate State agency, or the MSHA District Manager may request that a conference be conducted prior to intersecting any plugged well. The party requesting the conference shall notify all other parties listed above within a reasonable time prior to the conference to provide opportunity for participation. The purpose of the conference shall be to review, evaluate, and accommodate any abnormal or unusual circumstance related to the condition of the well or surrounding strata when such conditions are encountered.

(2) The mine operator shall intersect a well on a shift approved by the District Manager. The mine operator shall notify the District Manager and the miners' representative in sufficient time prior to intersecting a well to provide an opportunity to have representatives present.

(3) When using continuous mining methods, the mine operator shall install drivage sites at the last open crosscut near the place to be mined to ensure intersection of the well. The drivage sites shall not be more than 50 feet from the well. When using longwall-mining methods, distance markers shall be installed on 5-foot centers for a distance of 50 feet in advance of the well in the headgate entry and in the tailgate entry.

(4) When either the conventional or continuous mining method is used, the mine operator shall ensure that fire-fighting equipment including fire extinguishers, rock dust, and sufficient fire hose to reach the working face area of the well intersection is available and operable during all well intersections. The fire hose shall be located in the last open crosscut of the entry or room. The mine operator shall maintain the water line to the belt conveyor tailpiece along with a sufficient amount of fire hose to reach the farthest point of penetration on the section. When the longwall mining method is used, a hose to the longwall water supply is sufficient.

(5) The mine operator shall ensure that sufficient supplies of roof support and ventilation materials shall be available and located at the last open crosscut. In addition, emergency plugs and suitable sealing materials shall be available in the immediate area of the well intersection.

(6) On the shift prior to intersecting the well, the mine operator shall test all equipment and check it for permissibility. Water sprays, water pressures, and water flow rates used for dust and spark suppression shall be examined and any deficiencies corrected.

(7) The mine operator shall calibrate the methane monitor(s) on the longwall, continuous mining machine, or cutting machine and loading machine on the shift prior to intersecting the well.

(8) When mining is in progress, the mine operator shall test for methane with a handheld methane detector at least every 10 minutes from when mining with the continuous mining machine or longwall face is within 30 feet of the well until the well is intersected. During the actual cutting process, no individual shall be allowed on the return side until the well intersection has been completed and the area has been examined and declared safe. All workplace examinations on the return side of the shearer shall be conducted while the shearer is idle. The mine operator's most current Approved Ventilation Plan shall be followed at all times unless the District Manager requires a greater air velocity for the intersect.

(9) When using continuous or conventional mining methods, the working place shall be free from accumulations of coal dust and coal spillages. Rock dust shall be placed on the roof, rib, and floor to within 20 feet of the face when intersecting the well. On longwall sections, rock dusting shall be conducted and placed on the roof, rib, and floor up to both the headgate and tailgate gob.

(10) When the well is intersected, the mine operator shall de-energize all equipment and thoroughly examine and determine the area to be safe before permitting mining to resume.

(11) After a well has been intersected and the working place determined to be safe, mining shall continue inby the well a sufficient distance to permit adequate ventilation around the area of the well.

(12) If the casing is cut or milled at the coal seam level, the use of torches should not be necessary. When necessary, torches may be used for inadequately or inaccurately cut or milled casings. No open flame shall be permitted in the area until adequate ventilation has been established around the well bore and methane levels of less than 1.0 percent are present in all areas that will be exposed to flames and sparks from the torch. The mine operator shall apply a thick layer of rock dust to the roof, face, floor, ribs, and any exposed coal within 20 feet of the casing prior to the use of torches.

(13) Non-sparking (brass) tools shall be available and used exclusively to expose and examine cased wells.

(14) No person shall be permitted in the area of the well intersection except those actually engaged in the operation, including company personnel, representatives of the miners, personnel from MSHA, and personnel from the appropriate State agency.

(15) The mine operator shall alert all personnel in the mine to the planned intersection of the well prior to their going underground if the planned intersection is to occur during their shift. This warning shall be repeated for all shifts until the well has been mined through.

(16) The well intersection shall be under the direct supervision of a certified individual. Instructions concerning the well intersection shall be issued only by the certified individual in charge.

(17) If the mine operator cannot find the well in the longwall panel or if a development section misses the anticipated intersection, the mine operator shall cease mining to examine for hazardous conditions at the projected location of the well, notify the District Manager, and take reasonable measures to locate the well, including visual observation/inspection or through survey data. Mining may resume if the well is located, and no hazardous conditions exist. If the well

cannot be located, the mine operator shall work with District Manager to resolve any issues before mining resumes.

(f) A copy of the PDO shall be maintained at the mine and available to the miners.

(g) If the well is not plugged to the total depth of all minable coal seams identified in the core hole logs, any coal seams beneath the lowest plug shall remain subject to the barrier requirements of 30 CFR 75.1700, should those coal seams be developed in the future.

(h) All necessary safety precautions and safe practices according to industry standards and required by MSHA regulations and State regulatory agencies having jurisdiction over the plugging site shall be followed to provide the upmost protection to the miners involved in the process.

(i) All miners involved in the plugging or re-plugging operations shall be trained on the contents of the PDO prior to starting the process. A copy of the PDO shall be posted at the well site until the plugging or re-plugging has been completed.

(j) Mechanical bridge plugs shall incorporate the best available technologies that are either required or recognized by the State regulatory agency and/or oil and gas industry.

(k) Within 30 days after the PDO becomes final, the mine operator shall submit proposed revisions for its approved 30 CFR part 48 training plan to the District Manager. These proposed revisions shall include initial and refresher training on compliance with the terms and conditions stated in the PDO. The mine operator shall provide all miners involved in well intersection with training on the requirements of the PDO prior to mining within 150 feet of the well intended to be mined through.

(l) The responsible person required under 30 CFR 75.150, shall be responsible for well intersection emergencies. The well intersection procedures shall be reviewed by the responsible person prior to any planned intersection.

(m) Within 30 days after the PDO becomes final, the mine operator shall submit proposed revisions for its approved mine emergency evacuation and firefighting program of instruction required under 30 CFR 75.1502. The mine operator shall revise the program of instruction to include the hazards and evacuation procedures to be used for well intersections. All underground miners shall be trained in this revised plan within 30 days of submittal.

In support of the Petition, the petitioner provided additional information including: a map showing the cutting, milling, perforating, or ripping well casing above and below the Pittsburgh #8 coal seam; a proposed permanent plugging schematic for a gas well; mine information including construction details, pressures, production history, site-specific geology, gas-producing formations locations, and relevant logging information; surface location well plat; mine map with gas well location; and well record and competition report for Jones 2H and 3H gas wells.

The petitioner asserts that the alternate method proposed will at all times guarantee no less than the same measure of protection afforded the miners under the mandatory standard.

**Song-ae Aromie Noe,**

*Director, Office of Standards, Regulations, and Variances.*

[FR Doc. 2023–07864 Filed 4–13–23; 8:45 am]

**BILLING CODE 4520–43–P**

## NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

**[NOTICE: (23–032)]**

### Lunabotics Challenge

**AGENCY:** National Aeronautics and Space Administration (NASA).

**ACTION:** Lunabotics Challenge.

**SUMMARY:** The Lunabotics Challenge (one of NASA's Artemis Student Challenges, *https://stem.nasa.gov/artemis/*) has provided college students from around the country an opportunity to engage and learn the NASA Systems Engineering process by designing and building robotic Lunar excavators capable of mining regolith and icy regolith simulants.

**DATES:** Challenge registration opened on September 14, 2022 and closed on October 19, 2022. No further requests for registration will be accepted after the stated deadline.

Other important dates, including deadlines for key deliverables from the Teams, are listed on the Challenge website: *https://www.nasa.gov/offices/education/centers/kennedy/technology/nasarmc.html*.

**FOR FURTHER INFORMATION CONTACT:** To get additional information regarding the Lunabotics Challenge, please contact Rich Johanboeke (321) 867–0586 and visit: *https://www.nasa.gov/offices/education/centers/kennedy/technology/nasarmc.html*.

Questions and comments regarding the challenge should be addressed to: *ksc-robotic-mining-competition@mail.nasa.gov*.

**SUPPLEMENTARY INFORMATION:**

**Summary**

The Lunar robot shall drive in a simulated Lunar arena filled with Black Point –1 regolith simulant and excavate the icy-regolith simulant buried under an overburden of granular material, then return to the starting site and deliver the granular material to a simulated receiving hopper. More details are provided in Lunabotics Guidebook. This is a two-semester, virtual challenge, designed to educate college students in the application of the NASA Systems Engineering process. The virtual events of the Challenge are as follows: 1. Project Management Plan, 2. Systems Engineering Paper, 3. Public Outreach Report, 4. Presentation and Demonstration (optional), and a 5. Proof of Life Video. NASA is providing the prize purse.

For more than a decade, NASA has been able to gather valuable data about necessary excavation hardware and surface locomotion processes that can be implemented as the agency prepares to return to the Moon through the Artemis program. Major gaps exist between the functional capabilities and the technologies necessary for Lunar surface construction, and the requirements needed to narrow these gaps are in development and will support the long-term presence on the Moon, also known as ''Infrastructure to Stay''. Once identified, NASA will seek input from American academia to find new and innovative ways to apply existing or develop new technologies to meet Artemis Program requirements.

The skills developed in Lunabotics apply to other high technology industries that rely on the systems engineering principles. These industries will create a workforce posed to lead a new space-based economy and add to the economic strength of our country. NASA directly benefits from this challenge by annually assessing student designs and data the same way it does for its own, less frequent, prototypes. Encouraging innovation in student designs increases the potential of identifying clever solutions to the many challenges inherent in future Artemis missions.

**Accreditation Board for Engineering and Technology (ABET)**

One of the goals of Lunabotics is to introduce students to the ABET experience by aligning the events to those student outcomes. ABET is a nonprofit, ISO 9001 certified organization that accredits college and university programs in applied and natural science, computing, engineering,

and engineering technology. ABET accredits college and university programs in the disciplines of applied and natural science, computing, engineering, and engineering technology at the associate, bachelor's, and master's degree levels. ABET is the basis of quality for STEM disciplines all over the world. Schools do not have to be ABET accredited to participate.

**STEM Engagement**

NASA's journeys have propelled technological breakthroughs, pushed the frontiers of scientific research, and expanded our understanding of the universe. These accomplishments, and those to come, share a common genesis: education in science, technology, engineering, and math. In NASA STEM Engagement, we deliver tools for students and educators to learn and succeed. We seek to: Create unique opportunities for a diverse set of students to contribute to NASA's work in exploration and discovery; Build a diverse future STEM workforce by engaging students in authentic learning experiences with NASA's people, content, and facilities, and attract diverse groups of students to STEM through learning opportunities that spark interest and provide connections to NASA's mission and work. NASA STEM Engagement strives to increase K–12 involvement in NASA projects, enhance higher education, support underrepresented communities, strengthen online education, and boost NASA's contribution to informal education. The intended outcome is a generation.

**I. Prize Amounts**

Lunabotics has a total prize purse of $28,000.00 USD, (twenty-eight thousand United States dollars). There are three categories for awards in which teams can place 1st, 2nd or 3rd Place. Teams must meet the eligibility requirements to receive a prize from NASA.

**II. Eligibility To Participate and Win Prize Money**

To be eligible to win a prize, competitors must register and comply with all requirements in the Lunabotics guidebook. Interested Teams should refer to the official Lunabotics website (*https://www.nasa.gov/offices/education/centers/kennedy/technology/nasarmc.html*) for full details on eligibility and registration.

**III. Official Rules**

The complete official rules for the Lunabotics can be found at: *https://www.nasa.gov/offices/education/centers/kennedy/technology/nasarmc.html.*

**Cheryl Parker,**

*Federal Register Liaison Officer.*

[FR Doc. 2023–07972 Filed 4–13–23; 8:45 am]

**BILLING CODE 7510–13–P**

## NATIONAL SCIENCE FOUNDATION

### Sunshine Act Meetings

The National Science Board's (NSB) Committee on Science and Engineering Policy (SEP) hereby gives notice of the scheduling of a videoconference for the transaction of National Science Board business pursuant to the National Science Foundation Act and the Government in the Sunshine Act.

**TIME AND DATE:** Thursday, April 20, 2023, from 1 p.m.–2 p.m. EDT.

**PLACE:** The meeting will be held by videoconference through the National Science Foundation.

**STATUS:** Open.

**MATTERS TO BE CONSIDERED:** Chair's opening remarks; Detailed Narrative Outline for *Indicators* report: *Science and Technology: Public Perceptions, Awareness, and Information Sources;* Discussion of potential SEP/NSB contributions to OSTP Quadrennial Review.

**CONTACT PERSON FOR MORE INFORMATION:** Point of contact for this meeting is Chris Blair, *cblair@nsf.gov,* 703/292–7000. Members of the public can observe this meeting through a YouTube livestream. The YouTube link will be available from the NSB meetings web page—*https://www.nsf.gov/nsb/meetings/index.jsp.*

**Christopher Blair,**

*Executive Assistant to the National Science Board Office.*

[FR Doc. 2023–08088 Filed 4–12–23; 4:15 pm]

**BILLING CODE 7555–01–P**

## NATIONAL SCIENCE FOUNDATION

### Sunshine Act Meetings

The National Science Board's (NSB) NSB–NSF Commission on Merit Review hereby gives notice of the scheduling of a videoconference meeting for the transaction of National Science Board business pursuant to the National Science Foundation Act and the Government in the Sunshine Act.

**TIME AND DATE:** Wednesday, April 19, 2023, from 3–4 p.m. EDT.

**PLACE:** This meeting will be held by videoconference through the National Science Foundation.

**STATUS:** Open.

**MATTERS TO BE CONSIDERED:** The agenda of the meeting is: Chair's opening remarks; discussion of Commission workplan; discussion of potential topical areas of inquiry.

**CONTACT PERSON FOR MORE INFORMATION:** Point of contact for this meeting is: (Chris Blair, *cblair@nsf.gov*), 703/292–7000. Members of the public can observe this meeting through a YouTube livestream. The YouTube link will be available from the NSB meetings web page—*https://www.nsf.gov/nsb/meetings/index.jsp.*

**Christopher Blair,**

*Executive Assistant to the National Science Board Office.*

[FR Doc. 2023–08077 Filed 4–12–23; 4:15 pm]

**BILLING CODE 7555–01–P**

## NATIONAL SCIENCE FOUNDATION

### Sunshine Act Meetings

The National Science Board's (NSB) Committee on External Engagement hereby gives notice of the scheduling of a teleconference for the transaction of National Science Board business pursuant to the National Science Foundation Act and the Government in the Sunshine Act.

**TIME AND DATE:** Friday, April 21, 2023, from 11 a.m.–12 p.m. EDT.

**PLACE:** This meeting will be held by teleconference through the National Science Foundation.

**STATUS:** Open.

**MATTERS TO BE CONSIDERED:** The agenda of the teleconference is: Chair's opening remarks; Strategic Engagement Planning; Discuss draft *Science & Engineering Indicators* Engagement Plan.

**CONTACT PERSON FOR MORE INFORMATION:** Point of contact for this meeting is: Nadine Lymn, *nlymn@nsf.gov,* 703/292–7000. Members of the public can observe this meeting through a YouTube livestream. Meeting information including a YouTube link is available from the NSB website at *https://www.nsf.gov/nsb/meetings/index.jsp#up.*

**Christopher Blair,**

*Executive Assistant to the National Science Board Office.*

[FR Doc. 2023–08084 Filed 4–12–23; 4:15 pm]

**BILLING CODE 7555–01–P**

## NATIONAL SCIENCE FOUNDATION

### Agency Information Collection Activities: Comment Request

**AGENCY:** National Science Foundation.

**ACTION:** Submission for OMB review; comment request.

**SUMMARY:** The National Science Foundation (NSF) has submitted the following request for revision of the approved collection of research and development data in accordance with the Paperwork Reduction Act of 1995. This is the second notice for public comment; the first was published in the **Federal Register** and no comments were received. NSF is forwarding the proposed renewal submission to the Office of Management and Budget (OMB) for clearance simultaneously with the publication of this second notice.

**DATES:** Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAmain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

**FOR ADDITIONAL INFORMATION CONTACT:** Suzanne H. Plimpton, Reports Clearance Officer, National Science Foundation, 2415 Eisenhower Avenue, Alexandria, VA 22314; or send email to *splimpto@nsf.gov.* Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339, which is accessible 24 hours a day, 7 days a week, 365 days a year (including federal holidays).

**SUPPLEMENTARY INFORMATION:**

*Title of Collection:* Computer and Information Science and Engineering (CISE) Research Experiences for Undergraduates (REU) Sites and Supplements Evaluation.

*OMB Approval Number:* 3145–0266.

*Type of Request:* Revision of an approved information collection.

*Abstract:* Every year the National Science Foundation (NSF) funds hundreds of Research Experience for Undergraduates (REU) activities through its REU program. The Directorate of Computer and Information Science and Engineering (CISE) is seeking to evaluate the effectiveness of the CISE REU program.

The REU program provides undergraduate students at US higher education institutions with opportunities to work with faculty on a research project. They can take the form of REU Sites or REU Supplements. REU Sites are based on independent proposals to initiate and conduct projects that engage a number of students in research. REU Supplements are included as a component of proposals for new or renewal NSF grants or cooperative agreements or may be requested for ongoing NSF-funded research projects.

By offering this opportunity to undergraduate students, the REU program seeks to expand student participation in all kinds of research — both disciplinary and interdisciplinary—encompassing efforts by individual investigators, groups, centers, national facilities, and others. The REU experience integrates research and education to attract a diverse pool of talented students into careers in science and engineering, including teaching and education research related to science and engineering.

The current data collection project intends to measure the impact of the undergraduate REU Sites and REU Supplements programs sponsored by NSF CISE. The project will conduct online surveys to track NSF CISE REU participants over time—including pre-program, post-program, and one-year post-program measurement—alongside two comparison groups: (1) students participating in other undergraduate research, and (2) students who do not participate in research. The researchers will supplement REU participants' survey data with basic REU information and perceptions of impact from NSF CISE REU Principal Investigators (PIs). The evaluation and research questions guiding this project include the following:

1. Who are the students reached through the NSF REU Program, and how do they compare to students participating in other types of research experiences and to students in the broader CISE community?

2. How do CISE REU Sites and REU Supplements differ from other research experiences (*e.g.,* other REUs, internships, and independent research projects)?

3. To what extent are the goals of the NSF REU Program being met by the individual projects within the program, including recruitment and retention of students in science and engineering fields and increasing diversity in these fields?

4. In what ways does participation in REU Sites, REU Supplements, internships, and/or other independent research experiences impact student attitudes and pathways to CISE careers and other research experiences?

5. In what ways does participation in the REU Sites and REU Supplements impact recruitment and retention of students who are underrepresented in computing?

Ultimately, the findings from this data collection will be used to understand and improve the impact of the CISE REU program, including increasing recruitment and retention in science and engineering and promoting a diverse group of computing/STEM careers.

*Use of the information:* The information collected through this survey will be used to evaluate the NSF CISE REU Program.

*Respondents:* There will be four types of respondents: NSF CISE REU Site and Supplement participants, a comparison group of undergraduate students who participate in other, non-NSF REU research experiences, a comparison group of undergraduate students who do not participate in research, and NSF CISE REU PIs.

NSF CISE REU participants will include undergraduate students who participate in REU projects in which the project's Principal Investigator chooses to use NSF-sponsored program evaluation services. Participants from the two comparison groups will be identified and recruited from a pool of undergraduates in computing fields who have participated in a prior survey of the Computing Research Association and have agreed to be contacted for future data collection. The participating NSF CISE REU PIs will also complete PI REU Information Forms at the beginning and end of their REUs.

*Estimated number of respondents:* The study's data collection activities will occur over an 18-month period. It is estimated that during this time, there will be approximately 1,188 NSF CISE REU survey respondents, 1,175 comparison group survey respondents, and 100 NSF CISE REU PI respondents, for a total of 2,463 respondents.

*Average time per reporting:* Each online survey for REU participants and comparison group respondents is designed to be completed in 25 minutes or less. The three REU PI forms require 15 minutes or less to complete.

*Frequency:* Each NSF CISE REU site participant will be asked to complete three surveys: (1) a pre-test before they begin their REU project; (2) a post-test, after their REU ends; and (3) a one-year follow-up survey. Within the data collection timeline for this project, this will allow for one full data collection cohort, plus a subset of Cohort 1 CISE REU site participants who will only complete a follow-up survey. For cohort 2, NSF CISE REU supplement participants will only complete a follow-up survey. Each comparison group participant, including both those with a different research experience and those with no research experience, will

be asked to complete a pre-test survey and a follow-up survey occurring approximately one year later. Within the data collection timeline for this project, there will be one full data collection cycle for comparison group participants, plus a subset of Cohort 1 comparison group participants who will only complete a follow-up survey. Each NSF CISE REU PI will complete an Evaluation Interest Form to enroll in the evaluation, a Time 1 PI REU Information Form before their REU begins, and a Time 2 REU PI Information Form when their REU ends. Within the data collection timeline for this project, there will be one full data collection cycle for the REU PIs.

*Estimate burden on the public:* For REU participants, there will be one cohort of complete data collection (pre-test, post-test, and follow-up), plus a subset of Cohort 1 CISE REU site participants who will only complete a follow-up survey. For Cohort 1, it is expected that approximately 188 REU participants will complete a 25-minute one-year follow-up survey. Based on an expected 1,000 REU participant respondents per cohort, it is expected that a total of approximately 1,000 REU respondents will complete a 25-minute pre-survey for Cohort 2. Of these 1,000 REU participant respondents, we expect approximately 70%, or 700, will complete a 25-minute post-survey. For the follow-up survey, it is expected that approximately 50% of these respondents, or N = 500, will complete a 25-minute one-year follow-up survey. This would result in 2,388 25-minute surveys completed by REU respondents, for a total of 996 burden hours for this subset of respondents.

For comparison group participants, there will be one cohort of data collection (pre-test and follow-up) plus a subset of Cohort 1 comparison group participants who will only complete a follow-up survey. For Cohort 1, it is expected that approximately 175 comparison group participants will complete a 25-minute one-year follow-up survey. For Cohort 2, it is expected that 1,000 respondents will complete a 25-minute pre-survey. Of these 1,000, approximately 50%, or 500, are expected to complete a 25-minute one-year follow-up survey. This would result in 1,675 surveys completed by comparison group respondents for 698 burden hours.

For REU PIs, there will be 18 months of complete data collection (Evaluation Interest Form and Time 1 and Time 2 REU PI Information Forms). Based on an expected 100 NSF CISE REU PIs choosing to receive evaluation services in each of the two years, It is expected that approximately 100 REU PIs will complete all forms (total completion time for all three is approximately 15 minutes or less). This would result in 25 burden hours for this subset of respondents.

Together, the total estimated survey burden for the project is 1,719 hours. The calculations are shown in Table 1.

TABLE 1—ESTIMATED SURVEY BURDEN

| Category of respondent | Number of cohort 1 responses | Number of cohort 2 responses (partial year) | Participation time (minutes) | Burden (hours) |
|---|---|---|---|---|
| REU participant Pre-survey | Completed | 1,000 | 25 | 417 |
| REU participant Post-survey (70% of original) | Completed | 700 | 25 | 292 |
| REU participant Follow-up survey (50% of original) | 188 | 500 | 25 | 287 |
| Comparison participant Pre-survey | Completed | 1,000 | 25 | 417 |
| Comparison participant Follow-up survey (50% of original) | 175 | 500 | 25 | 281 |
| REU PI Evaluation Interest Form | N/A | 100 | 3 | 5 |
| REU PI Time 1 Information Form | Completed | 100 | 2 | 3.33 |
| REU PI Time 2 Information Form | Completed | 100 | 10 | 16.67 |
| Total surveys to be completed | 363 | 4,000 | | 1,719 |

*Comments:* Comments are invited on:

1. Whether the proposed collection of information is necessary for the evaluation of the CISE REU Sites and Supplements Program.

2. The accuracy of the NSF's estimate of the burden of the proposed collection of information.

3. Ways to enhance the quality, utility, and clarity of the information on respondents, including through the use of automated collection techniques or other forms of information technology.

Dated: April 11, 2023.

**Suzanne H. Plimpton,**

*Reports Clearance Officer, National Science Foundation.*

[FR Doc. 2023–07943 Filed 4–13–23; 8:45 am]

**BILLING CODE 7555–01–P**

## NATIONAL SCIENCE FOUNDATION

### Sunshine Act Meetings

The National Science Board's (NSB) Committee on Oversight hereby gives notice of the scheduling of a videoconference meeting for the transaction of National Science Board business pursuant to the National Science Foundation Act and the Government in the Sunshine Act.

**TIME AND DATE:** Wednesday, April 19, 2023, from 10:30–11:30 a.m. EDT.

**PLACE:** This meeting will be held by videoconference through the National Science Foundation.

**STATUS:** Open.

**MATTERS TO BE CONSIDERED:** The agenda of the meeting is: Committee Chair's opening remarks; Approve prior minutes; FY 2021 Merit Review Digest matters, including consideration of draft Overview, discussion of NSF proposal regarding the Digest and Overview, and presentation regarding digital data tables of merit review data; Context for OIG Semiannual Report Review and NSF Management Response; and Committee Chair's closing remarks.

**CONTACT PERSON FOR MORE INFORMATION:** Point of contact for this meeting is: (Chris Blair, *cblair@nsf.gov*), 703/292–7000. Members of the public can observe this meeting through a YouTube livestream. The YouTube link will be available from the NSB meetings web page—*https://www.nsf.gov/nsb/meetings/index.jsp.*

**Christopher Blair,**

*Executive Assistant to the National Science Board Office.*

[FR Doc. 2023–08078 Filed 4–12–23; 4:15 pm]

**BILLING CODE 7555–01–P**

## NUCLEAR REGULATORY COMMISSION

**[NRC–2023–0001]**

### Sunshine Act Meetings

**TIME AND DATE:** Weeks of April 17, 24, May 1, 8, 15, 22, 2023. The schedule for Commission meetings is subject to change on short notice. The NRC Commission Meeting Schedule can be found on the internet at: *https://www.nrc.gov/public-involve/public-meetings/schedule.html.*

**PLACE:** The NRC provides reasonable accommodation to individuals with disabilities where appropriate. If you need a reasonable accommodation to participate in these public meetings or need this meeting notice or the transcript or other information from the public meetings in another format (*e.g.,* braille, large print), please notify Anne Silk, NRC Disability Program Specialist, at 301–287–0745, by videophone at 240–428–3217, or by email at *Anne.Silk@nrc.gov.* Determinations on requests for reasonable accommodation will be made on a case-by-case basis.

**STATUS:** Public.

Members of the public may request to receive the information in these notices electronically. If you would like to be added to the distribution, please contact the Nuclear Regulatory Commission, Office of the Secretary, Washington, DC 20555, at 301–415–1969, or by email at *Wendy.Moore@nrc.gov* or *Tyesha.Bush@nrc.gov.*

**MATTERS TO BE CONSIDERED:**

**Week of April 17, 2023**

*Thursday, April 20, 2023*

9 a.m. Strategic Programmatic Overview of the Fuel Facilities and the Spent Fuel Storage and Transportation Business Lines (Public Meeting) (Contact: Kellee Jamerson: 301–415–7408)

*Additional Information:* The meeting will be held in the Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland. The public is invited to attend the Commission's meeting in person or watch live via webcast at the Web address—*https://video.nrc.gov/.*

**Week of April 24, 2023—Tentative**

There are no meetings scheduled for the week of April 24, 2023.

**Week of May 1, 2023—Tentative**

There are no meetings scheduled for the week of May 1, 2023.

**Week of May 8, 2023—Tentative**

There are no meetings scheduled for the week of May 8, 2023.

**Week of May 15, 2023—Tentative**

*Tuesday, May 16, 2023*

9 a.m. Update on 10 CFR part 53 Licensing and Regulation of Advanced Nuclear Reactors (Public Meeting) (Contact: Scott Tonsfeldt: 301–415–1783)

*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, May 18, 2023*

10 a.m. Meeting with the Organization of Agreement States and the Conference of Radiation Control Program Directors (Public Meeting) (Contact: Jeffrey Lynch: 301–415–5041)

*Additional Information:* The meeting will be held in the Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland. The public is invited to attend the Commission's meeting in person or watch live via webcast at the Web address—*https://video.nrc.gov/.*

**Week of May 22, 2023—Tentative**

There are no meetings scheduled for the week of May 22, 2023.

**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: April 12, 2023.

For the Nuclear Regulatory Commission.

**Wesley W. Held,**

*Policy Coordinator, Office of the Secretary.*

[FR Doc. 2023–08113 Filed 4–12–23; 4:15 pm]

**BILLING CODE 7590–01–P**

## OFFICE OF PERSONNEL MANAGEMENT

### Federal Employees' Retirement System; Normal Cost Percentages

**AGENCY:** Office of Personnel Management.

**ACTION:** Notice.

**SUMMARY:** The Office of Personnel Management (OPM) is providing notice of revised normal cost percentages for employees covered by the Federal Employees' Retirement System (FERS) Act of 1986.

**DATES:** The revised normal cost percentages are effective at the beginning of the first pay period commencing on or after October 1, 2023. Agency appeals of the normal cost percentages must be filed no later than October 16, 2023.

**ADDRESSES:** Send or deliver agency appeals of the normal cost percentages and requests for actuarial assumptions and data to the Board of Actuaries, care of Gregory Kissel, Senior Actuary, Office of Healthcare and Insurance, Office of Personnel Management, Room 4316, 1900 E Street NW, Washington, DC 20415, or by email to *actuary@opm.gov.*

**FOR FURTHER INFORMATION CONTACT:** Karla Yeakle, (202) 606–0299.

**SUPPLEMENTARY INFORMATION:** The FERS Act of 1986, Public Law 99–335, created a new retirement system intended to cover most Federal employees hired after 1983. Most Federal employees hired before 1984 are under the older Civil Service Retirement System (CSRS). Section 8423 of title 5, United States Code, as added by the FERS Act of 1986, provides for the payment of the Government's share of the cost of the retirement system under FERS. Employees' contributions are established by law and constitute only a portion of the cost of funding the retirement system; employing agencies are required to pay the remaining costs. The amount of funding required, known as ''normal cost,'' is the entry age normal cost of the provisions of FERS that relate to the Civil Service Retirement and Disability Fund (Fund). The normal cost must be computed by OPM in accordance with generally accepted actuarial practices and standards (using dynamic assumptions). The normal cost calculations depend on economic and demographic assumptions. Subpart D of part 841 of title 5, Code of Federal Regulations, regulates how normal costs are determined.

In its meeting on May 10, 2022, the Board of Actuaries of the Civil Service Retirement System (the Board) recommended revisions to the demographic assumptions used in the actuarial valuations of CSRS and FERS. The demographic assumptions include assumed rates of future mortality, employee withdrawal, retirement, and merit and longevity pay increases. The Board reviewed the long-term economic assumptions and determined that they should remain unchanged. OPM has adopted the Board's recommendations.

With regard to the economic assumptions described under section 841.402 of title 5, Code of Federal Regulations, used in the actuarial valuations of FERS, the Board concluded that the long-term economic assumptions should remain unchanged from what was determined at the Board's meeting on April 2, 2020. The long-term economic assumptions continue to be a rate of investment return of 4.0 percent; assumed inflation rate of 2.40 percent; the assumed rate of FERS annuitant Cost of Living Adjustments should remain at 80 percent of the assumed rate of inflation; and the projected rate of General Schedule salary increases should remain at 2.65 percent. The general salary increases are in addition to assumed merit salary increases. These assumptions are intended to reflect the long term expected future experience of the Systems.

The demographic assumptions are determined separately for each of a number of special groups, in cases where separate experience data is available. Based on the demographic and economic assumptions described above, OPM has determined the normal cost percentage for each category of employees under section 841.403 of title 5, Code of Federal Regulations.

Section 5001 of Public Law 112–96, The Middle Class Tax Relief and Jobs Creation Act of 2012, established provisions for FERS Revised Annuity Employees (FERS–RAE). The law permanently increases the retirement contributions by 2.30 percent of pay for these employees. Subsequently, Section 401 of Public Law 113–67, the Bipartisan Budget Act of 2013, created another class of FERS coverage, FERS-Further Revised Annuity Employee (FERS–FRAE). Employees subject to FERS–FRAE must pay an increase of 1.30 percent of pay above the retirement contribution percentage set for FERS–RAE. Separate normal cost percentages apply for employees covered under FERS–RAE and for employees covered under FERS–FRAE.

The normal cost percentages for each category of employee, including the employee contributions, are as follows:

NORMAL COST PERCENTAGES FOR FERS, FERS—REVISED ANNUITY EMPLOYEE (RAE), AND FERS—FURTHER REVISED ANNUITY (FRAE) GROUPS

| Group | FERS normal cost (percent) | FERS–RAE normal cost (percent) | FERS–FRAE normal cost (percent) |
|---|---|---|---|
| Members | 26.3 | 19.6 | 19.9 |
| Capitol Police covered under 5 U.S.C. 8412(d) and 5 U.S.C. 8425(c) | 39.5 | 40.0 | 40.2 |
| Other Congressional employees | 27.0 | 19.6 | 19.9 |
| Law enforcement officers, members of the Supreme Court Police, firefighters, nuclear materials couriers, customs and border protection officers, and employees under section 302 of the Central Intelligence Agency Retirement Act of 1964 for certain employees | 39.5 | 40.0 | 40.2 |
| Air traffic controllers | 40.4 | 40.9 | 41.2 |
| Military reserve technicians | 21.4 | 21.8 | 22.1 |
| Employees under section 303 of the Central Intelligence Agency Retirement Act of 1964 for certain employees (when serving abroad) | 27.0 | 27.5 | 27.8 |
| Other employees of the United States Postal Service | 16.9 | 17.3 | 17.6 |
| All other regular FERS employees | 19.2 | 19.6 | 19.9 |

Under section 841.408 of title 5, Code of Federal Regulations, these normal cost percentages are effective at the beginning of the first pay period commencing on or after October 1, 2023.

The time limit and address for filing agency appeals under sections 841.409 through 841.412 of title 5, Code of Federal Regulations, are stated in the **DATES** and **ADDRESSES** sections of this notice.

Office of Personnel Management.

**Stephen Hickman,**

*Federal Register Liaison.*

[FR Doc. 2023–07876 Filed 4–13–23; 8:45 am]

**BILLING CODE 6325–38–P**

## OFFICE OF PERSONNEL MANAGEMENT

### Federal Employees' Retirement System; Present Value Factors

**AGENCY:** Office of Personnel Management.

**ACTION:** Notice.

**SUMMARY:** The Office of Personnel Management (OPM) is providing notice of adjusted present value factors applicable to retirees who elect to provide survivor annuity benefits to a spouse based on post-retirement marriage, and to retiring employees who elect the alternative form of annuity or elect to credit certain service with nonappropriated fund instrumentalities. This notice is necessary to conform the present value factors to changes in the economic and demographic assumptions adopted by the Board of Actuaries of the Civil Service Retirement System.

**DATES:** The revised present value factors apply to survivor reductions or employee annuities that commence on or after October 1, 2023.

**ADDRESSES:** Send requests for actuarial assumptions and data to the Board of Actuaries, care of Gregory Kissel, Senior Actuary, Office of Healthcare and Insurance, Office of Personnel Management, Room 4316, 1900 E Street NW, Washington, DC 20415, or by email to *actuary@opm.gov.*

**FOR FURTHER INFORMATION CONTACT:** Karla Yeakle, (202) 606–0299.

**SUPPLEMENTARY INFORMATION:** Several provisions of the Federal Employees' Retirement System (FERS) require reduction of annuities on an actuarial basis. Under each of these provisions, OPM is required to issue regulations on the method of determining the reduction to ensure that the present value of the reduced annuity plus a lump-sum equals, to the extent practicable, the present value of the unreduced benefit. The regulations for each of these benefits provide that OPM will publish a notice in the **Federal Register** whenever it changes the factors used to compute the present values of these benefits.

Section 842.706(a) of title 5, Code of Federal Regulations, prescribes the method for computing the reduction in the beginning rate of annuity payable to a retiree who elects an alternative form of annuity under 5 U.S.C. 8420a. That reduction is required to produce an annuity that is the actuarial equivalent of the annuity of a retiree who does not elect an alternative form of annuity. The

present value factors listed below are used to compute the annuity reduction under 5 CFR 842.706(a).

Section 842.615 of title 5, Code of Federal Regulations, prescribes the use of these factors for computing the reduction required for certain elections to provide survivor annuity benefits based on a post-retirement marriage or divorce under 5 U.S.C. 8416(b), 8416(c), or 8417(b). Under section 11004 of the Omnibus Budget Reconciliation Act of 1993, Public Law 103–66, effective October 1, 1993, OPM ceased collection of these survivor election deposits by means of either a lump-sum payment or installments. Instead, OPM is required to establish a permanent actuarial reduction in the annuity of the retiree. This means that OPM must take the amount of the deposit computed under the old law and translate it into a lifetime reduction in the retiree's benefit.

Subpart F of part 847 of title 5, Code of Federal Regulations, prescribes the use of present value factors for computing the deficiency the retiree must pay to receive credit for certain service with nonappropriated fund instrumentalities made creditable by an election under section 1043 of Public Law 104–106. Subpart I of part 847 of title 5, Code of Federal Regulations, prescribes the use of present value factors for employees that elect to credit nonappropriated fund instrumentality service to qualify for immediate retirement under section 1132 of Public Law 107–107.

OPM published the present value factors currently in effect on March 29, 2021, at 86 FR 16398. On April 14, 2023, OPM published a notice to revise the normal cost percentage under the Federal Employees' Retirement System (FERS) Act of 1986, Public Law 99–335, based on changed assumptions adopted by the Board of Actuaries of the Civil Service Retirement System. Under 5 U.S.C. 8461(i), those changes require corresponding changes in the present value factors used to produce actuarially equivalent benefits when required by the FERS Act. The revised factors will become effective on October 1, 2023, to correspond with the changes in FERS normal cost percentages. For alternative forms of annuity, the new factors will apply to annuities that commence on or after October 1, 2023. See 5 CFR 842.706. For survivor election deposits, the new factors will apply to survivor reductions that commence on or after October 1, 2023. See 5 CFR 842.615(b). For obtaining credit for service with certain nonappropriated fund instrumentalities, the new factors will apply to cases in which the date of computation under 5 CFR 847.603 or 847.809 is on or after October 1, 2023. See 5 CFR 842.602, 842.616, 847.603, and § 847.809.

OPM is, therefore, revising the tables of present value factors to read as follows:

### TABLE I—FERS PRESENT VALUE FACTORS FOR AGES 62 AND OLDER

[Applicable to annuity payable following an election under 5 U.S.C. 8416(b), 8416(c), 8417(b), § 8420a, under section 1043 of Public Law 104–106, or under section 1132 of Public Law 107–107]

| Age | Present value factor |
|---|---|
| 62 | 226.5 |
| 63 | 219.9 |
| 64 | 213.2 |
| 65 | 206.4 |
| 66 | 199.6 |
| 67 | 192.7 |
| 68 | 185.8 |
| 69 | 178.9 |
| 70 | 171.9 |
| 71 | 165.0 |
| 72 | 158.1 |
| 73 | 151.2 |
| 74 | 144.3 |
| 75 | 137.5 |
| 76 | 130.8 |
| 77 | 124.2 |
| 78 | 117.7 |
| 79 | 111.3 |
| 80 | 105.0 |
| 81 | 98.8 |
| 82 | 92.9 |
| 83 | 87.1 |
| 84 | 81.5 |
| 85 | 76.1 |
| 86 | 71.0 |
| 87 | 66.0 |
| 88 | 61.3 |
| 89 | 56.8 |
| 90 | 52.6 |
| 91 | 48.7 |
| 92 | 45.1 |
| 93 | 41.8 |
| 94 | 38.8 |
| 95 | 36.1 |
| 96 | 33.6 |
| 97 | 31.4 |
| 98 | 29.4 |
| 99 | 27.7 |
| 100 | 26.2 |
| 101 | 24.8 |
| 102 | 23.5 |
| 103 | 22.2 |
| 104 | 20.8 |
| 105 | 19.3 |
| 106 | 17.3 |
| 107 | 14.4 |
| 108 | 9.5 |
| 109 | 6.4 |

### TABLE II.A—FERS PRESENT VALUE FACTORS FOR AGES 40 THROUGH 61

[Applicable to annuity payable when annuity is not increased by cost-of-living adjustments before age 62 following an election under 5 U.S.C. 8416(b), 8416(c), 8417(b), § 8420a, under section 1043 of Public Law 104–106, or under section 1132 of Public Law 107–107]

| Age | Present value factor |
|---|---|
| 40 | 271.7 |
| 41 | 270.3 |
| 42 | 268.7 |
| 43 | 267.1 |
| 44 | 265.4 |
| 45 | 263.7 |
| 46 | 261.8 |
| 47 | 259.9 |
| 48 | 257.9 |
| 49 | 255.9 |
| 50 | 253.9 |
| 51 | 251.9 |
| 52 | 249.7 |
| 53 | 247.6 |
| 54 | 245.4 |
| 55 | 243.1 |
| 56 | 240.8 |
| 57 | 238.5 |
| 58 | 236.1 |
| 59 | 233.8 |
| 60 | 231.4 |
| 61 | 229.0 |

### TABLE II.B—FERS PRESENT VALUE FACTORS FOR AGES 40 THROUGH 61

[Applicable to annuity payable when annuity is increased by cost-of-living adjustments before age 62 following an election under 5 U.S.C. 8416(b), 8416(c), 8417(b), or § 8420a, under section 1043 of Public Law 104–106, or under section 1132 of Public Law 107–107]

| Age | Present value factor |
|---|---|
| 40 | 355.7 |
| 41 | 350.7 |
| 42 | 345.7 |
| 43 | 340.5 |
| 44 | 335.3 |
| 45 | 329.9 |
| 46 | 324.4 |
| 47 | 318.7 |
| 48 | 313.0 |
| 49 | 307.3 |
| 50 | 301.5 |
| 51 | 295.7 |
| 52 | 289.7 |
| 53 | 283.7 |
| 54 | 277.6 |
| 55 | 271.4 |
| 56 | 265.2 |
| 57 | 258.9 |
| 58 | 252.6 |
| 59 | 246.1 |
| 60 | 239.7 |
| 61 | 233.1 |

TABLE III—FERS PRESENT VALUE FACTORS FOR AGES AT CALCULATION BELOW 40

[Applicable to annuity payable following an election under section 1043 of Public Law 104–106 or under section 1132 of Public Law 107–107]

| Age at calculation | Present value of a monthly annuity |
|---|---|
| 17 | 443.3 |
| 18 | 440.3 |
| 19 | 437.2 |
| 20 | 434.1 |
| 21 | 431.0 |
| 22 | 427.7 |
| 23 | 424.4 |
| 24 | 421.0 |
| 25 | 417.6 |
| 26 | 414.1 |
| 27 | 410.5 |
| 28 | 406.8 |
| 29 | 403.0 |
| 30 | 399.2 |
| 31 | 395.2 |
| 32 | 391.2 |
| 33 | 387.1 |
| 34 | 382.9 |
| 35 | 378.6 |
| 36 | 374.2 |
| 37 | 369.7 |
| 38 | 365.2 |
| 39 | 360.5 |

Office of Personnel Management.

**Stephen Hickman,**

*Federal Register Liaison.*

[FR Doc. 2023–07878 Filed 4–13–23; 8:45 am]

**BILLING CODE 6325–38–P**

## OFFICE OF PERSONNEL MANAGEMENT

### Civil Service Retirement System; Present Value Factors

**AGENCY:** Office of Personnel Management.

**ACTION:** Notice.

**SUMMARY:** The Office of Personnel Management (OPM) is providing notice of adjusted present value factors applicable to retirees under the Civil Service Retirement System (CSRS) who elect to provide survivor annuity benefits to a spouse based on post-retirement marriage; to retiring employees who elect the alternative form of annuity, owe certain redeposits based on refunds of contributions for service ending before March 1, 1991, or elect to credit certain service with nonappropriated fund instrumentalities; or, for individuals with certain types of retirement coverage errors who can elect to receive credit for service by taking an actuarial reduction under the provisions of the Federal Erroneous Retirement Coverage Correction Act. This notice is necessary to conform the present value factors to changes in the economic and demographic assumptions adopted by the Board of Actuaries of the Civil Service Retirement System.

**DATES:** *Applicable Date:* The revised present value factors apply to survivor reductions or employee annuities that commence on or after October 1, 2023.

**ADDRESSES:** Send requests for actuarial assumptions and data to the Board of Actuaries, care of Gregory Kissel, Senior Actuary, Office of Healthcare and Insurance, Office of Personnel Management, Room 4316, 1900 E Street NW, Washington, DC 20415, or by email to *actuary@opm.gov.*

**FOR FURTHER INFORMATION CONTACT:** Karla Yeakle, (202) 606–0299.

**SUPPLEMENTARY INFORMATION:** Several provisions of CSRS require reduction of annuities on an actuarial basis. Under each of these provisions, OPM is required to issue regulations on the method of determining the reduction to ensure that the present value of the reduced annuity plus a lump-sum equals, to the extent practicable, the present value of the unreduced benefit. The regulations for each of these benefits provide that OPM will publish a notice in the **Federal Register** whenever it changes the factors used to compute the present values of these benefits.

Section 831.2205(a) of title 5, Code of Federal Regulations, prescribes the method for computing the reduction in the beginning rate of annuity payable to a retiree who elects an alternative form of annuity under 5 U.S.C. 8343a. That reduction is required to produce an annuity that is the actuarial equivalent of the annuity of a retiree who does not elect an alternative form of annuity. The present value factors listed below are used to compute the annuity reduction under section 831.2205(a) of title 5, Code of Federal Regulations.

Section 831.303(c) of title 5, Code of Federal Regulations, prescribes the use of these factors for computing the reduction to complete payment of certain redeposits of refunded deductions based on periods of service that ended before March 1, 1991, under section 8334(d)(2) of title 5, United States Code; section 1902 of the National Defense Authorization Act for Fiscal Year 2010, Public Law 111–84.

Section 831.663 of Title 5, Code of Federal Regulations, prescribes the use of similar factors for computing the reduction required for certain elections to provide survivor annuity benefits based on a post-retirement marriage under section 8339(j)(5)(C) or (k)(2) of title 5, United States Code. Under section 11004 of the Omnibus Budget Reconciliation Act of 1993, Public Law 103–66, effective October 1, 1993, OPM ceased collection of these survivor election deposits by means of either a lump-sum payment or installments. Instead, OPM is required to establish a permanent actuarial reduction in the annuity of the retiree. This means that OPM must take the amount of the deposit computed under the old law and translate it into a lifetime reduction in the retiree's benefit.

Subpart F of part 847 of title 5, Code of Federal Regulations, prescribes the use of similar factors for computing the deficiency the retiree must pay to receive credit for certain service with nonappropriated fund instrumentalities made creditable by an election under section 1043 of Public Law 104–106. Subpart I of part 847 of title 5, Code of Federal Regulations, prescribes the use of present value factors for employees that elect to credit nonappropriated fund instrumentality service to qualify for immediate retirement under section 1132 of Public Law 107–107.

Sections 839.1114–1121 of title 5, Code of Federal Regulations, prescribes the use of these factors for computing the reduction required for certain service credit deposits, Government Thrift Savings Plan contributions, or for previous payment of the FERS Basic Employee Death Benefit in annuities subject to the Federal Erroneous Retirement Coverage Corrections Act (FERCCA) under the provisions of Public Law 106–265. Retirees and survivors who owe a larger deposit because of a retirement coverage error can choose to pay the additional deposit amount or their annuity will be actuarially reduced to account for the deposit amount that remains unpaid. Additionally, retirees and survivors of deceased employees who received Government contributions to their Thrift Savings Plan account after being corrected to FERS and who later elect CSRS Offset under FERCCA keep the Government contributions and associated earnings in their Thrift Savings Plan account. Instead of adjusting the Thrift Savings Plan account, FERCCA requires that the CSRS-Offset annuity be actuarially reduced. Also, survivors that received the FERS Basic Employee Death Benefit and elect CSRS Offset under FERCCA do not have to pay back the Basic Employee Death Benefit. Instead, OPM actuarially reduces the survivor annuity payable. These reductions under FERCCA allow the annuity to be actuarially reduced in a way that, on

average, allows the Fund to recover the amount of the missing lump sum over the recipient's lifetime.

The present value factors currently in effect were published by OPM on March 29, 2021, at 86 FR 16399. On April 14, 2023, OPM published a notice to revise the normal cost percentage under the Federal Employees' Retirement System (FERS) Act of 1986, Public Law 99–335, based on changed assumptions adopted by the Board of Actuaries of the CSRS. Those changes require corresponding changes in present value factors used to produce actuarially equivalent benefits when required by the Civil Service Retirement Act. The revised factors will become effective on October 1, 2023. For alternative forms of annuity and redeposits of employee contributions, the new factors will apply to annuities that commence on or after October 1, 2023. See 5 CFR 831.2205 and 831.303(c). For survivor election deposits, the new factors will apply to survivor reductions that commence on or after October 1, 2023. See 5 CFR 831.663(c) and (d). For obtaining credit for service with certain nonappropriated fund instrumentalities, the new factors will apply to cases in which the date of computation under sections 847.603 or 847.809 of title 5, Code of Federal Regulations, is on or after October 1, 2023. See 5 CFR 842.602, 842.616, 847.603, and § 847.809. For retirement coverage corrections under FERCCA, the new factors will apply to annuities that commence on or after October 1, 2023, or in the case of previous payment of the Basic Employee Death Benefit, the new factors will apply to deaths occurring on or after October 1, 2023. See 5 CFR 839.1114–1121 and 5 CFR 831.303(d).

OPM is, therefore, revising the tables of present value factors to read as follows:

CSRS Present Value Factors Applicable to Annuity Payable Following an Election Under Section 8339(j) or (k) or Section 8343a of Title 5, United States Code, or Under Section 1043 of Public Law 104–106 or Under Section 1132 of Public Law 107–107 or Under FERCCA or Following a Redeposit Under Section 8334(d)(2) of Title 5, United States Code

| Age | Present value factor |
|---|---|
| 40 | 393.5 |
| 41 | 387.5 |
| 42 | 381.4 |
| 43 | 375.2 |
| 44 | 368.9 |
| 45 | 362.5 |
| 46 | 355.9 |
| 47 | 349.3 |
| 48 | 342.6 |
| 49 | 335.9 |
| 50 | 329.2 |
| 51 | 322.3 |
| 52 | 315.4 |
| 53 | 308.4 |
| 54 | 301.3 |
| 55 | 294.1 |
| 56 | 286.7 |
| 57 | 279.1 |
| 58 | 271.6 |
| 59 | 264.1 |
| 60 | 256.5 |
| 61 | 248.9 |
| 62 | 241.3 |
| 63 | 233.6 |
| 64 | 225.9 |
| 65 | 218.2 |
| 66 | 210.5 |
| 67 | 202.7 |
| 68 | 195.0 |
| 69 | 187.4 |
| 70 | 179.7 |
| 71 | 172.1 |
| 72 | 164.6 |
| 73 | 157.1 |
| 74 | 149.7 |
| 75 | 142.4 |
| 76 | 135.1 |
| 77 | 128.0 |
| 78 | 121.0 |
| 79 | 114.1 |
| 80 | 107.4 |
| 81 | 100.9 |
| 82 | 94.5 |
| 83 | 88.4 |
| 84 | 82.6 |
| 85 | 76.9 |
| 86 | 71.5 |
| 87 | 66.4 |
| 88 | 61.6 |
| 89 | 57.0 |
| 90 | 52.8 |
| 91 | 48.8 |
| 92 | 45.2 |
| 93 | 41.9 |
| 94 | 38.9 |
| 95 | 36.1 |
| 96 | 33.7 |
| 97 | 31.5 |
| 98 | 29.6 |
| 99 | 27.9 |
| 100 | 26.3 |
| 101 | 24.9 |
| 102 | 23.6 |
| 103 | 22.3 |
| 104 | 20.9 |
| 105 | 19.3 |
| 106 | 17.3 |
| 107 | 14.4 |
| 108 | 9.5 |
| 109 | 6.4 |

CSRS Present Value Factors Applicable to Annuity Payable Following an Election Under Section 1043 of Public Law 104–106 or Under Section 1132 of Public Law 107–107 or Under FERCCA

[For ages at calculation below 40]

| Age at calculation | Present value of a monthly annuity |
|---|---|
| 17 | 507.1 |
| 18 | 503.0 |
| 19 | 498.9 |
| 20 | 494.6 |
| 21 | 490.3 |
| 22 | 486.0 |
| 23 | 481.5 |
| 24 | 477.0 |
| 25 | 472.4 |
| 26 | 467.8 |
| 27 | 463.0 |
| 28 | 458.2 |
| 29 | 453.3 |
| 30 | 448.3 |
| 31 | 443.2 |
| 32 | 438.0 |
| 33 | 432.8 |
| 34 | 427.5 |
| 35 | 422.0 |
| 36 | 416.5 |
| 37 | 410.9 |
| 38 | 405.2 |
| 39 | 399.4 |

Office of Personnel Management.

**Stephen Hickman,**

*Federal Register Liaison.*

[FR Doc. 2023–07877 Filed 4–13–23; 8:45 am]

BILLING CODE 6325–38–P

## POSTAL REGULATORY COMMISSION

**[Docket No. R2023–2; Order No. 6480]**

### Market Dominant Price Adjustment

**AGENCY:** Postal Regulatory Commission.

**ACTION:** Notice.

**SUMMARY:** The Commission is recognizing a recently filed Postal Service notice of inflation-based rate adjustments affecting market dominant domestic and international products and services, along with proposed classification changes. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

**DATES:** *Comments are due:* May 10, 2023.

**ADDRESSES:** Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov*. Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

**FOR FURTHER INFORMATION CONTACT:** David A. Trissell, General Counsel, at 202–789–6820.

**SUPPLEMENTARY INFORMATION:**

**Table of Contents**

I. Introduction
II. Overview of the Postal Service's Filing
III. Initial Administrative Actions
IV. Ordering Paragraphs

## I. Introduction

On April 10, 2023, the Postal Service filed a notice of price adjustments affecting Market Dominant domestic and international products and services, along with proposed classification changes to the Mail Classification Schedule (MCS).[1] The intended effective date for the planned price adjustments is July 9, 2023. Notice at 1. The Notice, which was filed pursuant to 39 CFR part 3030, triggers a notice-and-comment proceeding. 39 CFR 3030.125.

## II. Overview of the Postal Service's Filing

The Postal Service's filing consists of the Notice, which the Postal Service represents addresses data and information required under 39 CFR 3030.122 and 39 CFR 3030.123; three attachments (Attachments A–C) to the Notice; and six public library references and one non-public library reference.

Attachment A presents the planned price and related product description changes to the MCS. Notice, Attachment A. Attachments B and C address workshare discounts and the price cap calculation, respectively. *Id.* Attachments B and C.

The first five public library references provide supporting documentation for the five classes of mail, and the sixth public library reference shows the banked rate adjustment authority for each class of mail over the last five years.[2] The Postal Service also filed a library reference pertaining to the two international mail products within First-Class Mail (Outbound Single-Piece First-Class Mail International and Inbound Letter Post) under seal and applied for non-public treatment of those materials.[3]

The Postal Service's planned percentage changes by class are, on average, as follows:

| Market dominant class | Planned price adjustment (%) |
|---|---|
| First-Class Mail | 5.378 |
| USPS Marketing Mail | 5.381 |
| Periodicals | 8.122 |
| Package Services | 5.379 |
| Special Services | 5.429 |

Notice at 5. Price adjustments for products within classes vary from the average. *See, e.g., id.* at 7, 10 (Table 6 showing range for First-Class Mail products and Table 9 showing range for USPS Marketing Mail products).

The Postal Service identifies the effect of its proposed classification changes on the MCS in Attachment A. *Id.* at 39; *id.* Attachment A. The Postal Service also seeks approval for the following six promotions for the indicated periods:

- Emerging and Advanced Technology Promotion (mailers to select a six-month promotion period within calendar year 2024);
- Informed Delivery Promotion (August 1–December 31, 2024);
- Retargeting Promotion (September 1–November 30, 2024);
- Reply Mail IMbA Promotion (July 1–December 31, 2024);
- Personalized Color Transpromo Promotion (February 1–July 31, 2024); and
- Tactile, Sensory and Interactive Engagement Promotion (February 1–July 31, 2024).

*Id.* at 34–37.

## III. Initial Administrative Actions

Pursuant to 39 CFR 3030.124(a), the Commission establishes Docket No. R2023–2 to consider the planned price adjustments for Market Dominant postal products and services, as well as the related classification changes, identified in the Notice. The Commission invites comments from interested persons on whether the Postal Service's planned price adjustments are consistent with applicable statutory and regulatory requirements. 39 CFR 3030.125. The applicable statutory and regulatory requirements the Commission considers in its review are the requirements of 39 CFR part 3030, Commission directives and orders, and 39 U.S.C. 3626, 3627, and 3629. 39 CFR 3030.126(b). Comments are due no later than May 10, 2023. 39 CFR 3030.124(f).

The public portions of the Postal Service's filing are available for review on the Commission's website (*http://www.prc.gov*). Comments and other material filed in this proceeding will be available for review on the Commission's website unless the information contained therein is subject to an application for non-public treatment. The Commission's rules on non-public materials (including access to documents filed under seal) appear in 39 CFR part 3011.

Pursuant to 39 U.S.C. 505, the Commission appoints R. Tim Boone to represent the interests of the general public (Public Representative) in this proceeding.

## IV. Ordering Paragraphs

*It is ordered:*

1. The Commission establishes Docket No. R2023–2 to consider the planned price adjustments for Market Dominant postal products and services, as well as the related classification changes, identified in the Postal Service's April 10, 2023 Notice.

2. Comments on the planned price adjustments and related classification changes are due no later than May 10, 2023.

3. Pursuant to 39 U.S.C. 505, R. Tim Boone is appointed to serve as an officer of the Commission to represent the interests of the general public (Public Representative) in this proceeding.

4. The Commission directs the Secretary of the Commission to arrange for prompt publication of this notice in the **Federal Register**.

By the Commission.

**Erica A. Barker,**

*Secretary.*

[FR Doc. 2023–07915 Filed 4–13–23; 8:45 am]

**BILLING CODE 7710–FW–P**

[1] United States Postal Service Notice of Market-Dominant Price Change, April 10, 2023 (Notice).

[2] USPS Notice of Filing Public Library References, April 10, 2023, at 1.

[3] USPS Notice of Filing USPS–LR–R2023–2–NP1, April 10, 2023, at 1, Attachment 1.

## SECURITIES AND EXCHANGE COMMISSION

**[Investment Company Act Release No. 34881; 812–15373]**

### DoubleLine ETF Trust, et al.

April 10, 2023.

**AGENCY:** Securities and Exchange Commission (''Commission'').

**ACTION:** Notice.

Notice of an application under section 6(c) of the Investment Company Act of 1940 (''Act'') for an exemption from section 15(a) of the Act, as well as from certain disclosure requirements in rule 20a-1 under the Act, Item 19(a)(3) of Form N–1A, Items 22(c)(1)(ii), 22(c)(1)(iii), 22(c)(8) and 22(c)(9) of Schedule 14A under the Securities Exchange Act of 1934, and sections 6–07(2)(a), (b), and (c) of Regulation S–X (''Disclosure Requirements'').

**SUMMARY OF APPLICATION:** The requested exemption would permit Applicants (as defined below) to enter into and materially amend subadvisory agreements with subadvisers without shareholder approval and would grant relief from the Disclosure Requirements as they relate to fees paid to the subadvisers.

**APPLICANTS:** DoubleLine ETF Trust (the ''Trust''), a Delaware statutory trust registered under the Act as an open-end management investment company with multiple series, which include the DoubleLine Opportunistic Bond ETF and the DoubleLine Shiller CAPE® U.S. Equities ETF (each series a ''Fund'' and collectively the ''Funds''), and DoubleLine ETF Adviser LP, a Delaware limited partnership registered as an investment adviser under the Investment Advisers Act of 1940 that serves as investment adviser to the Funds (collectively with the Trust, the ''Applicants'').

**FILING DATES:** The application was filed on July 25, 2022 and amended on November 2, 2022 and January 20, 2023.

**HEARING OR NOTIFICATION OF HEARING:** An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing on any application by emailing the Commission's Secretary at *Secretarys-Office@sec.gov* and serving the Applicants with a copy of the request by email, if an email address is listed for the relevant Applicant below, or personally or by mail, if a physical address is listed for the relevant Applicant below. Hearing requests should be received by the Commission by 5:30 p.m. on May 5, 2023, and should be accompanied by proof of service on the Applicants, in the form of an affidavit, or, for lawyers, a certificate of service. Pursuant to rule 0–5 under the Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by emailing the Commission's Secretary.

**ADDRESSES:** The Commission: *Secretarys-Office@sec.gov.* Applicants: John J. O'Brien, *john.obrien@morganlewis.com.*

**FOR FURTHER INFORMATION CONTACT:** Laura L. Solomon, Senior Counsel, or Lisa Reid Ragen, Branch Chief, at (202) 551–6825 (Division of Investment Management, Chief Counsel's Office).

**SUPPLEMENTARY INFORMATION:** For Applicants' representations, legal analysis, and conditions, please refer to Applicants' second amended and restated application, dated January 20, 2023, which may be obtained via the Commission's website by searching for the file number, using the Company name box, at *http://www.sec.gov/search/search.htm,* or by calling (202) 551–8090.

For the Commission, by the Division of Investment Management, under delegated authority.

**Sherry R. Haywood,**

*Assistant Secretary.*

[FR Doc. 2023–07875 Filed 4–13–23; 8:45 am]

**BILLING CODE 8011–01–P**

## SMALL BUSINESS ADMINISTRATION

**[Disaster Declaration #17854 and #17855; Arkansas Disaster Number AR–00129]**

### Presidential Declaration of a Major Disaster for Public Assistance Only for the State of Arkansas

**AGENCY:** U.S. Small Business Administration.

**ACTION:** Notice.

**SUMMARY:** This is a Notice of the Presidential declaration of a major disaster for Public Assistance Only for the State of Arkansas (FEMA–4700–DR), dated 04/04/2023.

*Incident:* Severe Winter Storm.

*Incident Period:* 01/30/2023 through 02/02/2023.

**DATES:** Issued on 04/04/2023.

*Physical Loan Application Deadline Date:* 06/05/2023.

*Economic Injury (EIDL) Loan Application Deadline Date:* 01/04/2024.

**ADDRESSES:** Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

**FOR FURTHER INFORMATION CONTACT:** A. Escobar, Office of Disaster Recovery & Resilience, U.S. Small Business Administration, 409 3rd Street SW, Suite 6050, Washington, DC 20416, (202) 205–6734.

**SUPPLEMENTARY INFORMATION:** Notice is hereby given that as a result of the President's major disaster declaration on 04/04/2023, Private Non-Profit organizations that provide essential services of a governmental nature may file disaster loan applications at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

*Primary Counties:* Bradley, Calhoun, Cleveland, Dallas, Desha, Drew, Grant, Jefferson, Lincoln, Nevada, Ouachita, Searcy, Stone.

The Interest Rates are:

| | Percent |
|---|---|
| *For Physical Damage:* | |
| Non-Profit Organizations with Credit Available Elsewhere ... | 2.375 |
| Non-Profit Organizations without Credit Available Elsewhere ..... | 2.375 |
| *For Economic Injury:* | |
| Non-Profit Organizations without Credit Available Elsewhere ..... | 2.375 |

The number assigned to this disaster for physical damage is 17854 B and for economic injury is 17855 0.

(Catalog of Federal Domestic Assistance Number 59008)

**Francisco Sánchez, Jr.,**

*Associate Administrator, Office of Disaster Recovery & Resilience.*

[FR Doc. 2023–07891 Filed 4–13–23; 8:45 am]

**BILLING CODE 8026–09–P**

## DEPARTMENT OF STATE

**[Public Notice 12043]**

### Notice of Determinations; Culturally Significant Objects Being Imported for Exhibition—Determinations: ''Van Gogh and the Avant-Garde: The Modern Landscape'' Exhibition

**SUMMARY:** Notice is hereby given of the following determinations: I hereby determine that certain objects being imported from abroad pursuant to agreements with their foreign owners or custodians for temporary display in the exhibition ''Van Gogh and the Avant-

Garde: The Modern Landscape'' at The Art Institute of Chicago, in Chicago, Illinois, and at possible additional exhibitions or venues yet to be determined, are of cultural significance, and, further, that their temporary exhibition or display within the United States as aforementioned is in the national interest. I have ordered that Public Notice of these determinations be published in the **Federal Register**.

**FOR FURTHER INFORMATION CONTACT:** Elliot Chiu, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (telephone: 202–632–6471; email: *section2459@state.gov*). The mailing address is U.S. Department of State, L/PD, 2200 C Street NW (SA–5), Suite 5H03, Washington, DC 20522–0505.

**SUPPLEMENTARY INFORMATION:** The foregoing determinations were made pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), E.O. 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.;* 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, Delegation of Authority No. 236–3 of August 28, 2000, and Delegation of Authority No. 523 of December 22, 2021.

**Scott Weinhold,**

*Principal Deputy Assistant Secretary for Educational and Cultural Affairs, Bureau of Educational and Cultural Affairs, Department of State.*

[FR Doc. 2023–07880 Filed 4–13–23; 8:45 am]

**BILLING CODE 4710–05–P**

## DEPARTMENT OF STATE

**[Public Notice: 12012]**

### 60-Day Notice of Proposed Information Collection: State Assistance Management System (SAMS) Domestic Results Monitoring Module

**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 June 13, 2023.

**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–2023–0009'' in the Search field. Then click the ''Comment Now'' button and complete the comment form.
- *Email: millerml@state.gov*.
- *Regular Mail:* Send written comments to: Matthew Miller, Bureau of Administration, Office of Logistics Management, 1800 N.Kent Street, Arlington, VA 22209.

You must include the DS form number (if applicable), information collection title, and the OMB control number in any correspondence.

**FOR FURTHER INFORMATION CONTACT:** Direct requests for additional information regarding the collection listed in this notice, including requests for copies of the proposed collection instrument and supporting documents, to Matthew Miller, ServiceNow Team Lead, U.S. Department of State, Bureau of Administration, Office of Logistics Management (A/LM), Suite 1200, 1800 N Kent Street, Arlington, VA. He may be reached by phone at (703) 875–4317 or by email at *millerml@state.gov.*

**SUPPLEMENTARY INFORMATION:**

- *Title of Information Collection:* State Assistance Management System (SAMS) Domestic Results Monitoring Module.
- *OMB Control Number:* 1405–0183.
- *Type of Request:* Extension of a currently approved collection.
- *Originating Office:* Bureau of Administration, Office of Logistic Management (A/LM).
- *Form Number:* DS–4127.
- *Respondents:* Recipients of Department of State grants.
- *Estimated Number of Respondents:* 240.
- *Estimated Number of Responses:* 960.
- *Average Time per Response:* 20 hours.
- *Total Estimated Burden Time:* 19,200 hours.
- *Frequency:* Quarterly.
- *Obligation to Respond:* Mandatory.

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**

In compliance with OMB Guidelines contained in 2 CFR 200, recipient organizations are required to provide, and the U.S. Department of State is required to collect, periodic program and financial performance reports. The responsibility of the Department to track and monitor the programmatic and financial performance necessitates a database that can help facilitate this in a consistent and standardized manner. The SAMS Domestic Results Monitoring Module enables enhanced monitoring and evaluation of grants through standardized collection and storage of relevant award elements, such as quarterly progress reports, workplans, results monitoring plans, grant agreements, and other business information related to implementers. The SAMS Domestic Results Monitoring Module streamlines communication with implementers and allows for rapid identification of information gaps for specific projects.

**Methodology**

Information will be electronically entered into SAMS Domestic by respondents.

**Nathalie B. Stevens,**

*Division Director, Office of Logistic Management, Department of State.*

[FR Doc. 2023–07874 Filed 4–13–23; 8:45 am]

**BILLING CODE 4710–24–P**

## SURFACE TRANSPORTATION BOARD

**[Docket No. MCF 21106]**

### Kelsian USA Inc.—Acquisition of Control—AAAHI Topco Corporation

**AGENCY:** Surface Transportation Board.

**ACTION:** Notice tentatively approving and authorizing finance transaction.

**SUMMARY:** On March 15, 2023, Kelsian USA Inc., (Kelsian USA), a noncarrier, filed an application to acquire from AAAHI Holdings LLC (Seller), a noncarrier, the motor carrier assets and direct control of AAAHI Topco Corporation (Topco). Topco is a

noncarrier that indirectly wholly owns and controls the following passenger motor carriers: First Class Transportation LLC, Ace Express Coaches LLC, Hotard Coaches, Inc., Lux Bus America Co., Industrial Bus Lines, Inc. d/b/a All Aboard America, and SureRide Charter Inc. d/b/a Sun Diego Charter Co. (collectively, Regulated Carriers). The Board is tentatively approving and authorizing the transaction, and, if no opposing comments are timely filed, this notice will be the final Board action.

**DATES:** Comments may be filed by May 26, 2023. If any comments are filed, Kelsian USA may file a reply by June 13, 2023. If no opposing comments are filed by May 26, 2023, this notice shall be effective on May 27, 2023.

**ADDRESSES:** Comments may be filed with the Board either via e-filing at *www.stb.gov/proceedings-actions/e-filing/other-filings/*or in writing addressed to: Surface Transportation Board, 395 E Street SW, Washington, DC 20423–0001. Comments must reference Docket No. MCF 21106. In addition, one copy of comments must be sent to Kelsian USA's representative: Ayelet Hirschkorn, Kaplan Kirsch & Rockwell LLP, 450 Seventh Avenue, Suite 1401, New York, NY 10123.

**FOR FURTHER INFORMATION CONTACT:** Jonathon Binet at (202) 245–0368. If you require an accommodation under the Americans with Disabilities Act, please call (202) 245–0245.

**SUPPLEMENTARY INFORMATION:** Persons wishing to oppose the application must follow the rules at 49 CFR 1182.5 and 1182.8.

According to the application, Kelsian USA is a recently established Delaware corporation and wholly owned subsidiary of Kelsian International Holdings Pty Ltd., which is a wholly owned subsidiary of Kelsian Group Limited (Kelsian). (Appl. 1.) Kelsian, a public company incorporated and domiciled in Australia, controls numerous subsidiaries that provide integrated multi-modal transport and tourism services in Australia as well as established bus operations in Singapore, London, and the Channel Islands. (*Id.* at 1–2.) Kelsian USA states that neither it, nor Kelsian, nor any of Kelsian's other subsidiaries currently operate any transportation services in the United States. (*Id.* at 2.)

Seller is a non-carrier Delaware corporation that wholly owns Topco, which in turn wholly owns AAAHI Tempco LLC, which in turn wholly owns AAAHI Intermediate Holdings LLC, which in turn wholly owns AAAHI Acquisition Corporation, which in turn wholly owns All Aboard America! Holdings, Inc. (*Id.*) Tensile Capital Partners Master Fund LP is the majority equity holder of Seller. (*Id.* at 2–3.) According to the application, none of the entities in Seller's ownership chain have any direct or indirect ownership interest in any interstate passenger motor carrier other than the Regulated Carriers. (*Id.* at 3.) Kelsian states that, through the transaction, it would acquire all of Seller's outstanding stock of Topco, resulting in the placement of Topco and the Regulated Carriers under the control of Kelsian.[1] (*Id.* at 8.) The Regulated Carriers are as follows:

- First Class Transportation LLC, which provides regional interstate contract and charter passenger services between Texas and points throughout the United States, as well as Texas intrastate charter service and intrastate weekday park-and-ride commuter services in the Houston, Tex., metropolitan area;
- Ace Express Coaches, which operates charter and contract passenger services in both interstate and Colorado intrastate commerce;
- Hotard Coaches, Inc., which provides local and regional contract and charter passenger services within Louisiana and to and from various points within the continental United States;
- Industrial Bus Lines, Inc., d/b/a All Aboard America, which provides local and regional interstate and intrastate contract and charter passenger services in Arizona, Texas, and New Mexico;
- Lux Bus America Co., which provides interstate and intrastate passenger group charter motor coach and shuttle services in the Los Angeles and San Francisco Bay areas of California; and
- SureRide Charter, Inc. d/b/a Sun Diego Charter Company, which provides regional charter and contract passenger services from its base in National City, Cal.

[1] Additional information about the Regulated Carriers, including U.S. Department of Transportation (USDOT) numbers, motor carrier numbers, and USDOT safety fitness ratings, can be found in the application. (*See* Appl. 3–7.) Kelsian USA states that the transaction will also result in Kelsian USA indirectly owning and controlling, in addition to the Regulated Carriers, the following entities that are not subject to the jurisdiction of the Board: (i) Lux Leasing LLC, a California limited liability company that leases vehicles to Lux Bus; (ii) McClintock Enterprises, Inc., a California corporation that no longer provides passenger motor carrier services; (iii) All Aboard America School Transportation, LLC, a Texas limited liability company that no longer provides passenger motor carrier services; and (iv) All Aboard Transit Services LLC, a Delaware limited liability company that no longer provides passenger motor carrier services. (*Id.* at 7.)

Under 49 U.S.C. 14303(b), the Board must approve and authorize a transaction that it finds consistent with the public interest, taking into consideration at least (1) the effect of the proposed transaction on the adequacy of transportation to the public, (2) the total fixed charges that result, and (3) the interest of affected carrier employees. Kelsian USA has submitted the information required by 49 CFR 1182.2, including information to demonstrate that the proposed transaction is consistent with the public interest under 49 U.S.C. 14303(b), *see* 49 CFR 1182.2(a)(7), and a jurisdictional statement under 49 U.S.C. 14303(g) that the aggregate gross operating revenues of the Regulated Carriers exceeded $2 million during the 12-month period immediately preceding the filing of the application, *see* 49 CFR 1182.2(a)(5).

Kelsian USA asserts that the transaction is consistent with the public interest. Kelsian USA states that the transaction is not expected to have a material, detrimental impact on the adequacy of transportation services available for the public, but rather it anticipates that public services will be improved as ''operating efficiencies and innovative solutions are realized and implemented.'' (Appl. 10.) Moreover, according to Kelsian USA, there are no significant fixed charges associated with the transaction. (*Id.*) Kelsian anticipates that the Regulated Carriers will continue to operate without any material impact on existing employment levels resulting from the transaction, as the local general managers of the Regulated Carriers will continue day-to-day operational management of those companies and Kelsian ''is committed to maintaining the current workforce of the Regulated Carriers and plans to continue that workforce.'' (*Id.* at 11.) Kelsian USA asserts that that neither competition nor the public interest will be adversely affected by the proposed transaction, as the transaction only involves the transfer of Seller's holding company (Topco) and ownership and control of the Regulated Carriers to another non-passenger carrier holding company that does not currently have any ownership interests in, or control of, any other passenger motor carrier in the United States. (*Id.* at 12.) Moreover, Kelsian USA notes that, because it does not currently operate any motor carrier service in the United States, there will be no overlap in the service areas or customer bases of the Regulated Carriers and Kelsian USA. (*Id.*)

The Board finds that the acquisition as proposed in the application is consistent with the public interest and should be tentatively approved and

authorized. If any opposing comments are timely filed, these findings will be deemed vacated, and, unless a final decision can be made on the record as developed, a procedural schedule will be adopted to reconsider the application. *See* 49 CFR 1182.6. If no opposing comments are filed by expiration of the comment period, this notice will take effect automatically and will be the final Board action.

This action is categorically excluded from environmental review under 49 CFR 1105.6(c).

Board decisions and notices are available at *www.stb.gov.*

*It is ordered:*

1. The proposed transaction is approved and authorized, subject to the filing of opposing comments.

2. If opposing comments are timely filed, the findings made in this notice will be deemed vacated.

3. This notice will be effective May 27, 2023, unless opposing comments are filed by May 26, 2023. If any comments are filed, Kelsian USA may file a reply by June 13, 2023.

4. A copy of this notice will be served on: (1) the U.S. Department of Transportation, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue SE, Washington, DC 20590; (2) the U.S. Department of Justice, Antitrust Division, 10th Street & Pennsylvania Avenue NW, Washington, DC 20530; and (3) the U.S. Department of Transportation, Office of the General Counsel, 1200 New Jersey Avenue SE, Washington, DC 20590.

Decided: April 10, 2023.

By the Board, Board Members Fuchs, Hedlund, Oberman, Primus, and Schultz.

**Stefan Rice,**

*Clearance Clerk.*

[FR Doc. 2023–07919 Filed 4–13–23; 8:45 am]

**BILLING CODE 4915–01–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Transit Administration

### FTA Fiscal Year 2023 Apportionments, Allocations and Program Information

**AGENCY:** Federal Transit Administration (FTA), Department of Transportation (DOT).

**ACTION:** Notice.

**SUMMARY:** This notice provides priorities for programs in fiscal year (FY) 2023, announces the Consolidated Appropriations Act, 2023, and full-year apportionments and allocations for grant programs, provides contract authority, and describes plans for several competitive programs.

**FOR FURTHER INFORMATION CONTACT:** For general information about this notice, contact John Bodnar, Director of Transit Programs, Office of Program Management, at (202) 366–2053. Please contact the appropriate FTA Regional Office for any specific requests for information or technical assistance. FTA Regional Office contact information is available on FTA's website: *https://www.transit.dot.gov/about/regional-offices/regional-offices.* An FTA headquarters contact for each major program area is included in the discussion of that program in the text of this notice. FTA recommends stakeholders subscribe via: *https://public.govdelivery.com/accounts/USDOTFTA/subscriber/new* to receive email notifications when new information is available.

**SUPPLEMENTARY INFORMATION:**

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## I. Overview

This notice provides priorities for the Federal Transit Administration's (FTA) programs in Fiscal Year (FY) 2023, announces the Consolidated Appropriations Act, 2023, Public Law 117–328 and full-year apportionments and allocations for grant programs, provides contract authority, as well as describes plans for several competitive programs.

It also contains information on how FTA plans to administer its transit programs in FY 2023 and how funds appropriated and allocated prior to FY 2023 will be treated.

This notice highlights updates and changes to FTA programs, describes definitional changes and cross-cutting requirements and provides specific information about FTA's statutory programs.

For each FTA program, FTA provides information on the Infrastructure Investment and Jobs Act (IIJA, also called the Bipartisan Infrastructure Law (BIL), Public Law 117–58) authorized funding levels for FY 2023, the basis for apportionment or allocation of funds, requirements specific to the program, period of availability of funds, and other program information. A separate section provides information on pre-award authority and other requirements and guidance applicable to FTA programs and grant administration. Finally, the notice includes references to tables on FTA's website that show amounts apportioned under the FY 2023 appropriations and approximately $6.6 billion in unobligated or carryover funding available in FY 2023 under certain competitive programs carried out in accordance with prior authorization acts.

Information in this document includes references to existing FTA program guidance and circulars. Some information in guidance and circulars may have been superseded by

provisions in IIJA, but these guidance documents and circulars remain a resource for program management in most areas. FTA intends to revise the guidance and circulars, as appropriate, with an opportunity for public comment when necessary.

## II. FY 2023 Funding for FTA Programs

### *A. Funding Available Under the Consolidated Appropriations Act, 2023*

A total of $21,432,364,662 was appropriated for FY 2023 including funding from the Consolidated Appropriations Act, 2023 and advance appropriations.

Division L, title I, of the Consolidated Appropriations Act, 2023, appropriated $16,968,459,324 for FY 2023, providing the authorized $13.634 billion from the Mass Transit Account; $542 million in Transit Infrastructure Grants, including: an additional $90 million for the Buses and Bus Facilities Competitive grant program, an additional $50 million for the Low or No Emission Grants program, an additional $15 million for the Urbanized Area Passenger Ferry program, an additional $2 million for the Bus Testing program, an additional $7 million for several research programs, an additional $17.5 million to the ferry service for rural communities program, and $360.5 million for Community Project Funding/ Congressionally Directed Spending. The Consolidated Appropriations Act, 2023, also appropriated $7.5 million in additional technical assistance and training funding; $2.2 billion for the Capital Investment Grant (CIG) program and the Expedited Project Delivery Pilot Program; $425 million in additional support for New Start and Core Capacity CIG Projects with Existing Full Funding Grant Agreements that met criteria listed in division L, section 165 of the Consolidated Appropriations Act, 2023; and $150 million for the Washington Metropolitan Area Transit Authority.

Division N, title X of the Consolidated Appropriations Act, 2023, appropriated $213,905,338 for Public Transportation Emergency Relief for transit systems affected by major declared disasters occurring in calendar years 2017, 2020, 2021, and 2022.

In addition, IIJA provided $4.25 billion in advance appropriations for FY 2023, including $1.6 billion for Capital Investment Grants; $2.05 billion for Transit Infrastructure Grants; $350 million for the All Stations Accessibility Program; $50 million for the Electric or Low-Emitting Ferry Program; and $217.5 million for Ferry Service for Rural Communities.

Current funding availability for each program is identified in section IV of this notice and in table 1 located on FTA's FY 2023 Apportionments web page: *https://www.transit.dot.gov/funding/apportionments/current-apportionments.*

### *B. Oversight Takedown*

The following oversight takedowns of FTA programs will be applied: 0.5 percent of Metropolitan and Statewide Planning funds, 0.75 percent of Urbanized Area Formula funds, 1 percent of Fixed Guideway Capital Investment Grants funds, 0.5 percent of Formula Grants for the Enhanced Mobility of Seniors and Individuals with Disabilities, 0.5 percent of Formula Grants for Rural Areas, 1 percent of State of Good Repair Formula funds, 0.75 percent for Grants for Buses and Bus Facilities, and 1 percent of Capital and Preventive Maintenance Projects for Washington Metropolitan Area Transit Authority funds. The funds are used to provide necessary oversight activities, such as oversight of the construction of any major capital project receiving Federal transit assistance; to conduct State Safety Oversight, drug and alcohol, civil rights, procurement systems, management, planning certification, and financial reviews and audits, as well as evaluations and analyses of recipient-specific problems and issues; to generally provide technical assistance and correct deficiencies identified in compliance reviews and audits; and to support FTA's administrative expenses.

Additionally, there remains a 2 percent administrative/oversight takedown from each of the advance appropriations provided under Division J, Title VIII of IIJA, except for the Capital Investment Grant takedown, which remains at 1 percent. One-half percent of the 2 percent is to be transferred to the U.S. DOT Office of the Inspector General (OIG).

### *C. Formula Apportionment Data and Methodology*

#### 1. Apportionment Tables

FTA published apportionment tables on its website for each program that reflect the full-year appropriations less oversight takedowns, as applicable. Tables displaying the funds available to eligible states, tribes, and urbanized areas have been posted to *Fiscal Year 2023 Apportionment Tables (Full Year).* This website contains a page listing the apportionment and allocation tables for FY 2023, as well as links to prior year formula apportionment notices and tables and the National Transit Database and Census data used to calculate the FY 2022 apportionments.

#### 2. National Transit Database and Census Data Used in the FY 2023 Apportionments

Consistent with past practices, the calculations for sections 5307, 5311, including 5311(j) (Tribal Transit), 5329, 5337, and 5339 programs rely on the most-recent transit service data reported to the National Transit Database (NTD), which at the time of apportionment was the 2021 report year. However, due to the impacts of the COVID–19 pandemic, through this final fiscal year, FTA allowed agencies to use either 2019 NTD data or 2021 NTD data, defaulting to the year with the higher vehicle revenue miles unless instructed otherwise by the reporting agency. In some cases where an apportionment is based on the age of the system, the age is calculated as of September 30, 2022, which was the last day before FY 2023 began. Any recipient or subrecipient of either section 5307 or section 5311 program funds is required to report to the NTD. All FTA grant recipients that own, operate, or manage transit capital assets must report their asset data to the NTD. Additionally, a number of transit operators report to the NTD on a voluntary basis. For the 2021 report year, the NTD includes data from 963 urban reporters, 935 of which reported operating transit service; 313 of these urban reporters also provide service in rural areas. The NTD also includes data from 1,338 rural transit providers. Additionally, 137 Tribes report service to the NTD, with 129 of them reporting exclusively rural service, and 8 operating both rural and urban service.[1] IIJA made a number of changes to NTD reporting requirements. FTA finalized the proposal in a **Federal Register** notice published on March 3, 2023 (88 FR 13497). Some of the changes will take effect beginning in NTD Report Year (RY) 2023 or 2024, which corresponds to an agency's fiscal year, while others will take effect in calendar year (CY) 2023.

The 2010 Census data was used to determine population and population density for sections 5303, 5305, 5307 and 5339 as well as rural population and rural land area for section 5311. The formulas for sections 5307, 5311, and

[1] Tribal reporters operate public transportation in a tribal area and receive or benefit from section 5311 funding under FTA's Tribal Transit Program. In some limited cases, tribal reporters may also receive section 5307 funding, in which case, these tribes may be counted as urban. The 137 tribes noted are those that receive Tribal Transit Program funding and excludes those tribes (if any) that receive section 5307 funding, for consistency with the other counts provided herein.

5311(j) include tiers where funding is allocated on the basis of the number of persons living in poverty, and the section 5310 formula program allocates funding on the basis of the population of older adults and people with disabilities. The Census Bureau no longer publishes decennial census data on persons living in poverty and persons with disabilities. As a result, since FY 2013, FTA has been using the data for these populations available via the Census' American Community Survey (ACS). The NTD and census data that FTA used to calculate the apportionments associated with this notice can be found on FTA's *Formula Apportionments Data web page: (https://www.transit.dot.gov/funding/apportionments/formula-apportionments-data).*

The FY 2023 apportionments use data on low-income persons, persons with disabilities, and older adults from the 2016–2020 ACS five-year data set, which was published in December 2021. This data represents the most recent five-year ACS estimates that are available as of October 1 for the year being apportioned. As was the case in prior years, data on low-income persons comes from ACS Table B17024, ''Age by Ratio of Income to Poverty in the Last Twelve Months,'' and data on people with disabilities under 65 years old comes from ACS table S1810, ''Disability Characteristics.'' For the FY 2023 apportionments, FTA is using data on older adults (over 65 years old) from ACS table B01001, ''Sex by Age'' after determining that the ACS table used in prior fiscal years (ACS table S.0103, ''People over 65 in the United States'') did not include data for all urbanized areas.

## III. FY 2023 Program Highlights and Updates

### *A. Focus Areas*

#### 1. Safety—PTASP and Safety Committees

IIJA amended 49 U.S.C. 5329(d) to require a transit agency that receives section 5307 funding and serves a large, urbanized area (an urbanized area with a population of 200,000 or more) to establish a Safety Committee consistent with 49 U.S.C. 5329(d)(5). The transit agency must certify, through their Certifications and Assurances, that the safety committee of the operator approved the Public Transportation Agency Safety Plan (PTASP) or any updates to the Public Transportation Agency Safety Plan prior to approval by the Board of Directors, or Equivalent Authority.

The Safety Committee also is responsible for, at a minimum: (1) identifying and recommending risk-based mitigations or strategies necessary to reduce the likelihood and severity of consequences identified through the agency's safety risk assessment; (2) identifying mitigations or strategies that may be ineffective, inappropriate, or were not implemented as intended; and (3) identifying safety deficiencies for purposes of continuous improvement.

IIJA also amended 49 U.S.C. 5329(d)(1)(B) to require a transit agency serving a small, urbanized area (an urbanized area with a population of fewer than 200,000) to review and update its PTASP in cooperation with frontline employee representatives. Transit agencies serving a small urbanized area are required to certify, through their Certifications and Assurances, that their Public Transportation Agency Safety Plan was developed or updated in cooperation with frontline worker representatives prior to approval by the Board of Directors, or Equivalent Authority.

#### 2. Census Urbanized Areas Designations

On December 29, 2022, the Census Bureau announced final urban area designations based on the 2020 Census. FTA program eligibility and funding distribution is determined in part by service provision and demographics in both urban and non-urban areas. The 2020 Census delineations will impact FTA formula apportionments beginning in FY 2024. Eligibility and requirements associated with a Notice of Funding Opportunity (NOFO) published in FY 2023 will be determined using 2010 Census designations. FTA has additional resources and information available on its Census landing page, *https://transit.dot.gov/census.*

#### 3. Build America, Buy America Act

The Infrastructure Investment and Jobs Act (IIJA) includes the Build America, Buy America Act (BABA), Public Law 117–58, division G, title IX, subtitle A, part I, sections 70901 through 70927, which greatly strengthens Made in America standards. Specifically, BABA expands the coverage and application of Buy America preferences in Federal financial assistance programs for infrastructure. BABA requires that no later than May 14, 2022—180 days after the date of enactment—the head of each covered Federal agency shall ensure that ''none of the funds made available for a Federal financial assistance program for infrastructure . . . may be obligated for a project unless all of the iron, steel, manufactured products, and construction materials used in the project are produced in the United States.'' IIJA section 70914(a).

BABA provides that the preferences under section 70914 apply only to the extent that a domestic content procurement preference as described in section 70914 does not already apply to iron, steel, manufactured products, and construction materials. IIJA section 70917(a)–(b). This provision allows FTA to continue to implement its existing Buy America regulations and policies for steel and iron, manufactured products, and rolling stock, which meet or exceed the standards required by BABA. One of the new Buy America preferences included under section 70914 of BABA is for construction materials. By May 14, 2022, each covered Federal agency had to ensure that all manufacturing processes for construction materials used in federally assisted infrastructure projects occur in the United States.

On April 18, 2022, OMB issued memorandum M–22–11, ''Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure'' (''Implementation Guidance''). Under section VIII of the Implementation Guidance, ''Preliminary Guidance for Construction Materials,'' ''construction materials'' includes: An article, material, or supply—other than an item of primarily iron or steel; a manufactured product; cement and cementitious materials; aggregates such as stone, sand, or gravel; or aggregate binding agents or additives—that is or consists primarily of: Non-ferrous metals; plastic and polymer-based products (including polyvinylchloride, composite building materials, and polymers used in fiber optic cables); glass (including optic glass); lumber; or drywall. Implementation Guidance at p. 13–14. The Implementation Guidance also states that ''an article, material, or supply should only be classified into one of the following categories: (1) Iron or steel; (2) a manufactured product; or (3) a construction material. For ease of administration, an article, material, or supply should not be considered to fall into multiple categories.'' Id. at p. 6. The Implementation Guidance also explains that ''items that consist of two or more of the listed materials that have been combined together through a manufacturing process, and items that include at least one of the listed materials combined with a material that is not listed through a manufacturing process, should be treated as manufactured products, rather than as construction materials.'' Id. at p. 14.

On May 19, 2022, the U.S. Department of Transportation (DOT) issued a general waiver that delayed the effective date of BABA's domestic preference requirements for construction materials, until November 10, 2022 (87 FR 31931). All FTA grants obligated on or after November 10 have required construction materials produced in the United States.

On January 30, 2023, DOT announced a new, limited waiver of the Buy America requirement for construction materials for certain contracts and solicitations. The waiver is intended to assist project sponsors transitioning to using U.S. manufactured construction materials without delaying delivery of projects in sufficiently advanced stages. The waiver of BABA's domestic preference for construction materials applies to: (1) Any contract entered into before November 10, 2022; and (2) Any contract entered into on or after November 10, 2022, and before March 10, 2023, if the contract results from a solicitation published prior to May 14, 2022. For contracts executed on or after May 14, 2022, and before March 10, 2023, the waiver does not apply to any construction materials that a contractor or subcontractor takes delivery of on or after October 1, 2024.

This waiver applies only to: (i) DOT awards (including FTA awards) obligated on or after January 30, 2023; and (ii) for awards that are obligated on or after November 10, 2022, but prior to January 30, 2023, to expenditures for construction materials incurred on or after January 30, 2023. FTA encourages recipients to contact their FTA Regional Office with any questions regarding applicability of this waiver.

4. State, Local, Tribal, and Territorial Fiscal Recovery, Infrastructure, and Disaster Relief Flexibility Act (Cornyn-Padilla)

Division LL of the Consolidated Appropriations Act, 2023, is the ''State, Local, Tribal, and Territorial Fiscal Recovery, Infrastructure, and Disaster Relief Flexibility Act,'' also known as Cornyn-Padilla. The law amends title VI of the Social Security Act (42 U.S.C. 801, *et seq.*), as amended by the Infrastructure Investment and Jobs Act (IIJA), to allow coronavirus relief funds to be used for certain infrastructure projects by State, Territorial, Tribal, metropolitan, city, non-entitlement unit of local government, or county recipients. Among other eligible uses, funds may be used for capital projects eligible under FTA's Urbanized Area Formula Grants Program (section 5307), Capital Investment Grants Progra (section 5309), Rural Area Formula Grants Program (section 5311), State of Good Repair Grants Program (section 5337), and Bus and Bus Facility Grants Program (section 5339). Funds specifically may be used to meet the non-Federal share requirement for capital investment grants and may be used to repay TIFIA loans.

The law requires the Department of Treasury, in consultation with U.S. DOT, to issue guidance or promulgate a rule to carry out the transportation section of the bill. FTA encourages recipients to review the Treasury guidance or rule when it becomes available and to contact their FTA Regional Office with any questions.

5. FTA Strategic Plan

FTA recently completed an agency-specific strategic plan, in alignment with the recently completed DOT Strategic Plan for 2021–2026. FTA's plan sets five strategic goals for the agency:

- Enhance Safety—reduce safety events on the Nation's transit systems.
- Build Resiliency—renew our transit systems and increase resiliency into the future.
- Increase Sustainability—reduce greenhouse gas emissions and environmental impacts from transit construction and operations.
- Improve Equity—address disparities in access to opportunities and services; and
- Connect Communities—expand high quality transit service to build communities that connect people

*B. Program Updates*

1. FY 2023 Competitive Program Updates

FTA's competitive grant programs and the FY 2023 appropriated funding levels are identified in the chart below. FTA selects projects for funding after issuance of a Notice of Funding Opportunity.

| Program/competitive grant title | Statute 49 U.S.C. | FY 2023 funding appropriated | Proposed or actual NOFO publication | Application due date and comments |
|---|---|---|---|---|
| Transit-Oriented Development Planning Pilot Program. | MAP–21 Section 20005(b), IIJA Section 30009. | $13,432,051 | Summer 2023 | TBA. |
| Low or No Emission Grants and Grants for Buses & Bus Facilities. | Section 5339(b) and (c) | 1,621,126,602 | January 27, 2023 | April 13, 2023. |
| Tribal Transit Grants | Section 5311(c)(1)(A) | 8,935,753 | March 28, 2023 | June 26, 2023. |
| Passenger Ferry Grants, Electric or Low-Emitting Ferry Program, Ferry Service for Rural Communities. | Sections 5307/5311 | 307,500,000 | Spring 2023 (Passenger Ferry and Rural Only). | Part of FY23 Rural Ferry and all FY23 Low-Emitting Ferry selections were announced in January 2023. Approximately $50M in Passenger Ferry and $170M in Rural Ferry funding will be made available through NOFO. |
| Innovative Coordinated Access & Mobility. | Section 5312 | 9,525,190 | Fall 2023 | TBA. |
| All Station Accessibility Program. | Sections 5307/5311 | 343,000,000 | N/A | Project selections announced in December 2022. |
| Competitive Grants for Rail Vehicle Replacement. | Section 5337 | 300,000,000 | N/A | FY22 and FY23 funding announced in the same NOFO on October 12, 2022. |

## IV. Program Information

*A. Metropolitan Planning Program (49 U.S.C. 5303, 5305(d), and 5305(f))*

Section 5305(d) and (f) makes available Federal funding to support a cooperative, continuous, and comprehensive planning program for transportation investment decision-making at the metropolitan area level. The specific requirements of metropolitan transportation planning are set forth in 49 U.S.C. 5303 and in 23 CFR part 450, as incorporated by reference in 49 CFR part 613, Metropolitan and Statewide and Non-metropolitan Planning. State Departments of Transportation (DOTs) are direct recipients of planning funds allocated by FTA, and the funds are then sub-allocated to Metropolitan Planning Organizations (MPOs) for planning activities that support the economic vitality of the metropolitan area.

The metropolitan transportation planning process must establish a performance-based approach in which the MPO will develop specific performance targets that address transportation system performance measures (issued by U.S. DOT), where applicable, to use in tracking progress towards attaining critical outcomes. These performance targets will be established by MPOs in coordination with States and transit providers. MPOs will provide a system performance report that evaluates the progress of the MPO in meeting the performance targets in comparison with the system performance identified in prior reports.

This funding must support work elements and activities resulting in comprehensive intermodal transportation planning for the movement of people and goods in the metropolitan area. Comprehensive transportation planning is not limited to transit planning or surface transportation planning but also encompasses the relationships among land use and all transportation modes, without regard to the programmatic source of Federal assistance. A represenatataive list of eligible work elements or activities is provided in FTA Circular 8100.1D, *Program Guidance for Metropolitan Planning and State Planning and Research Program Grants,* dated September 10, 2018.

The Infrastructure Investment and Jobs Act (IIJA), also known as the Bipartisan Infrastructure Law (BIL), amended 49 U.S.C. 5305(f) to require a Federal share of not less than 90 percent for grants under the Metropolitan Planning Program (MPP) and the State Planning and Research Program (SPRP). Eligible recipients seeking an increased Federal share under 49 U.S.C. 5305(f)(2) must demonstrate that planning activities support increased mobility through expanded access to public transportation in areas with a lower population density or a lower average income in relationship to surrounding areas. In addition, on March 13, 2023, FTA approved a waiver of the non-Federal match for the MPP and the SPRP funds authorized at 49 U.S.C. 5305(f)(1) for Complete Streets planning activities conducted by States and MPOs in their transportation planning processes. The non-Federal match waiver for MPP and SPRP funds is limited to Complete Streets planning activities as identified in BIL, section 11206(c)). The waiver of the non-Federal share for Complete Streets planning activities will end once a State or MPO receives approval from FHWA to opt out of meeting the requirements described in BIL, section 11206(c). Once a State or MPO opts out, they must notify FTA.

For more about the Metropolitan Planning Program, contact Ryan Long, Office of Planning and Environment at (215) 656–7051 or *ryan.long@dot.gov.*

1. Authorized Amounts

IIJA authorized $799.4 million over five years to provide financial assistance for metropolitan planning needs under section 5305.

2. FY 2023 Funding Availability

Under the Consolidated Appropriations Act, 2023, $155,931,187 is available to the Metropolitan Planning Program (section 5305(d) and (f)) to support metropolitan transportation planning activities set forth in section 5303. The total amount apportioned for the Metropolitan Planning Program to States for use by MPOs is $155,151,531 as shown in the table below, after the deduction for oversight (authorized by section 5338).

| Metropolitan Planning Program—FY2023 | |
|---|---|
| Total FY 2023 Appropriation Available ..... | $155,931,187 |
| Oversight Deduction ..... | (779,656) |
| Total Apportioned ..... | 155,151,531 |

3. Basis for Formula Apportionment

Of the amounts authorized in section 5305, 82.72 percent is made available to the Metropolitan Planning program. Eighty percent of those funds are apportioned on a statutory basis to the States based on the most recent decennial Census for each State's UZA population. The remaining 20 percent is provided to the States based on an FTA administrative formula to address planning needs in larger, more complex UZAs. The amount published for each State includes the supplemental allocation.

4. Requirements

The State allocates Metropolitan Planning funds to MPOs in UZAs or portions thereof to provide funds for planning projects included in a one- or two-year program of planning work activities (the Unified Planning Work Program, or UPWP) that includes multimodal systems planning activities spanning both highway and transit planning topics. Each State has either reaffirmed or developed, in consultation with their MPOs, an allocation formula among MPOs within the State, based on the 2010 Census. The allocation formula among MPOs in each State may be changed annually, but any change requires approval by the FTA Regional Office before grant approval. Program guidance for the Metropolitan Planning Program is found in FTA Circular 8100.1D.

5. Period of Availability

The Metropolitan Planning program funds apportioned in this notice are available for obligation during FY 2023 plus three additional fiscal years. Accordingly, funds apportioned in FY 2023 must be obligated in grants by September 30, 2026. Any FY 2023 apportioned funds that remain unobligated at the close of business on September 30, 2026, will revert to FTA for reapportionment under the Metropolitan Planning program.

*B. State Planning and Research Program (49 U.S.C. 5304, 5305(e), and 5305(f))*

This program provides financial assistance to States for statewide transportation planning and other technical assistance activities, including supplementing the technical assistance program provided through the Metropolitan Planning program. The specific requirements of Statewide transportation planning are set forth in 49 U.S.C. 5304 and in 23 CFR part 450, as incorporated by reference in 49 CFR part 613, Metropolitan and Statewide and Nonmetropolitan Planning. State DOTs are required to reference

performance measures and performance targets within the Statewide Planning process. This funding must support work elements and activities resulting in comprehensive intermodal transportation planning for the movement of people and goods and has the same eligibilities as metropolitan planning funds. Comprehensive transportation planning is not limited to transit planning or surface transportation planning but also encompasses the relationships among land use and all transportation modes, without regard to the programmatic source of Federal assistance.

The Infrastructure Investment and Jobs Act (IIJA), also known as the Bipartisan Infrastructure Law (BIL), amended 49 U.S.C. 5305(f) to require a Federal share of not less than 90 percent for grants under the Metropolitan Planning Program (MPP) and the State Planning and Research Program (SPRP). Eligible recipients seeking an increased Federal share under 49 U.S.C. 5305(f)(2) must demonstrate that planning activities support increased mobility through expanded access to public transportation in areas with a lower population density or a lower average income in relationship to surrounding areas. In addition, on March 13, 2023, FTA approved a waiver of the non-Federal match for the MPP and the SPRP funds authorized at 49 U.S.C. 5305(f)(1) for Complete Streets planning activities conducted by States and MPOs in their transportation planning processes. The non-Federal match waiver for MPP and SPRP funds is limited to Complete Streets planning activities as identified in BIL, section 11206(c)). The waiver of the non-Federal share for Complete Streets planning activities will end once a State or MPO receives approval from FHWA to opt out of meeting the requirements described in BIL, section 11206(c). Once a State or MPO opts out, they must notify FTA.

For more information, contact Ryan Long, Office of Planning and Environment at (215) 656–7051 or *ryan.long@dot.gov.*

1. Authorized Amounts

IIJA authorized $167 million over five years to provide financial assistance for statewide planning and other technical assistance activities under section 5305.

2. FY 2023 Funding Availability

In FY 2023, $32,573,633 is available to the State Planning and Research Program (section 5305(e) and (f)). The total amount apportioned for the State Planning and Research Program (SPRP) is $32,412,789 as shown in the table below, after the deduction for oversight and addition of reapportioned funds.

| Statewide Planning Program—FY 2023 | |
|---|---|
| Total Appropriation ..... | $32,573,633 |
| Oversight Deductions ... | (162,868) |
| Reapportioned Funds ... | 2,024 |
| Total Apportioned ..... | 32,412,789 |

States' apportionments for this program are displayed in table 2.

3. Basis for Formula Apportionment

Of the amount authorized in section 5305, 17.28 percent is allocated to the State Planning and Research Program. FTA apportions these funds to States by a statutory formula that is based on the most recent decennial Census data available, and the State's UZA population as compared to the UZA population of all States.

4. Requirements

Funds are provided to States for Statewide transportation planning programs. These funds may be used for a variety of statewide and nonmetropolitan transportation planning purposes such as developing transportation plans and programs, planning and evaluating public transportation projects, and conducting technical studies. In addition, a State may authorize a portion of these funds to be used to supplement Metropolitan Planning funds allocated by the State to its UZAs, as the State deems appropriate. Program guidance for the State Planning and Research program is found in FTA Circular 8100.1D.

5. Period of Availability

The State Planning and Research program funds apportioned in this notice are available for obligation during FY 2023 plus three additional fiscal years. Accordingly, funds apportioned in FY 2023 must be obligated in grants by September 30, 2026. Any FY 2023 apportioned funds that remain unobligated at the close of business on September 30, 2026, will revert to FTA for reapportionment under the State Planning and Research Program.

*C. Urbanized Area Formula Program (49 U.S.C. 5307)*

The Urbanized Area Formula Program provides Federal assistance for capital, planning, job access and reverse commute projects, and, in some cases, operating assistance for public transportation in urbanized areas. In accordance with 49 U.S.C. 5302, an urbanized area (UZA) is an Urban Area, as defined and designated as such by the U.S. Census Bureau, with a population of 50,000 or more. Program funds are apportioned to urbanized areas through a statutory formula. In addition, $30 million is allocated each year under this program to passenger ferry projects through a discretionary funding competition.

For more information about the Urbanized Area Formula Program, contact Bret Martin with the Office of Transit Programs, at (202) 366–0870 or *bret.martin@dot.gov.*

1. Authorized Amounts

IIJA authorized $33.5 billion over five years to provide financial assistance for urbanized areas under section 5307. Of the amounts authorized and appropriated for section 5307 in each year, $30 million is set aside for the competitive discretionary Passenger Ferry Grant Program, 0.75 percent is apportioned to eligible States for State Safety Oversight (SSO), and 0.75 percent is set aside for oversight.

2. FY 2023 Funding Availability

Under the Consolidated Appropriations Act, 2023, $6,542,164,133 is available for the Urbanized Area Formula program. The total amount apportioned is $7,060,120,714 after deductions for the State Safety Oversight Program, Passenger Ferry Program, and oversight (authorized by section 5338) and the addition of section 5340 and reapportioned funds as shown in the table below.

| Urbanized Area Formula Program—FY 2023 | |
|---|---|
| Total Appropriation ..... | $6,542,164,133 |
| Oversight Deductions ... | (49,066,231) |
| State Safety Oversight Program ..... | (49,066,231) |
| Passenger Ferry Program ..... | (30,000,000) |
| Section 5340 High Density States ..... | 355,566,259 |
| Section 5340 Growing States ..... | 286,316,112 |
| Reapportioned Funds ... | 4,206,672 |
| Total Apportioned ..... | 7,060,120,714 |

3. Basis for Formula Apportionment

FTA apportions Urbanized Area Formula Program funds based on statutory formulas. Congress established four separate formulas that are used to apportion the available funding: the section 5307 Urbanized Area Formula Program formula, the Small Transit Intensive Cities (STIC) formula, the Growing States and High-Density States formulas, and a formula based on low-income population.

a. Section 5307—Urbanized Area Formula

For UZAs between 50,000 and 199,999 in population, the section 5307 formula is based on population and population density. For UZAs with populations of 200,000 and more, the formula is based on a combination of bus vehicle revenue miles, bus passenger miles, bus operating costs, fixed guideway vehicle revenue miles, and fixed guideway directional route miles, as well as population and population density. The Urbanized Area Formula is defined in 49 U.S.C. 5336.

To calculate a UZA's FY 2023 apportionment, FTA used population and population density statistics from the 2010 Census and validated mileage and transit service data from transit providers' 2019 or 2021 National Transit Database (NTD) Report Year, defaulting to the year with the higher vehicle revenue miles unless instructed otherwise by the reporting agency. Consistent with section 5336(b), FTA has included 27 percent of the fixed guideway directional route miles and vehicle revenue miles from eligible urbanized area transit systems, but which were attributable to rural areas outside of the urbanized areas from which the system receives funds. FTA has calculated dollar unit values for the formula factors used in the Urbanized Area Formula Program apportionment calculations. These values represent the amount of money each unit of a factor is worth in this year's apportionment. The unit values change each year based on all of the data used to calculate the apportionments, as well as the amount appropriated by Congress for the apportionment. The dollar unit values for FY 2023 are displayed in table 5. To replicate the basic formula component of a UZA's apportionment, multiply the dollar unit value by the appropriate formula factor (*i.e.,* the population, population x population density), and when applicable, data from the NTD (*i.e.,* directional route miles, vehicle revenue miles, passenger miles, and operating cost).

b. Small Transit Intensive Cities Formula (STIC)

Under the STIC formula, FTA apportions 3 percent of the funds made available for section 5307 to UZAs that are under 200,000 in population and have public transportation service that operates at a level equal to or above the industry average for UZAs with a population of at least 200,000, but not more than 999,999. STIC funds are apportioned on the basis of one or more of six performance categories: passenger miles traveled per vehicle revenue mile, passenger miles traveled per vehicle revenue hour, vehicle revenue miles per capita, vehicle revenue hours per capita, passenger miles traveled per capita, and passengers per capita.

The data used to determine a UZA's eligibility under the STIC formula and to calculate the STIC apportionments was obtained from the NTD. Because performance data change with each year's NTD reports, the UZAs eligible for STIC funds and the amount each receives may vary each year. UZAs that received funding through the STIC formula for FY 2023 are listed in table 6.

c. Section 5340—Growing States and High-Density States Formula

FTA also apportions funds to qualifying UZAs and States according to the section 5340 Growing States and High-Density States formula, as shown in table 3. More information on this program and its formula is found in section IV.P. of this notice.

d. Low-Income Population

Of the amount authorized and appropriated for the Urbanized Area Formula Program in each year, 3.07 percent is apportioned on the basis of low-income population.

As specified in statute, FTA apportions 75 percent of the available funds to UZAs with a population of 200,000 or more. Funds are apportioned based on the ratio of the number of low-income individuals in each UZA to the total number of low-income individuals in all urbanized areas of that size. FTA apportions the remainder of the funds (25 percent) to UZAs with populations of less than 200,000, according to an equivalent formula. The low-income populations used for this calculation were based on the American Community Survey (ACS) data set for 2016—2020. This information is updated by the Census Bureau annually.

4. Eligible Expenses

Eligible activities include planning, engineering, design and evaluation of transit projects and other technical transportation-related studies; capital investments in bus and bus-related activities such as replacement, overhaul and rebuilding of buses; crime prevention and security equipment; construction of maintenance and passenger facilities; and capital investments in new and existing fixed guideway systems, including rolling stock, overhaul and rebuilding of vehicles, track, signals, communications, and computer hardware and software. All preventive maintenance and some Americans with Disabilities Act complementary paratransit service costs are considered capital costs. For urbanized areas with populations less than 200,000, operating assistance is an eligible expense. In areas with a population of 200,000 or more, operating assistance is an eligible expense for an applicant that operates a maximum of 100 buses during peak service hours, per 49 U.S.C. 5307(a)(2) (the ''100-bus rule''). Job access and reverse commute activities remain eligible under the program.

In addition, recipients may use up to one-half of one percent of their section 5307 funds to support workforce development activities, including supportive services, at an 80 percent Federal share; the eligible workforce development activities are defined in section 5314; see section IV.K. of this notice for more information. This provision is in addition to the one-half of one percent that a recipient may use for training activities with the National Transit Institute.

5. Requirements

Program guidance for the Urbanized Area Formula Program is found in FTA Circular 9030.1E, *Urbanized Area Formula Program: Program Guidance and Application Instructions,* dated January 16, 2014, and is supplemented by additional information and changes provided in this notice and that may be posted to the FTA's section 5307 web page.

6. Period of Availability

Funds made available under section 5307 are available for obligation during the year of apportionment plus five additional years. Accordingly, funds apportioned in FY 2023 must be obligated in grants by September 30, 2028. Any FY 2023 apportioned funds that remain unobligated at the close of business on September 30, 2028, will revert to FTA for reapportionment under the Urbanized Area Formula Program.

*D. Fixed Guideway Capital Investment Grants Program (49 U.S.C. 5309)*

The Capital Investment Grants (CIG) Program includes three types of eligible projects—New Starts projects, Small Starts projects, and Core Capacity Improvement projects. Funding is provided for construction of: (1) new fixed guideway systems or extensions to existing fixed guideway systems such as rapid rail (heavy rail), commuter rail, light rail, trolleybus (using overhead catenary), cable car, passenger ferries, and bus rapid transit operating on an exclusive transit lane for the majority of

the corridor length that also includes features that emulate the services provided by rail fixed guideway including defined stations, traffic signal priority for public transit vehicles, and short headway bi-directional service for a substantial part of weekdays and weekends; (2) corridor-based bus rapid transit service that does not operate on an exclusive transit lane but includes features that emulate the services provided by rail fixed guideway including defined stations, traffic signal priority for public transit vehicles, and short headway bi-directional services for a substantial part of weekdays; and (3) projects that expand the capacity by at least 10 percent of an existing fixed guideway corridor that is at capacity today or will be in ten years.

Projects become candidates for funding under the Capital Investment Grants program by successfully completing steps in the multi-year process defined in section 5309 and obtaining a satisfactory rating under the statutorily defined criteria. For New Starts and Core Capacity Improvement projects, the steps in the process include project development, engineering, and construction. For Small Starts projects the steps in the process include project development and construction. New Starts and Core Capacity Improvement projects receive construction funds from the program through a full funding grant agreement (FFGA) that defines the scope of the project and specifies the total multi-year Federal commitment to the project. Small Starts projects receive construction funds through a single year grant or an expedited grant agreement that defines the scope of the project and specifies the Federal commitment to the project.

Bundles of CIG projects, comprised of multiple New Starts, Core Capacity, or Small Starts projects being pursued by the same project sponsor, are also allowed. Bundles must enhance or increase the capacity of the transportation system and streamline procurements or enable time or cost savings for the projects.

For more information about the Capital Investment Grants program contact Elizabeth Day, Office of Capital Project Development, at (202) 366–5159 or *elizabeth.day@dot.gov.*

For information about published allocations contact Kevin Osborn, Office of Transit Programs, at (202) 366–7519 or *kevin.osborn@dot.gov.*

1. Authorized Amounts

IIJA authorized $15 billion to be appropriated over five years for the CIG program and the Expedited Project Delivery Pilot Program (EPD), with an additional $8 billion in advance appropriations.

2. FY 2023 Funding Availability

Under the Consolidated Appropriations Act, 2023, $3,810,000,000 is available for the Capital Investment Grants (CIG) Program and the FAST Act section 3005(b) Expedited Project Delivery Pilot Program. The total amount available for projects is $3,771,900,000 as shown in the table below, after the deduction for oversight (authorized by section 5338).

**Capital Investment Grant Program—FY 2023**

| | |
|---|---|
| Total Appropriation ..... | $3,810,000,000 |
| Oversight ..... | (38,100,000) |
| Deduction ..... | ..... |
| Total Apportioned ..... | 3,771,900,000 |

In addition, $425,000,000 is available as additional funding to support New Start and Core Capacity Improvement CIG Projects with existing Full Funding Grant Agreements (FFGA) that met criteria listed in division L, section 165 of the Consolidated Appropriations Act, 2023. Such amounts are in addition to the CIG amounts identified in the FFGA.

**Additional Funding to Projects with Existing FFGAs—FY 2023**

| | |
|---|---|
| Additional Funding for Existing FFGAs ..... | $425,000,000 |
| Total Apportioned ..... | 425,000,000 |

3. Basis for Allocation

CIG Funds are allocated on a discretionary basis and subject to program evaluation. However, the $425 million in additional funding to projects with existing FFGAs was allocated based on factors identified in the Consolidated Appropriations Act, 2023.

4. Eligible Expenses

See beginning of section D above.

5. Requirements

Project sponsors should reference the FTA website at *https://www.transit.dot.gov/CIG* for the most current Capital Investment Grants program policy guidance to learn what is required to enter and advance through the program. Grant-related guidance is found in FTA Circular 9300.1B, *Capital Investment Grant Program Guidance and Application Instructions,* November 1, 2008; and C5200.1A, *Full Funding Grant Agreement Guidance,* December 5, 2002.

6. Period of Availability

Funding is available for four years, which is the fiscal year in which the amount is allocated to a project plus three additional years. Therefore, funds for a project allocated funding in FY 2023 must be obligated for the project by September 30, 2026. Section 5309 funds that remain unobligated after four fiscal years to the projects for which they were originally designated may be made available for other section 5309 projects.

*E. Enhanced Mobility of Seniors and Individuals With Disabilities Program (49 U.S.C. 5310)*

The Enhanced Mobility of Seniors and Individuals with Disabilities Program provides formula funding apportioned to direct recipients: States for rural (population under 50,000) and small urbanized areas (population from 50,000 to 199,999); and designated recipients chosen by the Governor of the State for large urbanized areas (populations of 200,000 or more); or a State or local governmental entity that operates a public transportation service. The section 5310 program provides capital and operating assistance to improve the mobility for older adults and people with disabilities by removing barriers to transportation service and expanding transportation mobility options. This program supports transportation services planned, designed, and carried out to meet the transportation needs of older adults and people with disabilities.

This program provides funds for capital and operating assistance for: (1) public transportation to meet the needs of older adults and people with disabilities when public transportation is insufficient, inappropriate, or unavailable; (2) public transportation projects that exceed the requirements of the Americans with Disabilities Act (ADA); (3) public transportation projects that improve access to fixed-route service and decrease reliance on complementary paratransit; and (4) alternatives to public transportation that meet the transportation needs of older adults and people with disabilities.

Section 5310 funds are available for capital and operating expenses to support the provision of transportation services to meet the specific needs of older adults and people with disabilities. Additional information on eligible expenses can be found in FTA Circular 9070.1G, Enhanced Mobility of Seniors and Individuals with Disabilities Program Guidance and Application Instructions, dated July 7, 2014.

For more information about the section 5310 program, contact Destiny Buchanan, Office of Transit Programs, at (202) 493–8018 or *destiny.buchanan@dot.gov.*

1. Authorized Amounts

IIJA authorized $1,943,105,343 over five years for the Enhanced Mobility of Seniors and Individuals with Disabilities formula program, with an additional $250 million provided in advance appropriations.

2. FY 2023 Funding Availability

In FY 2023, $429,002,836 is appropriated for the program. A total of $428,004,567 is available for allocation after the oversight and administrative deduction, transfer to the U.S. DOT Office of Inspector General, and addition of reapportioned funds as shown in the table below.

| Section 5310 Formula Program—FY 2023 | |
|---|---|
| Total Appropriation | $429,002,836 |
| Oversight and Administrative | (2,890,014) |
| Transfer to OIG | (5,000) |
| Reapportioned Funds | 1,896,745 |
| Total Apportioned | 428,004,567 |

3. Basis for Formula Apportionment

Sixty percent of the funds are apportioned among designated recipients for urbanized areas with a population of 200,000 or more individuals. Twenty percent of the funds are apportioned among the States for their urbanized areas with a population of at least 50,000 but less than 200,000. Twenty percent of the funds are apportioned among the States for rural areas with a population of less than 50,000. Census Data on Older Adults and People with Disabilities is used for the section 5310 Enhanced Mobility of Older Adults and People with Disabilities Apportionments. To view the table 8, which displays the amounts apportioned under the Enhanced Mobility of Seniors and Individuals with Disabilities Program, see FTA's FY 2023 Apportionments web page.

Under the section 5310 formula, funds are allocated using Census data on seniors (*i.e.,* persons 65 and older) and people with disabilities. However, beginning in 2010, the Census Bureau stopped collecting this demographic information as part of its decennial census. Data on seniors and people with disabilities is now only available from the American Community Survey (ACS), which is conducted and published on a rolling basis. FTA's FY 2023 section 5310 apportionments incorporate ACS data published in December 2021, which was the most-recent data available at the start of Federal FY 2023. Data on seniors comes from the ACS 2016—2020 five-year data set, Table B01001, ''Sex by Age.'' Data on persons with disabilities comes from the ACS 2016—2020 five-year data set, Table S.1810, ''Disability Characteristics.''

4. Requirements

Eligible direct recipients include States for rural and small urban areas and designated recipients chosen by the Governor of the State for large urban areas. Federally recognized Indian tribes and State or local governmental entities that operate a public transportation service are also eligible direct recipients.

Eligible subrecipients include private nonprofit organizations, and state or local governmental authorities approved by a state to coordinate services for older adults and people with disabilities, or state or local governmental authorities which certify to the Governor that no nonprofit organizations or associations are readily available in an area to provide the service.

Of the amounts apportioned to states and designated recipients, not less than 55 percent of funds must be used for ''traditional'' section 5310 projects—those public transportation capital projects planned, designed, and carried out to meet the specific needs of seniors and individuals with disabilities when public transportation is insufficient, unavailable, or inappropriate. Up to 45 percent of an area's apportionment may be used for additional public transportation projects that: exceed the Americans with Disabilities Act minimum requirements; improve access to fixed-route service and decrease reliance by individuals with disabilities on ADA complementary paratransit service; or provide alternatives to public transportation that assist seniors and individuals with disabilities with transportation.

All projects funded under this program must be included in a locally developed, coordinated public transit-human service transportation plan.

5. Period of Availability

For Enhanced Mobility of Seniors and Individuals with Disabilities Program funds apportioned under this notice, the period of availability is the year of apportionment plus two additional years. Accordingly, funds apportioned in FY 2023 must be obligated in grants by September 30, 2025. Any FY 2023 apportioned funds that remain unobligated at the close of business on September 30, 2025, will revert to FTA for reapportionment among the States and urbanized areas.

6. Other Program Highlights

Recipients may use a competitive selection process to select projects, but it is not required. A State may transfer funds apportioned to small, urbanized areas and rural areas to other parts of the state if it can certify that the needs are being met in the area to which the funds were originally apportioned. Funds apportioned to large, urbanized areas may not be used outside the urbanized area to which they were apportioned.

Transit service providers receiving section 5310 funds may coordinate and assist in providing meal delivery services on a regular basis as long as this does not conflict with the provision of transit services.

Additional information about the requirements for the section 5310 program can be found in FTA Circular 9070.1G, *Enhanced Mobility of Seniors and Individuals with Disabilities Program Guidance and Application Instructions,* dated July 7, 2014.

*F. Formula Grants for Rural Areas Program (49 U.S.C. 5311)*

The Rural Areas program provides formula funding to States and Indian tribes for the purpose of supporting public transportation in areas with a population of less than 50,000. Funding may be used for capital, operating, planning, job access and reverse commute projects, and State administration expenses. Eligible subrecipients include State and local governmental authorities, Indian Tribes, private non-profit organizations, and private operators of public transportation services, including intercity bus companies. Indian Tribes are also eligible direct recipients under section 5311, both for funds apportioned to the States and for projects apportioned or selected to be funded with funds set aside for a separate Tribal Transit Program.

For more information about the Formula Grants for Rural Areas program, contact Matt Lange, Office of Transit Programs, at (312) 353–4118 or *matthew.lange@dot.gov.*

1. Authorized Amounts

IIJA authorized $4.1 billion over five years to provide financial assistance for rural areas under section 5311(c)(3). The section 5311 program includes three other programs: the Rural Transit Assistance Program (RTAP); the

Appalachian Development Public Transportation Assistance Program; and the Tribal Transit Program. These separate programs are described in the sections that follow.

In addition to the funds made available to States under section 5311, $114.6 million of the funds authorized for the section 5340 Growing States formula factors are apportioned to States for use in rural areas.

2. FY 2023 Funding Availability

Under the Consolidated Appropriations Act, 2023, $804,217,747 is available for the Rural Area Formula Program. The total amount apportioned to the program is $914,581,455 as shown in the table below, after the addition of section 5340 Growing States, reapportioned funds and the oversight deduction authorized by section 5338.

**Grants for Rural Areas Formula Program—FY 2023**

| | |
|---|---|
| Total FY 2023 Appropriation | $804,217,747 |
| Oversight Deduction | (4,467,876) |
| Section 5340 Growing States | 114,641,584 |
| Reapportioned Funds | 190,000 |
| Total Apportioned | 914,581,455 |

3. Basis for Formula Apportionment

FTA apportions section 5311 funds to the states by a statutory formula. The majority of rural formula funds (83.15 percent) are apportioned based on land area and population factors. In this first tier, no state may receive more than 5 percent of the amount apportioned on the basis of land area. The remaining rural formula funds (16.85 percent) are apportioned based on land area, vehicle revenue miles, and low-income individual factors. In this second tier, no state may receive more than 5 percent of the amount apportioned on the basis of land area, or more than 5 percent of the amounts apportioned for vehicle revenue miles. In addition to funds made available under section 5311, FTA adds amounts apportioned based on rural population according to the Growing States formula factors of 49 U.S.C. 5340 to the amounts apportioned to the states under the section 5311 formula. Before FTA apportions section 5311 funds to the states, FTA subtracts funding from the total available amounts for the Appalachian Development Transportation Assistance Program, the Tribal Transit Program, the Rural Transportation Assistance Program (RTAP), and FTA oversight activities.

Data from the Rural Module of the National Transit Database (NTD) was used for this apportionment, including data from directly reporting Indian tribes. Data from public transportation systems that reported to the Annual (Urbanized Area) Module, and not attributable to an urbanized area, was also included.

4. Requirements

The section 5311 program provides funding for capital, operating, planning, job access and reverse commute projects, and administration expenses for public transit service in rural areas under 50,000 in population. The planning activities undertaken with section 5311 funds are in addition to those awarded to the State under section 5305 and must be used specifically for rural areas' needs. Additional information on eligible expenses can be found in Circular 9040.1G, *Formula Grants for Rural Areas: Program Guidance and Application Instructions,* dated October 24, 2014.

a. Intercity Bus Transportation

Each State must spend no less than 15 percent of its annual Rural Areas Formula apportionment for the development and support of intercity bus transportation, unless it can certify, after consultation with affected intercity bus service providers, that the intercity bus service needs of the State are adequately being met.

b. State Administration

States may elect to use up to 10 percent of their apportionment at 100 percent Federal share to administer the section 5311 program and provide technical assistance to subrecipients.

c. Eligibility for Safety Certification Training

Recipients of section 5311 funds are permitted to use not more than 0.5 percent of their formula funds under the Rural Areas program to pay not more than 80 percent of the cost of participation for an employee who is directly responsible for safety oversight to participate in public transportation safety certification training. Safety certification training program requirements are established in accordance with section 5329.

The Federal share for capital assistance is 80 percent and for operating assistance is 50 percent, except that States eligible for the sliding scale match under FHWA programs may use that match ratio for section 5311 capital projects and 62.5 percent of the sliding scale capital match ratio for operating projects.

Each State prepares an annual program of projects, which must provide for fair and equitable distribution of funds within the States, including Indian reservations, and must provide for maximum feasible coordination with transportation services assisted by other Federal sources.

Additional program guidance for the Rural Areas Program is found in FTA Circular 9040.1G, *Formula Grants for Rural Areas: Program Guidance and Application Instructions,* dated October 24, 2014, and is supplemented by additional information and changes provided in this notice and that may be posted to FTA's section 5311 web page.

5. Period of Availability

Section 5311 funds remain available to states for obligation for three Federal fiscal years, beginning with the year of apportionment plus two additional years. The Rural Areas program funds apportioned in this notice are available for obligation during FY 2023 plus two additional years. Any FY 2023 apportioned funds that remain unobligated at the close of business on September 30, 2025, will revert to FTA for reapportionment under the Rural Areas program.

*G. Rural Transportation Assistance Program (49 U.S.C. 5311(b)(3))*

The Rural Transportation Assistance Program (RTAP) provides funding to states to assist in the design and implementation of training and technical assistance projects, research, and other support services tailored to meet the needs of transit operators in rural areas.

The National Rural Transit Assistance Program (NRTAP) is administered through a cooperative agreement and re-competed at five-year intervals. In 2019, FTA awarded a cooperative agreement to Neponset Valley Transportation Management Association to administer NRTAP. NRTAP addresses the training and technical assistance needs of rural and tribal transit operators across the nation and supports state RTAP programs. NRTAP's comprehensive set of free technical assistance programs and resources includes training materials, webinars, newsletters and technical briefs, peer resources, research, and innovative technology initiatives.

For more information about Rural Transportation Assistance Program (RTAP) contact Matt Lange, Office of Transit Programs, at (312) 353–4118 or *matthew.lange@dot.gov.*

1. Authorized Amounts

IIJA authorizes $105 million over five years to carry out this program. Of this amount, 15 percent is reserved for the National RTAP program.

2. FY 2023 Funding Availability

Under the Consolidated Appropriations Act, 2023, $17,871,506 is available for the RTAP. The total amount apportioned for RTAP is $15,190,780 as shown in the table below, after the deduction for NRTAP.

**Rural Transportation Assistance Program—FY 2023**

| | |
|---|---|
| Total Appropriation ..... | $17,871,506 |
| National RTAP ..... | (2,680,726) |
| Total Apportioned ..... | 15,190,780 |

State allocations are shown in table 9 posted on FTA's FY 2023 Apportionments web page.

3. Basis for Formula Apportionment

FTA allocates funds to the States by an administrative formula. First, FTA allocates $65,000 to each State ($10,000 to territories), and then allocates the balance based on rural population.

4. Requirements

Eligible expenses include the design and implementation of training and technical assistance projects, research, and other support services tailored to meet the needs of transit operators in rural areas.

States may use the funds to undertake research, training, technical assistance, and other support services to meet the needs of transit operators in rural areas. These funds should be used in conjunction with a State's administration of the Rural Areas Formula Program and may also support the rural components of the section 5310 program.

5. Period of Availability

The section 5311 RTAP funds apportioned in this notice are available for obligation in FY 2023 plus two additional years, consistent with that established for the section 5311 program. Any FY 2023 apportioned funds that remain unobligated at the close of business on September 30, 2025, will revert to FTA for reapportionment under the Rural Areas program.

*H. Appalachian Development Public Transportation Assistance Program (49 U.S.C. 5311(c)(2))*

This program provides additional funding to support public transportation in the Appalachian region. There are thirteen eligible States that receive an allocation under this provision. The States and their allocation are shown in the table 9 posted on FTA's FY 2023 Apportionments web page.

For more information about the Appalachian Development Public Transportation Assistance Program, contact Matt Lange, Office of Transit Programs, at (312) 353–4118 or *matthew.lange@dot.gov.*

1. Authorized Amounts

A total of $137.4 million is authorized over five years to support public transportation in the Appalachian region.

2. FY 2023 Funding Availability

Under the Consolidated Appropriations Act, 2023, $26,807,258 million is available. The total amount apportioned to the program is $26,849,056 as shown in the table below, after the addition of reapportioned funds.

**Appalachian Development Public Transportation Assistance Program—FY 2023**

| | |
|---|---|
| Total FY 2023 Available | $26,807,258 |
| Reapportioned Funds ... | 41,798 |
| Total Apportioned ..... | 26,849,056 |

3. Basis for Formula Apportionment

FTA apportions the funds using percentages established under section 9.5(b) of the Appalachian Regional Commission Code (subtitle IV of title 40 U.S.C.). Allocations are based in general on each State's remaining estimated need to complete eligible sections of the Appalachian Development Highway System as determined from the latest percentages of available cost estimates for completion of the System. Allocations contain upper and lower limits in amounts determined by the Commission and are made in accordance with legislative instructions.

4. Requirements

Funds apportioned under this program can be used for purposes consistent with section 5311 to support public transportation in the Appalachian region. Funds can be applied for in the State's annual section 5311 grant. Appalachian program funds that cannot be used for operating may be used for a highway project under certain circumstances. States should contact their Regional Office if they intend to request a transfer. Additional information about the requirements for this section can be found in chapter VII of FTA Circular 9040.1G, *Formula Grants for Rural Areas: Program Guidance and Application Instructions,* dated October 24, 2014.

5. Period of Availability

Section 5311 Appalachian program funds are available for three years, which includes the year of apportionment plus two additional years, consistent with that established for the section 5311 program. Any FY 2023 apportioned funds that remain unobligated at the close of business on September 30, 2025, will revert to FTA for reapportionment under the Rural Areas program.

*I. Formula Grants for Public Transportation on Indian Reservations Program (49 U.S.C. 5311(j))*

The Public Transportation on Indian Reservations Program or Tribal Transit Program (TTP) is funded as a takedown from the section 5311 program. Eligible direct recipients are federally recognized American Indian Tribes and Alaskan Native Villages, groups and communities providing public transportation in rural areas. The TTP funds are allocated for grants to eligible recipients for any purpose eligible under section 5311, which includes capital, operating, planning, and job access and reverse commute projects. No local match is required for TTP formula funds.

For more information about the Tribal Transit Program contact Elan Flippin-Jones, Office of Transit Programs at (202) 366–3800 or *TribalTransit@dot.gov.*

1. Authorized Funding

A total of $229 million is authorized over five years, of which $183.2 million is for a formula program and $45.8 million is for a discretionary grant program.

2. FY 2023 Funding Availability

Under the Consolidated Appropriations Act, 2023, $35,743,011 is available for the Tribal Transit formula program. The total apportioned for the formula program is $36,413,211 after the addition of reapportioned funds.

**Public Transportation on Indian Reservations Program Formula Grants—FY 2023**

| | |
|---|---|
| Total FY 2023 Appropriation Available ..... | $35,743,011 |
| Reapportioned Funds ... | 670,200 |
| Total Apportioned ..... | 36,413,211 |

3. Basis for Formula Apportionment

Funding is allocated by formula to eligible Indian Tribes providing public transportation on tribal lands in rural areas. The formula apportionment shown in Table 10 is based on a statutory formula which includes three tiers. Tiers 1 and 2 are based on data reported to NTD by Indian tribes; Tier 3 is based on 2016–2020 American Community Survey data. The three tiers for the formula are: Tier 1—50 percent based on vehicle revenue miles reported to the NTD; Tier 2—25 percent provided in equal shares to Indian Tribes reporting at least 200,000 vehicle revenue miles to the NTD; Tier 3—25 percent based on Indian Tribes providing public transportation on Tribal Lands (American Indian Areas, Alaska Native Areas, and Hawaiian Home Lands) on which more than 1,000 low income individuals reside. If more than one Tribe provides public transportation services on Tribal Lands in a single Tribal Statistical area, and the tribes cannot determine how to allocate Tier 3 funds, FTA will allocate the funds based on the relative portion of transit (as defined by unlinked passenger trips) operated by each Tribe, as reported to the National Transit Database.

4. Requirements

Formula funds apportioned under this program can be used for purposes consistent with section 5311 to support public transportation on Indian Reservations in rural areas.

Section 5335 requires NTD reporting for all direct recipients and subrecipients of section 5311 funds. This reporting requirement has and continues to apply to the Tribal Transit Program. Tribes that provide public transportation in rural areas are reminded to report annually so they are included in the TTP formula apportionments. Tribes needing assistance with reporting to the NTD should contact the NTD Helpdesk: *NTDHelp@dot.gov* or the Appian NTD Reporting Application Support line: (877) 561–7466.

Additional program guidance for the TTP is found in FTA Circular 9040.1G, *Formula Grants for Rural Areas: Program Guidance and Application Instructions,* dated October 24, 2014, and is supplemented by additional information and changes provided in this notice and that may be posted to FTA's Tribal Transit web page.

5. Period of Availability

Funding under the TTP is available for three years, which includes the year of apportionment or allocation plus two additional years, consistent with that established for the section 5311 program. Any FY 2023 formula funds that remain unobligated at the close of business on September 30, 2025, will revert to FTA for reapportionment under the TTP.

6. Other Program Highlights

The funds set aside for the TTP are not meant to replace or reduce funds that Indian Tribes receive from States through the section 5311 program but are to be used to enhance public transportation on Indian reservations and transit serving Tribal communities. Funds allocated to Indian Tribes by a State may be included in the State's section 5311 application or awarded by FTA in a grant directly to the Indian Tribe. FTA encourages Indian Tribes intending to apply to FTA as direct recipients to contact the appropriate FTA Regional Office at the earliest opportunity.

TTP recipients must comply with all applicable Federal statutes, regulations, executive orders, FTA circulars, and other Federal requirements in carrying out the project supported by the FTA grant. FTA assists Tribes with understanding these requirements through Tribal Transit Technical Assistance Workshops, and the Tribal Transit Technical Assistance Assessments initiative. Through these assessments, FTA collaborates with Tribal Transit grantees to review processes and identify areas in need of improvement and then assist with solutions to address these needs—all in a supportive and mutually beneficial manner. Information about upcoming workshops and other technical assistance opportunities will be posted on the FTA website. FTA's Regional Tribal Transit Liaisons are available to assist Tribes with applying for and managing FTA grants. A list of Regional Tribal Transit Liaisons can be found on FTA's website at: *https://www.transit.dot.gov/funding/grants/federal-transit-administrations-regional-tribal-liaisons.*

The Tribal Transportation Self-Governance Program (TTSGP) was authorized by the FAST Act and is codified at 23 U.S.C. 207. Grant funding made available through the FTA formula or competitive TTP may be included in a Tribal Transportation Self-Governance funding agreement if there is an existing Self-Governance compact in place between the Tribe and the Department of Transportation. If funds are transferred to a Tribal Self-Governance funding agreement, the funds will be subject to the requirements and provisions of the Tribal Transportation Self-Governance Program regulation at 49 CFR part 29 and may be used only for the purpose for which they were awarded.

For more information about the Tribal Transit Program, please contact Elan Flippin-Jones at *TribalTransit@dot.gov* or (202)366–3800.

*J. Public Transportation Innovation (49 U.S.C. 5312)*

FTA's innovative research program includes three distinct programs: (a) a Research, Development, Demonstration, Deployment, and Evaluation program (49 U.S.C. 5312(b)–(e)); (b) a Low or No Emission Vehicle Component Assessment Program (Lo-No CAP) (49 U.S.C. 5312(h)); and (c) a Transit Cooperative Research Program (TCRP) (49 U.S.C. 5312(i)).

For more information about the Public Transportation Innovation program, contact Mary Leary, Office of Research, Demonstration and Innovation at (202) 366–4052 or *mary.leary@dot.gov.*

1. Authorized Funding

IIJA authorizes $192.8 million over five years.

2. FY 2023 Funding Availability

Under the Consolidated Appropriations Act, 2023, $32,789,262 is available for the Public Transportation Innovation program. The total amounts apportioned to each subcomponent of the program is shown below in the table.

| Public Transportation Innovation—FY 2023 | |
|---|---|
| Research, Development, Demonstration, Deployment, and Evaluation | $32,789,262 |
| Low or No Emission Vehicle Component Testing | 5,104,455 |
| Transit Cooperative Research Program (TCRP) | 6,716,026 |
| Total Apportioned | 44,609,743 |

3. Basis for Allocation of Funds

Section 5312 funds are allocated according to the authorized purposes and amounts described above, and then remaining amounts are subject to discretionary allocations where not specifically authorized. For FY 2023, FTA intends to fund projects and activities in support of the FTA FY 2023 action plan in five major areas: safety, climate and resiliency, equity, economic strength, and transformation. The Consolidated Appropriations Act, 2023, included $7 million in Transit

Infrastructure Grants, including: $1 million for demonstration and deployment for innovation mobility solutions; $1 million for the accelerating innovative mobility initiative; and $5 million for technical assistance, research, demonstration, or deployment activities or projects to accelerate the adoption of zero emissions buses. Projects may be selected through competitive Notices of Funding Opportunity (NOFO), noncompetitive awards, and partnerships with other Federal entities through interagency agreements. Potential recipients can register to receive information on NOFOs that are released under this program on *https://www.Grants.gov.*

4. Eligible Expenses

Eligible expenses include activities involving research; innovation and development; demonstration, deployment, and evaluation; accelerated implementation and deployment of advanced digital construction management systems; evaluation; low or no emission vehicle component testing and research; and the Transit Cooperative Research Program.

5. Requirements

Generally, the Government share of the cost of a project carried out under section 5312 shall not exceed 80 percent, except if there is substantial public interest or benefit, FTA may approve a greater Federal share. The non-Government share of the cost of a project carried out under section 5312 may be derived from in-kind contributions. If FTA determines that there would be a clear and direct financial benefit to an entity under a grant, contract, cooperative agreement, or other agreement under this section, FTA shall establish a Government share of the costs of the project to be carried out under the grant, contract, cooperative agreement, or other agreement that is consistent with the benefit. However, for the Lo-No Component Testing Program, the Government share is 50 percent; the remaining 50 percent of the costs will be paid by amounts recovered through the fees established by the testing facilities. There is no match requirement for the TCRP.

Application instructions and program management guidelines are set forth in FTA Circular 6100.1E, Technology Development and Deployment, ''*Research, Technical Assistance and Training Program: Application Instructions and Program Management Guidelines*'' dated April 10, 2015. All research recipients are required to work with FTA to develop approved Statements of Work.

Pursuant to the Small Business Innovation Development Act, a portion of the section 5312 funds must be set aside for the Department's Small Business Innovation Research program to address high priority research that will demonstrate innovative, economic, accurate, and durable technologies, devices, applications, or solutions to significantly improve current transit-related service including transit vehicle operation, safety, infrastructure and environmental sustainability, mobility, rider experience, or broadband communication.

6. Period of Availability

FTA establishes the period in which the funds must be obligated to the project. If the funds are not obligated within that period of time, they revert to FTA for reallocation under the program.

*K. Technical Assistance and Workforce Development (49 U.S.C. 5314)*

The Technical Assistance and Workforce Development program, 49 U.S.C. 5314, provides assistance to: (1) carry out technical assistance activities that enable more effective and efficient delivery of transportation services, foster compliance with Federal laws, and improve public transportation service; (2) develop standards and best practices for the transit industry; and (3) address public transportation workforce needs through research, outreach, training and the implementation of a frontline workforce grant program, and conduct training and educational programs in support of the public transportation industry.

For more information about the Technical Assistance and Workforce Development program, contact Mary Leary, Office of Research, Demonstration, and Innovation at 202–366–4052 or *mary.leary@dot.gov.*

1. Authorized Amounts

IIJA authorizes $61.98 million over five years for technical assistance. Of this amount, $34.4 million is authorized for the National Transit Institute under section 5314(c).

2. FY 2023 Funding Availability

In FY 2023, under the Consolidated Appropriations Act, 2023, $19,588,846 is available for the Technical Assistance and Workforce Development program, as shown in the table below. The total apportioned for the formula program is $12,872,820 after the deduction of $6.7 million for National Transit Institute.

**Technical Assistance and Workforce Development—FY 2022**

| | |
|---|---|
| Technical Assistance, Standards Development & Human Resource Training ..... | $19,588,846 |
| National Transit Institute | (6,716,026) |
| Total Appropriated .... | 12,872,820 |

3. Basis for Allocation of Funds

Under the appropriated amounts for section 5314, $6.7 million is available for the National Transit Institute (NTI) in FY 2023. The remaining $12.87 million of appropriated funds will be allocated in support of both FTA and USDOT strategic goals for technical assistance, standards development, and workforce development. Projects may be selected through Notices of Funding Opportunity (NOFO) or sole source cooperative agreements. Potential recipients can register to receive notification of NOFOs under this program on *https://www.Grants.gov.*

Once selected, FTA enters into cooperative agreements, contracts, or other agreements to award funds and manage the projects carried out under this section.

4. Eligible Expenses

Eligible expenses include activities involving (a) technical assistance; (b) standards development; and (c) human resources and training, which includes workforce development programs and activities as well as supportive services. Supportive services are wraparound services that help individuals, and especially those from underrepresented and underserved groups, enroll in and successfully complete training. For mor information on Supportive Services please go to: *https://www.transit.dot.gov/funding/grants/federal-transit-administration-faqs-supportive-services.*

Eligible technical assistance activities may include activities to support: (a) compliance with the Americans with Disabilities Act (ADA); (b) compliance with coordinating planning and human services transportation; (c) meeting the transportation needs of elderly individuals; (d) increasing transit ridership in coordination with MPOs and other entities, particularly around transit-oriented development; (e) addressing transportation equity with regard to the effect that transportation planning, investment, and operations have for low-income and minority individuals; (f) facilitating best practices to promote bus driver safety; (g) compliance with Buy America and pre- and post-award audits; (h) assisting with the development and deployment of low

and no emission vehicles or components for vehicles; (i) and other technical assistance activities that are necessary to advance the interests of public transportation.

Eligible standards activities include the development of voluntary and consensus-based standards and best practices by the industry to include those needed for safety, fare collection, intelligent transportation systems, accessibility, procurement, security, asset management, operations, maintenance, vehicle propulsion, communications, and vehicle electronics.

Eligible human resources and training activities include (a) employment training programs; (b) outreach programs to increase employment for veterans, females, individuals with disabilities, and minorities in public transportation activities; (c) research on public transportation personnel and training needs; (d) training and assistance for veteran and minority business opportunities; and (e) consensus-based national training standards and certifications in partnership with industry stakeholders. FTA funding directly allocated for these eligible purposes must be done through a competitive frontline workforce development program as required in the authorization. Should FTA allocate funds for these purposes, it will advertise the available funding in a Notice of Funding Opportunity (NOFO) on *https://www.Grants.gov* and on its website. FTA will be issuing additional guidance in the coming months on how recipients can utilize their formula funds in support of these eligible activities.

5. Requirements

Generally, the Government's share of the cost of a project carried out using a grant under section 5314 shall not exceed 80 percent. However, for the human resources and training, including the Innovative Public Transportation Frontline Workforce Development Program, the Government's share cannot exceed 50 percent. The Federal share for other types of awards will be stated in the agreement. In some cases, FTA may require a higher non-Federal share if FTA determines a recipient would obtain a clear and direct financial benefit from the project, or if the non-Federal share is an evaluation factor under a competitive selection process. There is no match requirement for the National Transit Institute.

Application instructions and program management guidelines are set forth in FTA Circular 6100.1E, *Research, Technical Assistance and Training Program: Application Instructions and Program Management Guidelines* dated April 10, 2015.

Under 49 U.S.C. 5314(b)(4), recipients may use no more than 0.5 percent of their section 5307, 5337 and 5339 funds to support workforce development activities. In addition, 49 U.S.C. 5314(c)(4) allows recipients to use no more than 0.5 percent of their 5307, 5337, and 5339 funds to attend NTI training. Both provisions allow recipients to use these funds to pay up to 80 percent of the cost of training.

6. Period of Availability

FTA establishes the period in which the funds must be obligated to the project. If the funds are not obligated within that period of time, they revert to FTA for reallocation under the program.

7. Other Program Highlights

For more information about the NTI, contact Lisa Colbert, at the FTA Office of Research, Demonstration, and Innovation (TRI): *lisa.colbert@dot.gov* or call 202–366–9261.

*L. Public Transportation Emergency Relief Program (49 U.S.C. 5324)*

FTA's Emergency Relief (ER) Program is authorized to provide funding for public transportation expenses incurred as a result of an emergency or major disaster. The Consolidated Appropriations Act, 2023 (Pub. L. 117–328), appropriated $213,905,338 for FTA's Emergency Relief Program for transit systems affected by major declared disasters occurring in calendar years 2017, 2020, 2021, and 2022. Costs related to the COVID–19 pandemic are not eligible for this funding. After the administrative takedown of 0.75 percent, FTA announced a Notice of Availability of Emergency Relief Funding (NAERF), the availability of $212,301,048 in FY 2023.

In the event of a publicly declared emergency or disaster, eligible expenses will include emergency operating expenses, such as evacuations, rescue operations, and expenses incurred to protect assets in advance of a disaster, as well as capital projects to protect, repair, reconstruct, or replace equipment and facilities of a public transportation system in the United States or on an Indian reservation that the Secretary determines is in danger of suffering serious damage or has suffered serious damage as a result of an emergency. Additional information on eligible expenses and the process for applying for ER Program funding can be found in FTA's *Emergency Relief Manual: A Reference Manual for States & Transit Agencies on Response and Recovery from Declared Disasters and FTA's Emergency Relief Program (49 U.S.C. 5324),* which was published on October 5, 2015.

Recipients of FTA funding affected by a declared emergency or disaster are authorized to use funds apportioned under sections 5307 and 5311 for emergency purposes. Recipients are advised that formula funds used for emergency purposes will not be replaced or restored with funding available through FTA under the ER Program or by the Federal Emergency Management Agency (FEMA).

In the event of a disaster affecting a public transportation system, the affected recipient should contact their FTA Regional Office as soon as practicable to determine whether Emergency Relief funds are available, and to notify FTA that it plans to seek reimbursement for emergency operations or repairs that have already taken place or are in process. If Emergency Relief funds are unavailable the recipient may seek reimbursement from FEMA. Properly documented costs for which the recipient has not received reimbursement from FEMA may later be reimbursed by grants made either from section 5324 funding (if appropriated) or sections 5307 and 5311 program funding, once the eligible recipient formally applies to FTA for reimbursement and FTA determines that the expenses are eligible for emergency relief.

In addition, before receiving a grant under this section following an emergency, the recipient shall: (1) submit documentation demonstrating proof of insurance required under Federal law for all structures related to the grant application; and (2) certify that the recipient has insurance required under State law for all structures related to the grant application.

Additional information about the Emergency Relief program is available on the FTA website at *https://www.transit.dot.gov/funding/grant-programs/emergency-relief-program.*

For more information, contact Tom Wilson, Office of Program Management, at 202–366–5279 or *thomas.wilson@dot.gov.*

*M. Public Transportation Safety Program (49 U.S.C. 5329)*

Section 5329(e)(6) provides funding to support States with rail fixed guideway public transportation systems (rail transit systems) to develop and carry out State Safety Oversight (SSO) Programs consistent with the requirements of 49 U.S.C. 5329. For more information,

contact Maria Wright, Office of Safety Review at (202) 366–5922 or *maria1.wright@dot.gov.*

1. Authorized Amounts

A total of $251.6 million is authorized over five years for the State Safety Oversight Program.

2. FY 2023 Funding Availability

Under the Consolidated Appropriations Act, 2023, $49,066,231 is available for the State Safety Oversight (SSO) Formula program. The total apportioned for the formula program is $50,416,539 after the addition of reapportioned funds, as shown in the table below.

| Public Transportation Safety Program—FY 2023 | |
|---|---|
| Total Appropriation ..... | $49,066,231 |
| Reapportioned Funds ... | 1,350,308 |
| Total Apportioned ..... | 50,416,539 |

3. Basis for Formula Apportionment

FTA will continue to allocate funds to the States by an administrative formula, which is detailed in the **Federal Register** notice which apportioned the initial SSO Formula Grant Program funds (79 FR 13380). Grant funds for the SSO program are apportioned to eligible States using a three-tier formula based on statutory requirements, which apportion 60 percent of available funds based on rail transit system vehicle passenger miles (PMT), vehicle revenue miles (VRM), and directional route miles (DRM), 20 percent of available funds equally to each eligible State, and 20 percent based on the number of rail transit systems.

4. Requirements

FTA requires each applicant to demonstrate in its grant application that its proposed grant activities will develop, lead to, or carry out a State Safety Oversight program that meets the requirements under 49 U.S.C. 5329(e). Grant funds may be used for program operational and administrative expenses, including employee training activities. Please see the **Federal Register** notice (79 FR 13380) for more information.

IIJA enhances State safety oversight programs by strengthening rail inspection practices by providing state safety oversight agencies authority to collect and analyze data and conduct risk-based inspections of rail fixed guideway transportation systems. Recipients may also use funds in support of the development and implementation of transmission-based train control systems that enforce train speed regulation and ensure train separation and collision avoidance. FTA continues to be authorized to issue restrictions and prohibitions to address unsafe conditions or practices, and to withhold funds for non-compliance with safety requirements.

5. Period of Availability

SSO Formula Grant Program funds are available for the year of apportionment plus two additional years. Any FY 2023 funds that remain unobligated as of September 30, 2025, will revert to FTA for reapportionment under the SSO Formula Grant Program.

*N. State of Good Repair Program (49 U.S.C. 5337)*

The State of Good Repair (SGR) program provides capital assistance for maintenance, replacement, and rehabilitation projects of existing high intensity fixed guideway and high intensity motorbus systems to maintain a state of good repair. Additionally, SGR grants are eligible for developing and implementing Transit Asset Management plans. This program provides funding for the following fixed guideway transit modes: rapid rail (heavy rail), commuter rail, light rail, hybrid rail, monorail, automated guideway, trolleybus (using overhead catenary), aerial tramway, cable car, inclined plane (funicular), passenger ferry, and bus rapid transit. Fixed-route bus capital projects for services operating on high-occupancy-vehicle (HOV) facilities are also funded through the High Intensity Motorbus tier of this program. Of the amount authorized for section 5337 each year, $300 million is set aside for the competitive Rail Vehicle Replacement Program.

FTA published the State of Good Repair program guidance, FTA Circular 5300.1, *State of Good Repair Grants Program: Guidance and Application Instructions,* on January 28, 2015.

For more information about the SGR program, contact Donna Iken, Office of Transit Programs, at (202) 366–0876 or *donna.iken@dot.gov.*

1. Authorized Amounts

IIJA authorized $18.39 billion over five years for the State of Good Repair program, including $1.5 billion for the Rail Vehicle Replacement Program, and provided an additional $4.75 billion in advance appropriations.

2. FY 2023 Funding Availability

Under the Consolidated Appropriations Act, 2023, $4,537,778,037 is available for the State of Good Repair Program. The total amount apportioned is $4,183,665,069 after the deductions for oversight and transfers to OIG, the set-aside for the rail vehicle replacement program, and the addition of reapportioned funds as shown in the table below. Of the total amount apportioned, $4,063,735,620 is apportioned to the High Intensity Fixed Guideway Formula and $119,929,449 is apportioned to the High Intensity Motorbus Formula.

| State of Good Repair Formula Program—FY 2023 | |
|---|---|
| Total Appropriation ..... | $4,537,778,037 |
| Oversight Deductions ... | (54,782,780) |
| Transfer to OIG ..... | (95,000) |
| Reapportioned Funds ... | 764,812 |
| FY 2023 Rail Replacement Competitive Grant ..... | (300,000,000) |
| Total Available to Apportion ..... | 4,183,665,069 |
| Total Apportioned to High Intensity Fixed Guideway Formula ..... | 4,063,735,620 |
| Total Apportioned to High Intensity Motorbus Formula | 119,929,449 |

3. Basis for Formula Apportionment

FTA allocates State of Good Repair program funds according to a statutory formula. Funds are apportioned to urbanized areas with high intensity fixed guideway and high intensity motorbus systems that have been in operation for at least seven years. This means that only segments of high intensity fixed guideway and motorbus systems that entered into revenue service on or before September 30, 2015, are included in the formula, as identified in the NTD.

The law requires that 97.15 percent of the total amount authorized for the State of Good Repair program be apportioned to urbanized areas with ''High Intensity Fixed Guideway'' systems. The apportionments to urbanized areas with ''High Intensity Fixed Guideway'' systems are determined by two equal elements: (1) the proportion of the amount an urbanized area would have received in FY 2011 to the total amount apportioned to all urbanized areas in FY 2011 using new fixed guideway definition; and (2) the proportion of vehicle revenue miles of an urbanized area to the total vehicle revenue miles of all urbanized areas and the proportion of directional route miles of an urbanized area to the total directional route miles of all urbanized areas. High Intensity Motorbus systems will receive the remaining 2.85 percent of the total amount authorized for the State of Good

Repair program, and the apportionments to urbanized areas are based on vehicle revenue miles and directional route miles.

Vehicle revenue miles and directional route miles attributable to an urbanized area must be placed in revenue service at least 7 years before the first day of the fiscal year. A threshold level of more than one mile of high intensity fixed guideway is required in order to receive State of Good Repair funds. Therefore, urbanized areas reporting one mile or less of fixed guideway mileage under the NTD are not included. FTA will apportion funds to designated recipients in the UZAs (see section IV.C. of this notice for more information about designated recipients; FTA will apportion section 5337 funds to the section 5307 designated recipient for the UZA) with high intensity fixed guideway and/or high intensity motorbus systems operating at least 7 years. The designated recipients will then allocate funds as appropriate to recipients that are public entities in the urbanized areas and provide split letters to FTA. FTA can make grants to direct recipients after sub-allocation of funds.

4. Eligible Expenses

Eligible activities include projects that maintain, rehabilitate, and replace transit assets, as well as projects that implement Transit Asset Management plans. Additionally, training and workforce activities, including supportive services, authorized under 49 U.S.C. 5314(b) and (c) are eligible for the State of Good Repair funds; funds for such activities are limited to 1 percent of the total amount apportioned to the recipient (0.5 percent for each of the authorized activities). See section IV.K. of this notice for more information on workforce development activities.

5. Requirements

In addition to the program guidance found in the Circular, all recipients will need to certify that they will comply with the rule issued under section 5326 for the Transit Asset Management plan, 49 CFR part 625, and SGR projects will need to be included in recipients' Transit Asset Management plans.

6. Period of Availability

The State of Good Repair Program funds apportioned in this notice are available for obligation during FY 2023 plus three additional years. Accordingly, funds apportioned in FY 2023 must be obligated in grants by September 30, 2026. Any FY 2023 apportioned funds that remain unobligated at the close of business on September 30, 2026, will revert to FTA for reapportionment under the State of Good Repair Program.

*O. Grants for Buses and Bus Facilities Program (49 U.S.C. 5339)*

The section 5339 program provides funding to replace, rehabilitate, and purchase buses and related equipment as well as construct bus-related facilities.

Additional guidance on the section 5339(a) formula program can be found in FTA Circular 5100.1, *Bus and Bus Facilities Program: Guidance and Application Instructions,* which was published on May 18, 2015. Information on the section 5339(b) Buses and Bus Facilities Competitive Grant Program and the section 5339(c) Low or No Emission Vehicle Program was published in a Notice of Funding Opportunity on January 27, 2023.

For more information about the Low or No Emission Vehicle Program and the Buses and Bus Facilities program, contact Margaretta Veltri, Office of Transit Programs at (202) 366–5094 or *margaretta.veltri@dot.gov.*

1. Authorized Amounts

IIJA authorized a total of $5.5 billion to be appropriated over five years for the Section 5339 Program. IIJA provided an additional $5.25 billion over five years in advance appropriations for the Section 5339(c) Low or No Emission Program.

2. FY 2023 Funding Availability

Under the Consolidated Appropriations Act, 2023, $2,213,211,810 is available for Grants for Buses and Bus Facilities. Of this amount: $613,179,354 is available for the Formula Grants for Buses and Bus Facilities Program after the deduction for oversight and the addition of reapportioned funds; $469,445,424 is available for the Competitive Grants for Buses and Bus Facilities Program after the takedowns for oversight and the Low or No Emission grants; and $1,151,681,178 (including advance appropriations) is available for the Low or No Emission Competitive Grants Program after the takedowns for oversight and transfer to the OIG. These amounts are detailed in the table below.

**5339(a) Formula Grants for Buses and Bus Facilities**

| | |
|---|---|
| Total FY 2023 Appropriation Available ..... | $616,610,699 |
| Oversight Deduction ..... | (4,624,580) |
| Reapportioned Funds ... | 1,193,235 |
| Total Apportioned .. | 613,179,354 |

**Section 5339(b) Competitive Grants for Buses and Bus Facilities**

| | |
|---|---|
| Total FY 2023 Appropriation Available ..... | 546,601,111 |
| Oversight Deduction ..... | (4,099,509) |
| Less Section 5339(c) Low or No Emission Grants (Competitive) | (73,056,178) |
| Total Apportioned .. | 469,445,424 |

**Section 5339(c) Low or No Emission Grants (Competitive)**

| | |
|---|---|
| Total FY 2023 Available | 1,173,056,178 |
| Less FY 2023 Oversight and Admin ..... | (21,270,000) |
| Less FY 2023 Transfer to OIG ..... | (105,000) |
| Total Available for Allocation ..... | 1,151,681,178 |

3. Basis for Allocation

Section 5339(a) Buses and Bus Facilities formula program funds are apportioned to States, territories, and designated recipients based on a statutory formula. Under the national distribution, each State is allocated $4 million, and each territory is allocated $1 million, for use anywhere in the State or territory. The remainder of the available funding is then apportioned for UZAs based on population, vehicle revenue miles and passenger miles using the same apportionment formula and allocation process as section 5307. Funds for UZAs under 200,000 in population are apportioned to the State through a section 5339(a) Governor's apportionment for allocation to eligible recipients within such areas of the State at the Governor's discretion. Funds for UZAs with populations of 200,000 or more are apportioned directly to one or more designated recipients within each UZA for allocation to eligible projects and recipients within the UZA.

4. Eligible Expenses

Eligible capital projects under the Buses and Bus Facilities formula program (section 5339(a)) continue to include projects to replace, rehabilitate, and purchase buses and related equipment, and projects to construct bus-related facilities. Recipients may use up to one-half of one percent of their section 5339 funds to support workforce development activities, including supportive services, at an 80 percent Federal share; the eligible workforce development activities are defined in section 5314; see section IV.K. of this notice for more information. This provision is in addition to the one-half of one percent that recipients may use for training

activities with the National Transit Institute.

5. Requirements

Eligible recipients of the Buses and Bus Facilities formula program (section 5339(a)) include designated recipients that operate fixed route bus service or that allocate funding to fixed route bus operators; and State or local governmental entities that operate fixed route bus service that are eligible to receive direct grants under the Urbanized Area Formula (section 5307) and Rural Formula (section 5311) programs. Eligible subrecipients continue to include public agencies or private nonprofit organizations engaged in public transportation, including those providing services open to a segment of the general public, as defined by age, disability, or low income.

The requirements of section 5307 apply to recipients of section 5339 funds within an urbanized area. The requirements of section 5311 apply to recipients of section 5339 funds within rural areas. For additional program requirements, refer to FTA Circular 5100.1, *Bus and Bus Facilities Program: Guidance and Application Instructions.*

6. Period of Availability

The Buses and Bus Facilities Formula Program funds apportioned in this notice are available for obligation during FY 2023 plus three additional years. Accordingly, funds apportioned in FY 2023 must be obligated in grants by September 30, 2026. Any FY 2023 apportioned funds that remain unobligated at the close of business on September 30, 2026, will revert to FTA for reapportionment under the Buses and Bus Facilities Formula Program.

Discretionary program funds authorized under section 5339(b) and (c) (Bus and Low No, respectively) follow the same period of availability: year of allocation to a project plus three additional years.

*P. Growing States and High-Density States Formula Factors (49 U.S.C. 5340)*

IIJA continues the use of formula factors to distribute additional funds to the section 5307 and section 5311 programs for Growing States and High-Density States. FTA will continue to publish single urbanized and rural apportionments that show the total amount for section 5307 and 5311 programs that includes section 5340 apportionments for these programs.

a. Authorized Amounts

IIJA authorized $3.879 billion over five years for the Growing States and High-Density States Formula factors.

FY 2023 Funding Availability

In FY 2023, $756,523,955 is authorized and appropriated for apportionment in accordance with the formula factors prescribed for Growing States and High-Density States set forth in section 5340 for FY 2023.

**Growing States and High-Density States Formula Factors—FY 2023**

| | |
|---|---|
| 5340 High Density States | $355,566,259 |
| 5340 Growing States | 400,957,696 |
| Total Apportioned | 756,523,955 |

b. Basis for Formula Apportionment

Under the Growing States portion of the section 5340 formula, FTA projects each State's 2025 population by comparing each State's apportionment year population (as determined by the Census Bureau) to the State's 2010 Census population and extrapolating to 2025 based on each State's rate of population growth between 2010 and the apportionment year. Each State receives a share of Growing States funds on the basis of its projected 2025 population relative to the nationwide projected 2025 population.

Once each State's share is calculated, funds attributable to that State are divided into an urbanized area allocation and a non-urbanized area allocation on the basis of the percentage of each State's 2010 Census population that resides in urbanized and non-urbanized areas. Urbanized areas receive portions of their State's urbanized area allocation on the basis of the 2010 Census population in that urbanized area relative to the total 2010 Census population in all urbanized areas in the State. These amounts are added to the Urbanized Area's section 5307 apportionment. The States' rural area allocation is added to the allocation that each State receives under the section 5311 Formula Grants for Rural Areas program.

The High-Density States portion of the section 5340 formula are allocated to urbanized areas in States with a population density equal to or greater than 370 persons per square mile. Based on this threshold and 2010 Census data, the States that qualify in FY 2023 are Maryland, Delaware, Massachusetts, Connecticut, Rhode Island, New York and New Jersey. The amount of funds provided to each of these seven States is allocated on the basis of the population density of the individual State relative to the population density of all seven States. Once funds are allocated to each State, funds are then allocated to urbanized areas within the States on the basis of an individual urbanized area's population relative to the population of all urbanized areas in that State.

*Q. Washington Metropolitan Area Transit Authority Grants*

1. Authorized Amounts

Section 601(f) of the Passenger Rail Investment and Improvement Act of 2008, as amended by IIJA, authorized $150 million per year for each of fiscal years of 2022 through 2030 for capital and preventive maintenance grants to the Washington Metropolitan Area Transit Authority (WMATA).

2. FY 2023 Funding Availability

Under the Consolidated Appropriations Act, 2023, $150,000,000 is available. The total amount available is $148,500,000 after the deduction for oversight as shown in the table below.

**Washington Metropolitan Area Transit Authority Grants—FY 2023**

| | |
|---|---|
| Total Appropriation | $150,000,000 |
| Oversight Deduction | (1,500,000) |
| Total Apportioned | 148,500,000 |

3. Period of Availability

Funds appropriated for WMATA under the Consolidated Appropriations Act, 2023, shall remain available until expended.

For more information about WMATA grants, contact Kevin Osborn, Office of Transit Programs, at (202) 366–7519 or *kevin.osborn@dot.gov.*

*R. Transit Infrastructure Grants—Community Project Funding/Congressionally Directed Spending*

For more information about Community Project Funding grants, contact Amy Volz, Office of Transit Programs, at (202) 366–7484 or *amy.volz@dot.gov.*

1. Appropriated Amounts

The Consolidated Appropriations Act, 2023, appropriated $360,459,324 for Community Project Funding/Congressionally Directed Spending for 125 projects in 31 States, identified in the accompanying Joint Explanatory Statement. Table 20 identifies the recipient, project, amount and a project ID that will be used to identify the project in TrAMS.

**Community Project Funding/Congressionally Directed Spending—FY 2023**

| | |
|---|---|
| Total Appropriated | $360,459,324 |

2. Period of Availability

Funds remain available until expended. Recipients are, however, encouraged to apply for these funds by the end of FY 2026. First time grant recipients should contact the relevant Regional Office for assistance to initiate steps to become a FTA recipient.

3. Requirements

As the Consolidated Appropriations Act, 2023 specifies that funds are available for projects and activities eligible under chapter 53, generally applicable chapter 53 requirements apply to these funds, including the planning requirements of sections 5303 and 5304; bus testing requirements of section 5318; general provision requirements of section 5323 (such as Buy America compliance); contract requirements of section 5325; project management requirements of section 5327; nondiscrimination requirements of section 5332; disposition requirements of section 5334; and applicability of FTA oversight of section 5338, as well as the National Environmental Policy Act (NEPA) and related requirements.

Unlike in FY 2022, Community Project Funding/Congressionally Directed Spending projects funded by the Consolidated Appropriations Act, 2023 will receive a maximum Federal share of 80 percent of the net costs of the project. Non-Federal match of 20 percent is required for these funds.

Upon written request by the recipient named in table 20 and a proposed pass-through recipient, FTA may approve another entity to act as the direct recipient of the funding and the named recipient may serve as a subrecipient. Pre-award authority is provided consistent with the requirements for FTA's formula funds as of the date all necessary requirements were met (see section V, below.) However, before incurring costs, recipients are strongly encouraged to consult with the appropriate FTA Regional Office regarding the eligibility of the project for future FTA funds and for questions on environmental requirements, or any other Federal requirements that must be met before incurring pre-award costs.

## V. FTA Policy and Procedures for FY 2023 Grants

### *A. Automatic Pre-Award Authority To Incur Project Costs*

1. Caution to New Recipients

While FTA provides pre-award authority to incur expenses before grant award for formula programs, it recommends that first-time grant recipients not utilize this automatic pre-award authority without verifying with the appropriate FTA Regional Office that all pre-requisite requirements have been met. Commonly, a new recipient may misunderstand pre-award authority conditions and be unaware of all the applicable FTA requirements that must be met in order to be reimbursed for project expenditures incurred in advance of grant award. FTA programs have specific statutory requirements that are often different from those for other Federal grant programs with which new recipient may be familiar. If costs are incurred for an ineligible project or activity, or for an eligible activity but at an inappropriate time (*e.g.,* prior to NEPA completion), FTA will be unable to reimburse the project sponsor, and, in certain cases, the entire project may be rendered ineligible for FTA assistance.

2. Policy

FTA provides pre-award authority to incur expenses before grant award for certain program areas described below. This pre-award authority allows recipients to incur certain project costs before grant approval and retain the eligibility of those costs for subsequent reimbursement after grant approval. The recipient assumes all risk and is responsible for ensuring that all conditions are met to retain eligibility. This pre-award spending authority permits an eligible recipient to incur costs on an eligible transit capital, operating, planning, or administrative project without prejudice to possible future Federal participation in the cost of the project. In this notice, FTA continues to provide pre-award authority through the authorization period of IIJA (October 1, 2022, through September 30, 2026) for capital assistance under all formula programs, so long as the conditions described below are met. Pre-award authority is indicated in the application. The actual items of cost associated with the use of pre-award authority are documented in the initial Federal Financial Report (FFR) that is required to be completed prior to the recipient executing the award. FTA provides pre-award authority for planning and operating assistance under the formula programs without regard to the period of the authorization. For projects funded by competitive programs, pre-award authority may be granted at the time of project selection unless otherwise noted. All pre-award authority is subject to conditions and triggers stated below:

a. Operating, Planning, or Administrative Assistance

FTA does not impose additional conditions on pre-award authority for operating, planning, or administrative assistance under the formula grant programs. Recipients may be reimbursed for expenses incurred before grant award so long as funds have been expended in accordance with all Federal requirements, costs would have been allowable if incurred after the date of award, and the recipient is otherwise eligible to receive the funding. In addition to cross-cutting Federal grant requirements, program specific requirements must be met. Designated recipients of section 5310 funds have pre-award authority for the ten percent of the apportionment for program administration.

b. Transit Capital Projects

For transit capital projects, the date that costs may be incurred varies depending on the type of activity and its potential to have a significant impact on the human and natural environment as described in section 3., *Conditions,* below.

c. Public Transportation Innovation, Technical Assistance and Workforce Development

Unless provided for in an announcement of project selections, pre-award authority does not apply to section 5312 Public Transportation Innovation projects or section 5314 Technical Assistance and Workforce Development projects. Before an applicant may incur costs for activities under these programs, it must first obtain a written Letter of No Prejudice (LONP) from FTA.

For more information, contact Lisa Colbert, at the FTA Office of Research, Demonstration, and Innovation (TRI): *lisa.colbert@dot.gov* or call 202–366–9261.

3. Conditions

The conditions under which pre-award authority may be utilized are specified below:

i. Pre-award authority is not a legal or implied commitment that the subject project will be approved for FTA assistance or that FTA will obligate Federal funds. Furthermore, it is not a legal or implied commitment that all items undertaken by the applicant will be eligible for inclusion in the project.

ii. All FTA statutory, procedural, and contractual requirements must be met.

iii. No action will be taken by the recipient that prejudices the legal and administrative findings that FTA must make in order to approve a project.

iv. Local funds expended by the recipient after the date of the pre-award authority will be eligible for credit toward local match or reimbursement if FTA later makes a grant or grant amendment for the project. Local funds expended by the recipient before the date of the pre-award authority will not be eligible for credit toward local match or reimbursement. Furthermore, the expenditure of local funds or the undertaking of certain activities that would compromise FTA's ability to comply with Federal environmental laws (*e.g.,* project implementation activities such as land acquisition, demolition, or construction before the date of pre-award authority) may render the project ineligible for FTA funding.

v. The Federal amount of any future FTA assistance awarded to the recipient for the project will be determined on the basis of the overall scope of activities and the prevailing statutory provisions with respect to the Federal/local match ratio at the time the funds are obligated.

vi. For funds to which the pre-award authority applies, the authority expires with the lapsing of the fiscal year funds.

vii. When a grant for the project is subsequently awarded, the grant and the Federal Financial Report in TrAMS must indicate the use of pre-award authority and an initial Federal Financial Report must be submitted in TrAMS to associate those costs with the award.

viii. Environmental Requirements—All Federal grant requirements must be met at the appropriate time for the project to remain eligible for Federal funding. Designated recipients may incur costs for design and environmental review activities for all formula funded projects from the date of the authorization of the formula funds or for discretionary funded projects other than those funded by the Capital Investment Grants (CIG) program from the date of the announcement of the competitive allocation of funds for the project.

For projects that qualify for a categorical exclusion (CE) pursuant to 23 CFR 771.118(c), designated recipients may start activities and incur costs under pre-award authority for property acquisition, demolition, construction, and acquisition of vehicles, equipment, or construction materials from the date of the authorization of formula funds or the date of the announcement of competitive allocations for the project.

FTA recommends that a grant applicant considering a CE pursuant to 23 CFR 771.118(c) contact the appropriate FTA Regional Office for assistance in determining the proper environmental review process, including other applicable environmental laws, and level of documentation necessary before incurring the above-mentioned costs. This applies especially when the grant applicant believes a c-list CE with construction activities, such as 23 CFR 771.118(c)(8), (9), (10), (12), or (13), applies to its project or if a grant applicant intends to acquire property through the use of pre-award authority. If FTA subsequently finds that a project does not qualify for a CE under 23 CFR 771.118(c) and the sponsor has already undertaken activities under pre-award authority that are only allowable for projects that qualify for a CE under 23 CFR 771.118(c), the project will be ineligible for FTA assistance.

For all other non-CIG projects that do not qualify for a CE under 23 CFR 771.118(c), grant applicants may take action and incur costs for property acquisition, demolition, construction, and acquisition of vehicles, equipment, or construction materials from the date that FTA completes the environmental review process required by NEPA and its implementing regulations, 23 U.S.C. 139, and other environmental laws, by its issuance of a 23 CFR 771.118(d) CE determination, a finding of no significant impact (FONSI), a combined final environmental impact statement (FEIS)/record of decision (ROD), or a ROD.

ix. Planning and other requirements—Formula funds must be authorized, or appropriated, and competitive project allocations published or announced before pre-award authority can be considered.

The requirements that a capital project be included in a locally adopted Metropolitan Transportation Plan, the Metropolitan Transportation Improvement Program, and the federally approved Statewide Transportation Improvement Program (23 CFR part 450) must be satisfied before the recipient may advance the project beyond planning and preliminary design with non-Federal funds under pre-award authority. If the project is located within an EPA-designated non-attainment or maintenance area for air quality, the conformity requirements of the Clean Air Act, 40 CFR part 93, must also be met before the project may be advanced into implementation-related activities under pre-award authority triggered by the completion of the NEPA process. For a planning project to have pre-award authority, the planning project must be included in an MPO-approved UPWP that has been coordinated with the State.

x. Federal procurement procedures, as well as the whole range of applicable Federal requirements (*e.g.,* Buy America, Davis-Bacon Act, and Disadvantaged Business Enterprise), must be followed for projects in which Federal funding will be sought in the future. Failure to follow any such requirements could make the project ineligible for Federal funding. In short, the administrative flexibility requires a recipient to make certain that no Federal requirements are circumvented.

xi. All program specific requirements must be met. For example, projects under section 5310 must comply with specific program requirements, including coordinated planning.

Before incurring costs, recipients are strongly encouraged to consult with the appropriate FTA Regional Office regarding the eligibility of the project for future FTA funds and for questions on environmental requirements, or any other Federal requirements that must be met.

4. Pre-Award Authority for the Fixed Guideway Capital Investment Grants Program

Projects proposed for section 5309 Capital Investment Grant (CIG) program funds are required to follow a multi-step, multi-year process defined in law. For New Starts and Core Capacity projects, this process includes three phases: project development (PD), engineering, and construction. For Small Starts projects, this process includes two phases: PD and construction. After receiving a letter from the project sponsor requesting entry into the PD phase, FTA must respond in writing within 45 days whether the information was sufficient for entry. If FTA's correspondence indicates the information was sufficient and the New Starts, Small Starts or Core Capacity project enters PD, FTA extends pre-award authority at that time to the project sponsor to incur costs for PD activities. PD activities include the work necessary to complete the environmental review process and as much engineering and design activities as the project sponsor believes are necessary to support the environmental review process. Upon completion of the environmental review process with a Record of Decision (ROD), Finding of No Significant Impact (FONSI), or Categorical Exclusion (CE) determination by FTA for a New Starts, Small Starts, or Core Capacity Improvement project, FTA extends pre-award authority to project sponsors to incur costs for as much engineering and design as needed to develop a reasonable cost estimate and financial

plan for the project, utility relocation, and real property acquisition and associated relocations for any property acquisitions not already accomplished as a separate project for hardship or protective purposes or right-of-way under 49 U.S.C. 5323(q).

For Small Starts projects, upon completion of the environmental review process and confirmation from FTA that the overall project rating is at least a Medium, FTA extends pre-award authority for vehicle purchases. Upon receipt of a letter notifying a New Starts or Core Capacity project sponsor of the project's approval into the engineering phase, FTA extends pre-award authority for vehicle purchases as well as any remaining engineering and design, demolition, and procurement of long lead items for which market conditions play a significant role in the acquisition price. The long lead items include, but are not limited to, procurement of rails, ties, and other specialized equipment, and commodities.

Please contact the appropriate FTA Regional Office for a determination of activities not listed here, but which meet the intent described above. FTA provides this pre-award authority in recognition of the long-lead time and complexity involved with purchasing vehicles as well as their relationship to the ''critical path'' project schedule. FTA cautions recipients that do not currently operate the type of vehicle proposed in the project about exercising this pre-award authority. FTA encourages these sponsors to wait until later in the process when project plans are more fully developed. FTA reminds project sponsors that the procurement of vehicles must comply with all Federal requirements including, but not limited to, competitive procurement practices, the Americans with Disabilities Act, and Buy America. FTA encourages project sponsors to discuss the procurement of vehicles with FTA in regard to Federal requirements before exercising pre-award authority. Because there is not a formal engineering phase for Small Starts projects, FTA does not extend pre-award authority for demolition and procurement of long lead items. Instead, this work must await receipt of a construction grant award or an expedited grant agreement.

a. Real Property Acquisition

FTA extends pre-award authority for the acquisition of real property and real property rights for CIG projects (New or Small Starts or Core Capacity) upon completion of the environmental review process for that project. The environmental review process is completed when FTA signs a combined FEIS/ROD, ROD, FONSI or makes a CE determination. With the limitations and caveats described below, real estate acquisition may commence, at the project sponsor's risk. To maintain eligibility for a possible future FTA grant award, any acquisition of real property or real property rights must be conducted in accordance with the requirements of the Uniform Relocation Assistance and Real Property Acquisition Policies Act (URA) and its implementing regulations, 49 CFR part 24. This pre-award authority is strictly limited to costs incurred: (i) to acquire real property and real property rights in accordance with the URA regulation, and (ii) to provide relocation assistance in accordance with the URA regulation. This pre-award authority is limited to the acquisition of real property and real property rights that are explicitly documented in the draft environmental impact statement (DEIS), FEIS, environmental assessment (EA), or CE document, as needed for the selected alternative that is the subject of the FTA-signed ROD or FONSI, or CE determination. This pre-award authority regarding property acquisition that is granted at the completion of the environmental review process does not cover site preparation, demolition, or any other activity that is not strictly necessary to comply with the URA, with one exception—namely when a building that has been acquired, has been vacated and awaits demolition poses a potential fire safety hazard or other hazard to the community in which it is located or is susceptible to reoccupation by unauthorized occupants. Demolition of the building is also covered by this pre-award authority upon FTA's written agreement that the adverse condition exists. Pre-award authority for property acquisition is also provided when FTA makes a CE determination for a protective buy or hardship acquisition in accordance with 23 CFR 771.118(d)(3). Pre-award authority for property acquisition is also provided when FTA completes the environmental review process for the acquisition of right-of-way as a separate project in accordance with 49 U.S.C. 5323(q). When a tiered environmental review in accordance with 23 CFR 771.111(g) is used, pre-award authority is not provided upon completion of the first-tier environmental document except when the Tier-1 ROD or FONSI signed by FTA explicitly provides such pre-award authority for a particular identified acquisition. Project sponsors should use pre-award authority for real property acquisition relocation assistance with a clear understanding that it does not constitute a funding commitment by FTA. FTA provides pre-award authority upon completion of the environmental review process for real property acquisition and relocation assistance for displaced persons and businesses in accordance with the requirements of the URA.

b. Reimbursement of Costs Incurred Under Pre-Award Authority

Although FTA provides pre-award authority for property acquisition, long lead items, and vehicle purchases upon completion of the environmental review process, FTA does not generally award Federal funding for these activities conducted under pre-award authority until the project receives a CIG program construction grant. This is to ensure that Federal funds are not risked on a project whose advancement into construction is not yet assured.

c. National Environmental Policy Act (NEPA) Activities

NEPA requires that major projects proposed for FTA funding assistance be subjected to a public and interagency review of the need for the project, its environmental and community impacts, and alternatives to avoid and reduce adverse impacts. Projects of more limited scope also need a level of environmental review, to determine whether there are significant environmental impacts or confirmation that a CE applies. FTA's regulation titled ''Environmental Impact and Related Procedures,'' at 23 CFR part 771 states that the costs incurred by a grant applicant for the preparation of environmental documents requested by FTA are eligible for FTA financial assistance (23 CFR 771.105(f)). Accordingly, FTA extends pre-award authority for costs incurred to comply with NEPA regulations and to conduct NEPA-related activities, effective as of the earlier of the following two dates: (1) the date of the Federal approval of the relevant STIP or STIP amendment that includes the project or any phase of the project, or that includes a project grouping under 23 CFR 450.216(j) that includes the project; or (2) the date that FTA approves the project into the project development phase of the CIG program. The grant applicant must notify the appropriate FTA Regional Office upon initiation of the Federal environmental review process consistent with 23 CFR 771.111. NEPA-related activities include, but are not limited to, public involvement activities, historic preservation reviews, section 4(f) evaluations, wetlands evaluations, and endangered species consultations. This pre-award authority

is strictly limited to costs incurred to conduct the NEPA process and associated engineering, and to prepare environmental, historic preservation and related documents. When a New Starts, Small Starts, or Core Capacity project is granted pre-award authority for the environmental review process, the reimbursement for NEPA activities conducted under pre-award authority may be sought at any time through section 5307 (Urbanized Area Formula Program) or the flexible highway programs (*e.g.,* Surface Transportation Program or Congestion Mitigation and Air Quality Improvement Program). Reimbursement from the section 5309 CIG program for NEPA activities conducted under pre-award authority is provided only for expenses incurred after entry into the project development phase and only once a construction grant agreement is signed. FTA reimbursement for costs incurred is not guaranteed and recipients may not start activities and incur costs under pre-award authority for property acquisition, demolition, construction, and acquisition of vehicles, equipment, or construction materials until the environmental review process is complete.

For more information about FTA's National Environmental Policy Act (NEPA) activities, contact Megan Blum, Office of Environmental Programs, at (202) 366–0463 or *megan.blum@dot.gov.*

d. Other CIG Project Activities Requiring Letter of No Prejudice (LONP)

Except as discussed in paragraphs i through iii above, a CIG project sponsor must obtain a written LONP from FTA before incurring costs for any activity not covered by pre-award authority. To obtain an LONP, an applicant must submit a written request accompanied by adequate information and justification to the appropriate FTA Regional Office, as described in C. Letter of No Prejudice (LONP) Policy, below.

For more information about the Fixed Guideway Capital Investment Grants program, including LONP policy, real property acquisition, and reimbursement of costs incurred under Pre-Award Authority, contact Elizabeth Day, Office of Capital Project Development, at (202) 366–5159 or *elizabeth.day@dot.gov.*

e. Pre-Award Authority for the Expedited Project Delivery (EPD) Pilot Program

The EPD Pilot Program, as authorized by section 3005(b) of the Fixing America's Surface Transportation Act (FAST Act), is aimed at expediting delivery of new fixed guideway capital projects, small starts projects, or core capacity improvement projects. Section 3005(b) requires FTA to notify Congress and the applicant, in writing, within 120 days after the receipt of a complete application, on the decision of project selection. FTA will extend pre-award authority for all eligible project costs at the time it is announced that a project has been selected. There is no pre-award authority provided until a project selection announcement is made, and costs incurred prior to project selection are not eligible. Letters of No Prejudice will not be provided for the EPD Pilot Program, as all eligible costs are covered by pre-award authority at the time of project selection.

Although FTA provides pre-award authority for eligible project costs, FTA does not award Federal funding for activities conducted under pre-award authority until the project receives an EPD Pilot Program construction grant. This is to ensure that Federal funds are not risked on a project whose advancement into construction is not yet assured. To maintain eligibility for a possible future FTA grant award, any acquisition of real property or real property rights must be conducted in accordance with the requirements of the Uniform Relocation Assistance and Real Property Acquisition Policies Act (URA) and its implementing regulations, 49 CFR part 24.

For more information about the Expedited Project Delivery Pilot Program, contact Elizabeth Day, Office of Capital Project Development, at (202) 366–5159 or *elizabeth.day@dot.gov.*

*B. FY 2023 Annual List of Certifications and Assurances*

Section 5323(n) requires FTA to publish annually a list of all certifications required under Chapter 53 concurrently with the publication of this annual apportionment notice. The FY 2023 version of FTA's Certifications and Assurances is available on FTA's website at *https://www.transit.dot.gov/funding/grantee-resources/certifications-and-assurances/certifications-assurances.*

FTA cannot make an award or an amendment to an award unless the recipient has executed the latest version of FTA's Certifications and Assurances. FTA encourages recipients of formula funding to execute the FY 2023 Certifications and Assurances electronically in TrAMS within 90 days of this notice, to prevent delays.

*C. Letter of No Prejudice (LONP) Policy*

1. Policy

LONP authority allows an applicant to incur costs on a project utilizing non-Federal resources, with the understanding that the costs incurred subsequent to the issuance of the LONP may be reimbursable as eligible expenses or eligible for credit toward the local match should FTA approve the project at a later date. LONPs are applicable to projects and project activities not covered by automatic pre-award authority. The majority of LONPs will be for section 5309 CIG program projects undertaking activities not covered under automatic pre-award authority. LONPs may be issued for formula funds beyond the life of the current authorization or FTA's extension of automatic pre-award authority; however, the LONP is limited to a five-year period, unless otherwise authorized in the LONP, or otherwise extended. Receipt of Federal funding under any program is not implied or guaranteed by an LONP.

2. Conditions and Federal Requirements

The conditions and requirements for pre-award authority specified in section V.4.ii and V.4.iii above apply to all LONPs for the CIG program. Because project implementation activities may not be initiated before completion of the environmental review process, FTA will not issue an LONP for such activities until the environmental review process has been completed with a combined FEIS/ROD, ROD, FONSI, or CE determination.

3. Request for LONP

Before incurring costs for project activities not covered by automatic pre-award authority, the project sponsor must first submit a written request for an LONP, accompanied by adequate information and justification, to the appropriate Regional Office and obtain written approval from FTA. FTA approval of an LONP is determined on a case-by-case basis. Federal funding under the CIG program is not implied or guaranteed by an LONP. Specifically, when requesting an LONP, the applicant shall provide the following items:

a. Description of the activities to be covered by the LONP.

b. Justification for advancing the identified activities. The justification should include an accurate assessment of the consequences to the project scope, schedule, and budget should the LONP not be approved.

c. Allocated level of risk and contingency for the activity requested.

*D. Civil Rights Requirements*

Recipients must ensure their programs and services operate in a nondiscriminatory manner and fulfill reporting requirements to document their civil rights compliance as a condition to receiving Federal funds.

*Americans With Disabilities Act (ADA) of 1990:* Recipients must carry out provisions of the ADA, related provisions in section 504 of the Rehabilitation Act of 1973, as amended, and the Department of Transportation's implementing regulations at 49 CFR parts 27, 37, 38, and 39. FTA's ADA Circular 4710.1, *Americans With Disabilities Act Guidance,* provides guidance for implementing the regulatory requirements of the ADA. As public entities, recipients may also be subject to Department of Justice regulations implementing Title II of the ADA (28 CFR part 35); in addition, as employers, recipients may be subject to Equal Employment Opportunity Commission regulations implementing the employment titles of the ADA (29 CFR part 1630).

In addition, recipients must regularly prepare and submit in TrAMS civil rights program plans and reports to establish and demonstrate compliance and document policies and practices in the following areas:

*Title VI of the Civil Rights Act of 1964:* The Department of Transportation's title VI implementing regulations are found in 49 CFR part 21. FTA's Title VI Circular 4702.1B, *Title VI Requirements and Guidelines for Federal Transit Administration Recipients,* provides guidance for carrying out the regulatory requirements and outlines the Title VI program requirements and timeline for submitting updates.

*Disadvantaged Business Enterprise (DBE) program:* The Department of Transportation's DBE implementing regulations are found in 49 CFR part 26 and set forth requirements for implementing the DBE program in good faith and developing and reporting on the triennial DBE goal.

*Title VII of the Civil Rights Act of 1964, Equal Employment Opportunity (EEO):* The Department of Transportation's EEO implementing regulations are found in 49 CFR part 21. FTA's EEO Circular 4704.1A *Equal Employment Opportunity (EEO) Act Guidance,* provides guidance for carrying out the regulatory requirements and outlines the EEO program submission process.

Recipients are expected to maintain current civil rights program plans and submit required reports in TrAMS. Recipients with past due or expired programs are ineligible for new funding awards and may be subject to other remedies or sanctions at FTA's discretion.

While not new requirements, recipients are specifically reminded of the following:

- Recipients awarding more than $250,000 in FTA-funded contracts must comply with the Disadvantaged Business Enterprise (DBE) regulations, including by implementing a DBE program that creates a level playing field for DBEs to compete on FTA-funded projects. The recipient must conduct outreach to and consultation with small businesses, women-owned businesses, and minority-owned businesses; apply DBE goals as needed when exercising pre-award authority; and verify the DBE compliance of transit vehicle manufacturers before purchasing transit vehicles.
- Recipients in urbanized areas of 200,000 or more in population and with 50 or more fixed-route vehicles in peak service must conduct a service equity analysis for all service changes that meet the recipient's definition of ''major service change'' prior to implementing the service change. Those recipients also must conduct a fare equity analysis for all fare increases or decreases prior to implementing a fare change. Furthermore, an environmental justice analysis is not a substitute for a Title VI service equity analysis triggered by a major service change or fare change. When a full equity analysis is not required due to the size of the recipient or duration of a change, FTA expects agencies to take steps to ensure changes are equitable and nondiscriminatory.

Recipients are encouraged to reach out to FTA's Office of Civil Rights when contemplating new projects, new services, or new service models for technical assistance and guidance, to support recipients in achieving their equity and accessibility goals and complying with Federal civil rights requirements.

For more information, contact the Office of Civil Rights at *FTACivilRightsSupport@dot.gov.*

*E. Consolidated Planning Grants*

The Consolidated Planning Grants (CPG) Program allows States and Metropolitan Planning Organizations (MPOs) to merge funds from the FTA Metropolitan Planning Program and State Planning and Research Program (SPRP) with FHWA Planning and SPRP funds into a single consolidated planning grant. Transferred planning funds can be awarded and administered by either FTA or FHWA. The CPG eliminates the need to monitor individual fund sources, if several have been used, and ensures that the oldest funds will always be used first.

Under the CPG, States can report metropolitan planning program expenditures to comply with the Uniform Administrative Requirements, 2 CFR part 200, subpart E, for both FTA and FHWA under the Catalogue of Federal Domestic Assistance number for FTA's Metropolitan Planning Program (20.505). Additionally, for States with an FHWA Metropolitan Planning fund-matching ratio greater than 80 percent, the State can waive the 20 percent local share requirement, with FTA's concurrence, to allow FTA funds used for metropolitan planning in a CPG to be granted at the higher FHWA sliding scale rate. For some States, this Federal match rate can exceed 90 percent.

States interested in transferring planning funds between FTA and FHWA should contact the FTA Regional Office or FHWA Division Office for more detailed procedures. *FHWA Order 4551.1* dated August 12, 2013, on ''Fund Transfers to Other Agencies and Among Title 23 Programs'' (*https://www.fhwa.dot.gov/legsregs/directives/orders/45511.cfm*) provides guidance and more detailed information.

For further information on CPGs, contact Ann Souvandara, Office of Budget and Policy, FTA, at (202) 366–0649 or *ann.souvandara@dot.gov;* or Ryan Long, Office of Planning and Environment at (215) 656–7051 or *ryan.long@dot.gov.*

*F. Grant Application Procedures*

All applications are filed electronically. FTA continues to award and manage grants and cooperative agreements using the Transit Award Management System (TrAMS). To access TrAMS, contact your FTA Regional Office. Resources on using TrAMS can be found on FTA's website at *https://www.transit.dot.gov/TrAMS.*

FTA regional staff are responsible for working with potential recipients to review and process grant applications. In order for an application to be considered complete and for FTA to assign a Federal Award Identification Number (FAIN), enabling submission in TrAMS, and submission to the Department of Labor (when applicable), the following requirements must be met:

i. Applicants must be registered and have an ''active status'' in the System for Award Management (SAM) and its registration is current. To register an entity or check the status and renew registration, visit the SAM website at *https://www.sam.gov/SAM.*

ii. Applicant's contact information is correct and up to date.

iii. Applicant has properly submitted its annual certifications and assurances.

iv. Applicant's Civil Rights submissions are current and approved.

v. Recipient has a Transit Asset Management plan in place that meets the requirements of 49 CFR part 625 or is covered by a compliant Group Plan.

vi. Documentation is on file to support status as either a designated recipient (for the program and area) or a direct recipient.

vii. Funding is available, including any flexible funds included in the budget, and split letters or suballocation letters on file, where applicable, to support amount being applied for in grant application.

viii. The activity is listed in a currently approved Transportation Improvement Program (TIP); Statewide Transportation Improvement Program (STIP), or Unified Planning Work Program (UPWP) unless such requirements have been waived for the specific funding and activity type to facilitate response and recovery from the COVID–19 public health emergency.

ix. All eligibility issues are resolved.

x. Required environmental findings are made.

xi. The application contains a well-defined scope of work including at least one project with accompanying project narratives, budget that includes scope codes and activity line-item information, Federal and non-Federal funding amounts, and milestones.

xii. Major Capital Projects as defined by 49 CFR part 633 Project Management Oversight must document that FTA has reviewed the project management plan and provided approval.

xiii. Milestone information is complete. FTA will also review status of other open grant reports to confirm financial and milestone information is current on other open awards.

xiv. Applicant has ensured that it has registered to report to the National Transit Database, and that any subrecipients that provide public transportation service have also registered to report to the National Transit Database.

xv. FTA must provide Congressional notification before awarding competitive grants.

Other important issues that impact FTA grant processing activities are discussed below.

a. Award Budgets—Scope Codes and Activity Line Items (ALI) Codes; Financial Purpose Codes

FTA uses the Scope and Activity Line Item (ALI) Codes in the award budgets to track program trends, to report to Congress, and to respond to requests from the Inspector General and the Government Accountability Office (GAO), as well as to manage grants. The accuracy of the data is dependent on the careful and correct use of codes. ALI codes should contain information on quantities (*e.g.,* the number of vehicles) related only to the funding identified for that ALI code.

b. Designated and Direct Recipients Documentation

For its formula programs, FTA primarily apportions funds to the Designated Recipient in the large UZAs (areas over 200,000), or for areas under 200,000 (small UZAs and rural areas), it apportions the funds to the Governor, or the Governor's designee (*e.g.,* State DOT). Depending on the program and as described in the individual program sections found in section IV of this notice, further suballocation of funds may be permitted to eligible recipients who may then apply directly to FTA for the funding as direct recipients.

For the programs in which FTA can make grants to eligible direct recipients, other than the designated recipients, recipients are reminded that documentation must be on file to support the (1) status of the recipient either as a designated recipient or direct recipient; and (2) the allocation of funds to the direct recipient.

Documentation to support existing designated recipients for the UZA must also be on file at the time of the first application in FY 2023. Suballocation letters (also called split letters or governor's apportionment letters) must also be on file to support grant applications from direct recipients. Once suballocation letters for FY 2023 funding are finalized they should also be uploaded as part of the application into TrAMS.

The Direct Recipient is required to upload to TrAMS a copy of the suballocation letter indicating the allocation of funding for the appropriate fund program when the applicant transmits its application for initial review. The suballocation letter must be signed by the Designated Recipient, or as applicable in accordance with local planning requirements. If there are two Designated Recipients, both entities must sign the suballocation letter. The suballocation letter must: (1) specify the allocations to the respective Direct Recipients listed in the letter; (2) incorporate language above the signatories to reflect this agreement; and (3) make clear that the Direct Recipient will assume all responsibility associated with the award for the funds. When drafting the suballocation letter, Designated Recipients may use the template language below:

''As identified in this Letter, the Designated Recipient(s) authorize(s) the reassignment/reallocation of [enter fund source, *e.g.,* section 5307 funds] to the Direct Recipient(s) named herein. The undersigned agree to the amounts allocated/reassigned to each Direct Recipient. Each Direct Recipient is responsible for its application to the Federal Transit Administration to receive such funds and assumes the responsibilities associated with any award for these funds.''

1. Payments

Once a grant has been awarded and executed, requests for payment can be processed. To process payments FTA uses ECHO-Web, an internet accessible system that provides recipients the capability to submit payment requests on-line, as well as receive user-IDs and passwords via email. New applicants should contact the appropriate FTA Regional Office to obtain and submit the registration package necessary for set-up under ECHO-Web.

2. Oversight

FTA is responsible for conducting oversight activities to help ensure that grant recipients use FTA Federal financial assistance in a manner consistent with their intended purpose and in compliance with regulatory and statutory requirements. Each Urbanized Area Formula Program recipient is reviewed every three years, (FTA's Triennial Review); and States and statewide public transportation agencies are reviewed periodically to assess the management practices and program implementation of FTA statewide programs (*e.g.,* Planning, Rural Areas, Enhanced Mobility of Seniors and Individuals with Disabilities Programs). Other more detailed reviews are scheduled based on an annual recipient oversight assessment. Important objectives of FTA's oversight program include but are not limited to: determining recipient compliance with Federal requirements; identifying technical assistance needs and delivering technical assistance to meet those needs; spotting emerging issues with recipients in a forward-looking fashion; recognizing when there is a need for more in-depth reviews in the areas of procurement, financial management, and civil rights; and identifying recipients with recurring or systemic issues.

3. Technical Assistance

As noted throughout the notice, FTA continues to rely on several of the existing program circulars for general program guidance. FTA is continuing to update the program circulars, with an opportunity for notice and comment where warranted, to reflect amendments to chapter 53 of title 49, U.S.C. made by IIJA. In the meantime, if you have any questions, please do not hesitate to contact FTA. FTA headquarters and regional staff will be pleased to answer your questions and provide any technical assistance you may need to apply for FTA program funds and manage the grants you receive. At its discretion, FTA may also use program oversight consultants to provide technical assistance to recipients on a case-by-case basis. This notice and the program guidance circulars previously identified in this document may be accessed via the FTA website at *https://www.transit.dot.gov/.*

*G. Grant Management*

1. Grant Reporting

Recipients of FTA funds are reminded that all FTA recipients are required to report on their grants and that it is critical to ensure reports demonstrate that reasonable progress is being made on the project. At a minimum, all awards require a Federal Financial Report (FFR) and a Milestone Progress Report (MPR) on an annual basis, with some reports required quarterly or monthly depending on the recipient and the type of projects funded under the grant. The requirements for these reports and other reporting requirements can be found in FTA Circular 5010.1E, *Grant Management Requirements,* dated July 16, 2018. FTA staff, auditors, and contractors rely on the information provided in the FFR and MPR to review and report on the status of both financial and project-level activities contained in the grant. It is critical that recipients provide accurate and complete information in these reports and submit them by the required due date. Failure to report or demonstrate reasonable progress on projects can result in suspension or premature close-out of a grant.

2. Inactive Grants and Grant Closeout

In FY 2023, FTA will continue to focus on inactive grants and grants that do not comply with reporting requirements. If appropriate, FTA will take action to close out and deobligate funds from these grants if reasonable progress is not being made. The efficient use of funds will further FTA's fulfillment of its mission to provide efficient and effective public transportation systems for the nation.

At the end of Federal Fiscal Year 2023, FTA will identify the list of grants that were awarded on or prior to September 30, 2020, have had no funds disbursed or have not had a disbursement since September 30, 2022. FTA Regional Offices will contact grant recipients with grants that meet these criteria to notify them that FTA intends to close the grant and deobligate any remaining funds unless the recipient can provide information that demonstrates that the projects funded by the grant remain active and the recipient has a realistic schedule to expedite completion of the projects funded in the grant.

3. Transportation Investments Generating Economic Recovery (TIGER), Better Utilizing Investments To Leverage Development (BUILD) and Rebuilding American Infrastructure With Sustainability and Equity (RAISE) Discretionary Grants

Recipients of open TIGER, BUILD and RAISE grants should be aware that, as a matter of law, all remaining TIGER funds must be disbursed from grants by the end of the fifth fiscal year after the Expiration of Obligation Authority. (See, 31 U.S.C. 1552.) For FTA TIGER VII projects, that deadline was extended to the end of FY 2023. For FTA TIGER VIII projects, that deadline is the end of FY 2024. Accordingly, once ECHO closes for disbursements in late September 2023 (September 2024 for TIGER VIII), all undisbursed funds within FTA TIGER VII-funded grants will no longer be available to the recipient. These undisbursed funds will be deobligated from the grant. Even if a recipient has incurred costs or disbursed funds prior to the close of ECHO, if the recipient has not actually drawn down the funds by the time ECHO closes, FTA will be unable to reimburse the recipient. Therefore, recipients with open TIGER VIII grants must ensure project activities are completed and all funds are drawn down before ECHO closes by late September 2024 (September 2023 for TIGER VII).

For more information about the Transportation Investments Generating Economic Recovery (TIGER), Better Utilizing Investments to Leverage Development (BUILD) and Rebuilding American Infrastructure with Sustainability and Equity (RAISE) Discretionary Grants program, contact Victor Waldron, Office of Transit Programs at (202) 366–5183 or *victor.waldron@dot.gov.*

The contents of this document do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies. Recipients should refer to applicable regulations and statutes referenced in this document.

**Nuria I. Fernandez,**

*Administrator.*

[FR Doc. 2023–07761 Filed 4–13–23; 8:45 am]

**BILLING CODE 4910–57–P**

## DEPARTMENT OF TRANSPORTATION

### Pipeline and Hazardous Materials Safety Administration

**[Docket No. PHMSA–2022–0111 (Notice No. 2022–14)]**

### Hazardous Materials: Request for Feedback on Recycled Plastics Policy

**AGENCY:** Pipeline and Hazardous Materials Safety Administration (PHMSA), Department of Transportation (DOT).

**ACTION:** Notice; request for information.

**SUMMARY:** PHMSA is publishing this notice to: (1) solicit information pertaining to how the potential use of recycled plastic resins in the manufacturing of specification packagings may affect hazardous materials transportation safety; (2) ensure transparency of its current policy pertaining to the use of recycled plastics in the manufacturing of specification packagings; (3) seek input on this policy to better inform potential regulatory changes; and (4) gather information for the evaluation of future approval requests and to better inform decisions pertaining to potential regulatory revisions and other related work.

**DATES:** Interested parties are invited to submit comments on or before July 13, 2023. Comments received after that date will be considered to the extent possible.

**ADDRESSES:** You may submit comments identified by the Docket Number PHMSA–2022–0111 by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 1–202–493–2251.
- *Mail:* Docket Management System; U.S. Department of Transportation, West Building Ground Floor, Room W12–140, Routing Symbol M–30, 1200 New Jersey Avenue SE, Washington, DC 20590.
- *Hand Delivery:* Docket Management System; Room W12–140 on the ground floor of the West Building, 1200 New

Jersey Avenue SE, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except federal holidays.

*Instructions:* All submissions must include the agency name and Docket Number (PHMSA–2022–0111) for this notice. To avoid duplication, please use only one of these four methods. All comments received will be posted without change to the Federal Docket Management System (FDMS) and will include any personal information you provide.

*Docket:* For access to the dockets to read background documents or comments received, go to *http://www.regulations.gov* or DOT's Docket Operations Office (see **ADDRESSES**).

*Privacy Act:* In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public. DOT posts these comments, without edit, including any personal information the commenter provides, to *http://www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *http://www.dot.gov/privacy.*

*Confidential Business Information (CBI):* CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this notice contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this notice, it is important that you clearly designate the submitted comments as ''CBI.'' Please mark each page of your submission containing CBI as ''PROPIN.'' Submissions containing CBI should be sent to Ryan Larson, Standards and Rulemaking Division, 202–366–8553, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590–0001. Any commentary that PHMSA receives which is not specifically designated as CBI will be placed in the public docket for this notice.

**FOR FURTHER INFORMATION CONTACT:**

Ryan Larson, Office of Hazardous Materials Safety, Standards and Rulemaking Division, 202–366–8553, email: *ryan.larson@dot.gov,* or Glenn Foster, Office of Hazardous Materials Safety, Standards and Rulemaking Division, 202–366–8553, email: *glenn.foster@dot.gov,* Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590–0001.

**SUPPLEMENTARY INFORMATION:**

## I. Purpose

PHMSA is publishing this notice to (1) solicit information pertaining to how the potential use of recycled plastic resins in the manufacturing of specification packagings may affect hazardous materials transportation safety; (2) ensure transparency of its current policy pertaining to the use of recycled plastics in the manufacturing of specification packagings; (3) seek input on this policy to better inform potential regulatory changes; and (4) gather information for the evaluation of future approval requests and to better inform decisions pertaining to potential regulatory revisions and other related work.

## II. Background

Plastic production contributes to planet-warming greenhouse gas emissions at every point in its life cycle. The process of drilling for plastic's source materials (oil and gas) includes methane leaking and flaring, and is often combined with clearing forests and wetlands that otherwise would have sequestered carbon. In addition, greenhouse gases are created from the processes that turn oil and gas into plastic. The process of recycling materials—especially recycling plastics—plays a vital role in combating climate change and reducing the amount of plastic waste in landfills. For example, the Environmental Protection Agency (EPA) states on its website that in 2018, plastic generation totaled 35.7 million tons in the United States, which was 12.2 percent of the municipal solid waste.[1]

PHMSA is aware through its participation in the development of international standards and regulations that an increasing number of countries are interested in expanding the use of recycled plastics in plastic packagings manufactured for hazardous materials. For example, the European Commission is considering a proposal with minimum targets for recycled content in certain plastic packaging, such as 30 percent by 2030 and 65 percent by 2040.[2]

Plastic packagings perform an integral role in ensuring that hazardous materials are transported safely and securely. Plastics are a vital source material for the manufacture of packaging used to transport hazardous materials around the world. Plastic is used to manufacture drums, jerricans, non-bulk composite packagings, and composite intermediate bulk containers (IBCs)—as well as some inner packagings that are part of combination packagings.

Consistent with the Administration's goals of reducing climate pollution and reducing the effects of per- and poly-fluoroalkyl substances (PFAS) on communities across the United States,[3] PHMSA is committed to taking actions that may extend the life cycle of existing plastic, including through reuse and recycling, and reduce the need for new plastics to limit the production of PFAS. Further, Section 207 of Executive Order 14057, ''Catalyzing Clean Energy Industries and Jobs Through Federal Sustainability,'' directs federal agencies to advance pollution prevention, support markets for recycled products, and promote a transition to a circular economy.[4]

Increasing the use of recycled plastics in packagings is one potential avenue to innovate within this complex issue. Further, advances in technology and operational cleaning processes may allow for new plastic articles to maintain high levels of consistency in the quality of the plastics at a molecular level and offer the potential for growth in the use of recycled plastics, including for the manufacture of plastic packagings used for hazardous materials.

## III. PHMSA's Current Policy on Recycled Plastics

While PHMSA has been committed to increasing the use of recycled plastics in packaging, it has traditionally taken an approach that corresponded to its understanding of the industry's ability to implement sufficient quality control actions to maintain packaging standards. The Hazardous Materials Regulations (HMR; 49 CFR parts 171–180) require approval from the Associate Administrator for Hazardous Materials Safety or a special permit to use recycled plastics in certain packagings [5] to transport hazardous

[1] Plastics: Material-Specific Data | US EPA.

[2] *https://environment.ec.europa.eu/system/files/2022-11/Proposal%20for%20a%20Regulation%20on%20packaging%20and%20packaging%20waste.pdf.*

[3] FACT SHEET: Biden-Harris Administration Launches Plan to Combat PFAS Pollution | The White House.

[4] 86 FR 70935 (Dec. 8, 2021).

[5] In accordance with the HMR, no used material other than production residues or regrind from the same manufacturing process may be used in the manufacture of specification plastic packagings unless approved by the Associate Administrator. See § 178.509(b)(1) for plastic drums and jerricans, § 178.522(b)(1) for composite packagings with inner

Continued

materials. *See* 49 CFR 107.105 and 107.705. PHMSA has not exempted plastic packagings manufactured from recycled plastic resins from applicable performance testing specifications as required by Part 178, Subparts M or O of the HMR. Since 1997, PHMSA has issued approximately 10 approvals permitting manufacturers of plastic packagings to use recycled plastic resins provided strict controls are followed to ensure the quality of the packaging.[6] These packagings have been permitted only for use at the Packing Group II and III levels, preventing their use for the hazardous materials posing the greatest risk (*i.e.,* Packing Group I). Further, minimum thickness requirements for plastic packagings must still be followed in accordance with 49 CFR 173.28(b)(4). Compatibility requirements for plastic packagings in 49 CFR 173.24(e) are still applicable, ensuring appropriate compatibility with the lading and safe rates of packaging permeation. As such, only plastic resins that have been prepared and evaluated under a manufacturer's quality assurance program may be used in the manufacture of recycled plastic packagings.

In the approvals, PHMSA has required that all recycled material selected for use must be cleaned of residue from the prior lading. Further, batches of not more than 250,000 pounds must be sorted and selected using the manufacturer's quality assurance program. The quality assurance program must identify the sources of the recycled material, their previous lading, and their tested metrics in accordance with designated testing procedures. PHMSA has not been asked and does not anticipate a request for approval to use recycled material that previously contained a Division 6.1 (poisonous) material, material that does not conform to melt index and density test specifications, or material that is otherwise determined to be unsuitable according to the manufacturer's quality assurance program. PHMSA has further required manufacturers to verify that each batch of recycled plastic material has the proper melt flow rate and density, consistent with that of the design type manufactured from recycled material. In addition, PHMSA has required that each batch of recycled resin demonstrate the following characteristics:

1. A melt index (HLMI), when tested in accordance with ASTM D–1238[7] at 21.6 kg and 190 °C, that does not exceed the following ranges:

- An HLMI range of <4 must be within ±1.5 grams per 10 minutes.
- An HLMI range of ≥4 <8 must be within ±2 grams per 10 minutes.
- An HLMI range of >8 ≤12 must be within ±2.5 grams per 10 minutes.

2. A density, when tested in accordance with either ASTM D–1505[8] or D–792,[9] within the range of 0.960 ± 0.02 g/cc.

Lastly, all plastic packagings manufactured from recycled plastic resins under the approvals must be tested more frequently than those plastic packagings manufactured from virgin resins. As an example, the periodic testing of drums must occur at least every 12 months and periodic testing of jerricans must occur at least every 30 days.

In anticipation of interested stakeholders considering the availability of approvals for packaging made from recycled plastics as they develop business plans, PHMSA is seeking input on ways to facilitate innovation and acceptance without compromising safety. Consequently, PHMSA is interested in learning whether any manufacturers have avoided adopting more recent recycling technologies in the use of recycled resins in plastic packaging manufacturing due to approval requirements. PHMSA is soliciting input on this issue to better guide its efforts in promoting increased use of recycled plastic resins in the manufacturing of specification packagings.

## IV. Request for Feedback

PHMSA requests comment on the following questions to assist in our evaluation of future approval requests and to better inform PHMSA-supported research and development, and potential regulatory revisions:

1. Are the controls (*e.g.,* material characteristics, design and requalification testing, and manufacturers quality assurance program) in the current approvals adequate for broader adoption of recycled plastics? Are they too narrow or too burdensome? Are there additional controls that should be implemented to ensure safety while using recycled plastic resins?

2. Do current cleaning processes for recycled plastic resins adequately remove all contaminants of the prior lading? What additional cleaning methods are being considered?

3. What, if any, are the potential cost savings in using recycled resins? Has there been or is there an expected increase in demand for hazardous materials packaging containing recycled materials?

4. What would be the climate impact of using more recycled resins?

5. Should hazardous materials packagings composed of recycled plastic resins be limited to resins derived from used hazardous materials packagings (*i.e.,* industrial packagings) or should other sources of plastics—such as plastics from consumer packagings—be allowed? How could PHMSA expand allowable materials sources in this area without adversely affecting the safety of packagings? What consensus standards are available to help facilitate this change in source materials?

6. What research could PHMSA conduct to characterize potential risks of transporting hazardous materials in packagings made of recycled resins?

7. Are there specific hazardous materials classes or divisions, including packing groups, that should not be allowed for use with recycled resins?

8. Are the hazardous materials compatibility requirements of the HMR adequate for use with packagings made from recycled resins or should there be additional considerations? If so, what are these considerations?

9. Should there be a limit to the number of times resins can be recycled, and if so, what should that limit be? How could PHMSA track this information?

PHMSA is also interested in learning whether any manufacturers have avoided adopting more recent recycling technologies in the use of recycled resins in plastic packaging manufacturing due to approval requirements. PHMSA is soliciting input on this issue to better guide its efforts in promoting increased use of recycled plastic resins in the manufacturing of specification packagings.

In conjunction with this notice, PHMSA is considering conducting a webinar to inform the public of its

plastic receptacles, § 178.707(c)(3)(iii) for composite IBCs, and § 178.925(b)(3) for rigid plastic large packagings.

[6] Examples of PHMSA CAA approvals for recycled plastics are available online at:

*https://www.phmsa.dot.gov/hazmat/documents/approval/1_CA2012030016_2021125171.pdf/ApprovalsCA_19836_CAApproval-2d7175bc-0a37-413b-a95e-62b3cca6fa77*

*https://www.phmsa.dot.gov/hazmat/documents/approval/1_CA2011030036_2020094986.pdf/ApprovalsCA_18946_CA-Approval-e329d08c-d80a-4ab3-ade0-82bbc4bd1205*

*https://www.phmsa.dot.gov/hazmat/documents/approval/1_CA2011030038_2020095047.pdf/ApprovalsCA_18948_CA-Approval-40283db3-31c1-4cc8-bdaa-11309d6922f1.*

[7] ASTM D 1238–10: Standard Test Method for Flow Rates of Thermoplastics for Extrusion Plastometer.

[8] ASTM D 1505–18: Standard Test Method for Density of Plastics by the Density-Gradient Technique.

[9] ASTM D 792–20: Standard Test Methods for Density and Specific Gravity (Relative Density) of Plastics by Displacement.

recycled plastics policy if there is sufficient feedback from this notice. Information regarding any future webinars will be made available on PHMSA's website at *phmsa.dot.gov.*

Issued in Washington, DC, on April 10, 2023.

**William S. Schoonover,**

*Associate Administrator for Hazardous Materials Safety, Pipeline and Hazardous Materials Safety Administration.*

[FR Doc. 2023–07869 Filed 4–13–23; 8:45 am]

**BILLING CODE 4910–60–P**

## DEPARTMENT OF VETERANS AFFAIRS

### Veterans' Advisory Committee on Education, Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under the Federal Advisory Committee Act, 5 U.S.C. 10, that the Veterans' Advisory Committee on Education (''Committee'') will meet on June 5–June 7, 2023 at 1800 G Street NW, Conference Room 542, Washington, DC. The meeting sessions will begin and end as follows:

| Dates | Times |
|---|---|
| June 5, 2023 | 1 p.m. to 5 p.m. Eastern Standard Time (EST). |
| June 6, 2023 | 10 a.m. to 5 p.m. EST. |
| June 7, 2023 | 10 a.m. to 5 p.m. EST. |

All sessions are open to the public.

The purpose of the Committee is to advise the Secretary of Veterans Affairs on the administration of education and training programs for Veterans, Servicepersons, Reservists and Dependents of Veterans including programs under Chapters 30, 32, 33, 35 and 36 of title 38, and Chapter 1606 of title 10, U.S.C.

During the meeting sessions, the Committee will hear reports from three subcommittees (Modernization, Veteran Vocational Education and Training Programs, and Distance Learning) and receive other updates and briefings that they will use for potential 2023 recommendations.

Interested persons may attend in person at 1800 G St. NW, Washington, DC or virtually via Microsoft Teams. Please email *EDUSTAENG.VBAVACO@va.gov* prior to June 2, 2023 if you wish to attend or you can dial-in by phone (for audio only) at 1–872–701–0185 (Toll-Free) using the Conference ID: 902 118 813#.

Time will be allotted for receiving oral presentations from the public and individuals wishing to share information with the Committee may submit written statements for the Committee's review to Mr. Joseph Maltby, Designated Federal Official, Department of Veterans Affairs, by email at *EDUSTAENG.VBAVACO@va.gov*. Advance comments will be accepted until close of business on Friday, June 2, 2023. In the communication, the writers must identify themselves and state the organization or association they represent for inclusion in the official record.

Dated: April 11, 2023.

**Jelessa M. Burney,**

*Federal Advisory Committee Management Officer.*

[FR Doc. 2023–07905 Filed 4–13–23; 8:45 am]

**BILLING CODE 8320–01–P**

## DEPARTMENT OF VETERANS AFFAIRS

### Veterans Rural Health Advisory Committee, Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under the Federal Advisory Committee Act, 5 U.S.C. 10, that the Veterans Rural Health Advisory Committee will hold an in-person meeting at the Alaska VA Health Care System, 1201 North Muldoon Road, Anchorage, AK 99504. The meeting dates are scheduled Wednesday, April 26, 2023 through Thursday, April 27, 2023. The meeting sessions will convene each day at 9:00 a.m., Alaska Daylight Time (AKDT) and adjourn each day at 5:00 p.m. (AKDT).

The meeting sessions are open to the public.

The purpose of the Committee is to advise the Secretary of VA on rural health care issues affecting Veterans. The Committee examines programs and policies that impact the delivery of VA rural health care to Veterans and discusses ways to improve and enhance VA access to rural health care services for Veterans.

The agenda will include updates from Department leadership; the Acting Executive Director, VA Office of Rural Health; and the Committee Chair; as well as presentations by subject-matter experts on general rural health care access.

Anyone interested in joining the meeting virtually can do so via Zoom, click the link (*https://us06web.zoom.us/j/86520849393),* Meeting ID (*i.e.,* 865 2084 9393), and phone number (1–646–558–8656) will be provided for the individuals who cannot attend in person.

Public comments will be received at 4:30 p.m. (AKDT) on April 27, 2023. Interested persons should contact Ms. Judy Bowie, via email at *VRHAC@va.gov,* or mail at 810 Vermont Avenue NW (12POP7), Washington, DC 20420. Individuals wishing to speak are invited to submit a 1–2-page summary of their comment for inclusion in the official meeting record. Any member of the public seeking additional information should contact Ms. Bowie at the phone number or email address noted above.

Dated: April 11, 2023.

**Jelessa M. Burney,**

*Federal Advisory Committee Management Officer.*

[FR Doc. 2023–07926 Filed 4–13–23; 8:45 am]

**BILLING CODE 8320–01–P**

# FEDERAL REGISTER

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Part II

## Securities and Exchange Commission

17 CFR Parts 242 and 249
Regulation Systems Compliance and Integrity; Proposed Rule

## SECURITIES AND EXCHANGE COMMISSION

### 17 CFR Parts 242 and 249

**[Release No. 34–97143; File No. S7–07–23]**

**RIN 3235–AN25**

## Regulation Systems Compliance and Integrity

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Proposed rule.

**SUMMARY:** The Securities and Exchange Commission (''Commission'' or ''SEC'') is proposing amendments to Regulation Systems Compliance and Integrity (''Regulation SCI'') under the Securities Exchange Act of 1934 (''Exchange Act''). The proposed amendments would expand the definition of ''SCI entity'' to include a broader range of key market participants in the U.S. securities market infrastructure, and update certain provisions of Regulation SCI to take account of developments in the technology landscape of the markets since the adoption of Regulation SCI in 2014. The proposed expansion would add the following entities to the definition of ''SCI entity'': registered security-based swap data repositories (''SBSDRs''); registered broker-dealers exceeding an asset or transaction activity threshold; and additional clearing agencies exempted from registration. The proposed updates would amend provisions of Regulation SCI relating to systems classification and lifecycle management; third party/vendor management; cybersecurity; the SCI review; the role of current SCI industry standards; and recordkeeping and related matters. Further, the Commission is requesting comment on whether significant-volume alternative trading systems (ATSs) and/or broker-dealers using electronic or automated systems for trading of corporate debt securities or municipal securities should be subject to Regulation SCI.

**DATES:** Comments should be received on or before June 13, 2023.

**ADDRESSES:** Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's internet comment form (*https://www.sec.gov/rules/proposed.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number S7–07–23 on the subject line.

*Paper Comments*

- Send paper comments to, Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number S7–07–23. 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 of submission. The Commission will post all comments on the Commission's website (*https://www.sec.gov/rules/proposed.shtml*). Comments are also available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10 a.m. and 3 p.m. Operating conditions may limit access to the Commission's Public Reference Room. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly.

Studies, memoranda, or other substantive items may be added by the Commission or staff to the comment file during this rulemaking. A notification of the inclusion in the comment file of any materials will be made available on our website. To ensure direct electronic receipt of such notifications, sign up through the ''Stay Connected'' option at *www.sec.gov* to receive notifications by email.

**FOR FURTHER INFORMATION CONTACT:** Heidi Pilpel, Senior Special Counsel; David Liu, Special Counsel; Sara Hawkins, Special Counsel; Gita Subramaniam, Special Counsel; Josh Nimmo, Special Counsel; An Phan, Special Counsel, at (202) 551–5500, Office of Market Supervision, Division of Trading and Markets, U.S. Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

**SUPPLEMENTARY INFORMATION:** The Commission is proposing amendments to the following rules under the Exchange Act and conforming amendments to Form SCI.

| Commission reference | CFR citation (17 CFR) |
|---|---|
| Rule 1000 | § 242.1000 |
| Rule 1001 | § 242.1001 |
| Rule 1001(a) | § 242.1001(a) |
| Rule 1001(a)(2) | § 242.1001(a)(2) |
| Rule 1001(a)(2)(v) | § 242.1001(a)(2)(v) |
| Rule 1001(a)(2)(vi) | § 242.1001(a)(2)(vi) |
| Rule 1001(a)(2)(vii) | § 242.1001(a)(2)(vii) |
| Rule 1001(a)(4) | § 242.1001(a)(4) |
| Rule 1002 | § 242.1002 |
| Rule 1002(b) | § 242.1002(b) |
| Rule 1002(b)(4)(ii)(B) | § 242.1002(b)(4)(ii)(B) |
| Rule 1002(b)(5) | § 242.1002(b)(5) |
| Rule 1002(b)(5)(i) | § 242.1002(b)(5)(i) |
| Rule 1002(b)(5)(ii) | § 242.1002(b)(5)(ii) |
| Rule 1002(c) | § 242.1002(c) |
| Rule 1002(c)(3) | § 242.1002(c)(3) |
| Rule 1002(c)(4) | § 242.1002(c)(4) |
| Rule 1002(c)(4)(i) | § 242.1002(c)(4)(i) |
| Rule 1002(c)(4)(ii) | § 242.1002(c)(4)(ii) |
| Rule 1003 | § 242.1003 |
| Rule 1003(b) | § 242.1003(b) |
| Rule 1003(b)(1) | § 242.1003(b)(1) |
| Rule 1003(b)(2) | § 242.1003(b)(2) |
| Rule 1003(b)(3) | § 242.1003(b)(3) |
| Rule 1004 | § 242.1004 |
| Rule 1004(a) | § 242.1004(a) |
| Rule 1004(b) | § 242.1004(b) |
| Rule 1005 | § 242.1005 |
| Rule 1005(c) | § 242.1005(c) |

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## I. Introduction

The U.S. securities markets are among the largest and most liquid in the world, attracting a wide variety of issuers and broad investor participation, and are essential for capital formation, job creation, and economic growth, both domestically and across the globe. The fair and orderly functioning of the U.S. securities markets is critically important to the U.S. economy. In 2014, recognizing the decades-long transformation of many U.S. securities markets from primarily manual markets to those that had become almost entirely electronic and highly dependent on sophisticated technology, including complex and interconnected trading, clearing, routing, market data, regulatory, surveillance and other technological systems, the Commission adopted 17 CFR 242.1000 through 242.1007 (''Regulation SCI'') to supersede and replace the Commission's voluntary Automation Review Policy Program (''ARP'') and certain provisions of 17 CFR 242.300 through 242.304 (''Regulation ATS'').[1] Regulation SCI, which applies to ''SCI entities'' with respect to their ''SCI systems'' and ''indirect SCI systems,'' was the Commission's first formal extensive regulatory framework for oversight of the core technology of the U.S. securities markets.

The U.S. securities markets have demonstrated resilience since the adoption of Regulation SCI, with some market observers crediting Regulation SCI in helping to ensure that markets and market participants were prepared for the unprecedented trading volumes and volatility experienced in March 2020 at the onset of the COVID–19 pandemic.[2] The U.S. securities markets continue to experience changes and new challenges, however. The growth of electronic trading allows ever-increasing volumes of securities transactions in a broader range of asset classes to take place at increasing speed by competing trading platforms, including those offered by broker-dealers that play multiple roles in the markets.[3] In addition, new types of registered entities that are highly dependent on interconnected technology have entered the markets.[4] The prevalence of remote workforces, furthered by the COVID–19 pandemic,[5] and increased outsourcing to third-party providers, including cloud service providers, continue to drive the markets' and market participants' reliance on new and evolving technology.[6] While these advances demonstrate the dynamic and adaptable nature of the U.S. securities markets and market participants, the greater dispersal, sophistication, and interconnection of the technology underpinning our markets bring potential new risks. These risks include not only the heightened risk of exposure to cybersecurity events from threat actors intent on doing harm, but also operational systems problems that can and do arise inadvertently.

As the Commission has acknowledged, Regulation SCI is not, nor can it be, designed to guarantee that SCI entities have flawless systems.[7] Rather, its goals are to strengthen the technology infrastructure of the U.S. securities markets and improve its resilience when technology falls short.[8] To help achieve these goals, the regulation requires that SCI entities have policies and procedures reasonably designed to ensure that their systems have levels of capacity, integrity, resiliency, availability, and security, adequate to maintain their operational capability and promote the maintenance of fair and orderly markets, and requires measures that facilitate the Commission's oversight of securities market technology infrastructure.[9] Consistent with the goals of addressing technological vulnerabilities and improving oversight of the core

[1] *See* Securities Exchange Act Release No. 73639 (Nov. 19, 2014), 79 FR 72252 (Dec. 5, 2014) (''SCI Adopting Release'').

[2] *See, e.g.,* Shane Remolina, *Is Remote Trading Leading to a Paradigm Shift on the Trading Desk?,* Traders Magazine (May 20, 2020), *available at www.tradersmagazine.com/departments/buyside/is-remote-trading-leading-to-a-paradigm-shift-on-the-trading-desk* (observing ''no outages'' at the stock exchanges in Mar. 2020 in contrast to ''glitches'' experienced in 2000s); Financial Industry Regulatory Authority, Inc. (''FINRA''), *Market Structure & COVID–19: Handling Increased Volatility and Volumes* (Apr. 28, 2020), *available at https://www.finra.org/media-center/finra-unscripted/market-structure-covid19-coronavirus* (observing that market infrastructure and integrity held during the challenges in Mar. 2020, and crediting Regulation SCI, among other regulatory protections).

[3] *See, e.g.,* Securities Industry and Financial Markets Association (''SIFMA''), *SIFMA Insights: Electronic Trading Market Structure Primer* (Oct. 2019), *available at https://www.sifma.org/wp-content/uploads/2019/10/SIFMA-Insights-Electronic-Trading-Market-Structure-Primer.pdf* (summarizing electronic trading history and trends in different markets). *See also* SEC *Staff Report on Algorithmic Trading in U.S. Capital Markets* at 16–19, 37 (Aug. 5, 2020), *available at https://www.sec.gov/files/marketstructure/research/algo_trading_report_2020.pdf* (discussing broker-dealer ATSs and internalizers, and other in-house sources of liquidity, such as single-dealer platforms (''SDPs''), and central risk books operated by broker-dealers) (''Algorithmic Trading Report''). Staff reports, Investor Bulletins, and other staff documents (including those cited herein) represent the views of Commission staff and are not a rule, regulation, or statement of the Commission. The Commission has neither approved nor disapproved the content of these staff documents and, like all staff statements, they have no legal force or effect, do not alter or amend applicable law, and create no new or additional obligations for any person.

[4] *See infra* section III.A.2.a (discussing registered SBSDRs).

[5] *See* FS–ISAC, *Navigating Cyber 2021* (Apr. 2021), *available at https://www.fsisac.com/navigatingcyber2021-report. See also* Vikki Davis, *Combating the cybersecurity risks of working home,* Cyber Magazine (Dec. 2, 2021), *available at https://cybermagazine.com/cyber-security/combating-cybersecurity-risks-working-home.*

[6] *See, e.g.,* Angus Loten, Cloud Demand Drives Data Center Market to New Records, Wall St. J. (Feb. 27, 2020); Angus Loten, CIOs Accelerate Pre-Pandemic Cloud Push, Wall St. J. (Apr. 26, 2021).

[7] *See* SCI Adopting Release, *supra* note 1, at 72291, 72351.

[8] *See id.* at 72257.

[9] *See generally* SCI Adopting Release, *supra* note 1, at 72299, 72372, 72402, 72404–05.

technology of key U.S. securities market entities, the Commission is proposing amendments to Regulation SCI that would expand its application to additional key market participants and update certain of its provisions to take account of the evolution of technology and trading since the rule's adoption in 2014. The application of Regulation SCI to a broader range of entities together with updates to certain provisions—including to account for heightened cybersecurity risks, wider use of cloud service providers, and the increasingly complex and interconnected nature of SCI entities' systems—should help ensure that the technology infrastructure of the U.S. securities markets remains robust, resilient, and secure.

The Commission has issued other proposals related to cybersecurity that would apply to SCI entities as well as other entities under the Commission's jurisdiction.[10] Regulation SCI, currently, and as proposed to be amended, however, differs from these proposals in terms of its purpose and scope. Regulation SCI applies to entities designated as key market participants because they play a significant role in the U.S. securities markets and/or have the potential to impact investors, the overall market, or the trading of individual securities in the event of a systems issue. Regulation SCI requires key market participants to (i) have policies and procedures in place to help ensure the robustness and resiliency of their market technology systems, and (ii) provide certain notices and reports to the Commission, and in some cases, market participants, to facilitate Commission oversight of securities market infrastructure. While Regulation SCI has cybersecurity aspects and certain of the proposed amendments to Regulation SCI would update policies and procedures requirements designed to keep SCI systems and indirect SCI systems secure, the proposed amendments are designed, more broadly, to ensure that SCI entities (current and proposed) have systems technology adequate to maintain operational capability of the systems on which the maintenance of fair and orderly markets depend.

## II. Background and Overview

### *A. History of Regulation SCI*

The Commission adopted Regulation SCI in 2014 to supersede and replace the Commission's legacy voluntary ARP Program as well as certain provisions of Regulation ATS.[11] In doing so, the Commission sought to strengthen the technology infrastructure of the U.S. securities markets, reduce the occurrence of systems issues in those markets, improve their resiliency when technological issues arise, and establish an updated and formalized regulatory framework, thereby helping to ensure more effective Commission oversight of such systems.[12] Several factors contributed to the Commission's decision to adopt this regulation. Recognizing the growing importance of technology in the securities markets, the Commission issued the ARP I and ARP II Policy Statements in 1989 and 1991, respectively.[13] In the decades that followed, key market participants in the securities industry increasingly relied on ever more complex technologies for trading and clearance and settlement of securities. The increased reliance on technology introduced challenges for the securities markets, as evidenced by a variety of market disruptions occurring in a relatively short time period.[14] The Commission convened a roundtable entitled ''Technology and Trading: Promoting Stability in Today's Markets'' (''Technology Roundtable'') in 2012.[15] Shortly thereafter, following Superstorm Sandy on the U.S. East Coast, the U.S. national securities exchanges closed for two business days in light of concerns over the physical safety of personnel and the possibility of technical issues.[16] These and other developments in U.S. securities markets led the Commission to consider the effectiveness of the 1980s and 90s-era ARP Program. The focus of the ARP Program was to ensure that the self-regulatory organizations (''SROs'') had adequate capacity, security, and business continuity plans by, among other things, reporting to the Commission staff their planned systems changes 30 days in advance and reporting outages in trading and related systems.[17] While the ARP Policy Statements were rooted in Exchange Act

[10] These include a proposal to adopt new rules requiring broker-dealers, major security-based swap participants, national securities exchanges, national securities associations, security-based swap data repositories, security-based swap dealers, transfer agents, and the Municipal Securities Rulemaking Board (''MSRB'') to adopt and implement written cybersecurity policies and procedures reasonably designed to address cybersecurity risks to their ''information systems'' and notify the Commission and the public of significant cybersecurity incidents affecting their information systems. *See* Securities Exchange Release No. 97142 (Mar. 15, 2023), 88 FR 20212 (April 5, 2023) (proposing 17 CFR 242.10) (for ease of reference, this proposal is referred to as the ''Exchange Act Cybersecurity Proposal''). *See also* Securities Exchange Release No. 97141 (Mar. 15, 2023), 88 FR 20616 (April 6, 2023) (proposing to amend 17 CFR part 248, subpart A (''Regulation S–P''), to, among other things, require broker-dealers, investment companies, SEC-registered investment advisers, and transfer agents to adopt incident response programs to address unauthorized access to or use of customer records and information, including procedures for providing timely notification to individuals affected by an information security incident designed to help affected individuals respond appropriately) (''Regulation S–P 2023 Proposing Release''). *See infra* section III.D (discussing of how SCI entities would be affected if the Exchange Act Cybersecurity Proposal, Regulation S–P 2023 Proposing Release, and this proposal are all adopted as proposed). In addition, the Commission has pending proposals to address cybersecurity risk with respect to investment advisers, investment companies, and public companies. *See Cybersecurity Risk Management for Investment Advisers, Registered Investment Companies, and Business Development Companies,* Release Nos. 33–11028, 34–94917, IA–5956, IC–34497 (Feb. 9, 2022), 87 FR 13524 (Mar. 9, 2022) (''IA/IC Cybersecurity Proposing Release''); *Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure,* Release Nos. 33–11038, 34–94382, IC–34529 (Mar. 9, 2022), 87 FR 16590 (Mar. 23, 2022). The Commission has reopened the comment period for the IA/IC Cybersecurity Proposing Release to allow interested persons additional time to analyze the issues and prepare their comments in light of other regulatory developments, including the proposed rules and amendments regarding this proposal, the Exchange Act Cybersecurity Proposal and the Regulation S–P 2023 Proposing Release. The Commission encourages commenters to review those proposals to determine whether they might affect their comments on this proposing release.

[11] *See generally* SCI Adopting Release, *supra* note 1.

[12] *See* SCI Adopting Release, *supra* note 1, at 72252–56 (discussing the background of Regulation SCI).

[13] *See* Securities Exchange Act Release Nos. 27445 (Nov. 16, 1989), 54 FR 48703 (Nov. 24, 1989), and 29185 (May 9, 1991), 56 FR 22490 (May 15, 1991).

[14] *See* Securities Exchange Act Release No. 69077 (Mar. 8, 2013), 78 FR 18083, 18089 (Mar. 25, 2013) (''SCI Proposing Release'') (citing, among other things, Findings Regarding the Market Events of May 6, 2010, Report of the Staffs of the Commodity Futures Trading Commission (''CFTC'') and SEC to the Joint Advisory Committee on Emerging Regulatory Issues (Sept. 30, 2010) (''Staff Report'') and discussing hackers penetrating certain Nasdaq OMX Group, Inc. computer networks in 2011, a ''software bug'' that hampered the initial public offerings of BATS Global Markets, Inc. in 2012, and issues with Nasdaq's trading systems delaying the start of trading in the high-profile initial public offering of Facebook, Inc.).

[15] *See* Securities Exchange Act Release No. 67802 (Sept. 7, 2012), 77 FR 56697 (Sept. 13, 2012) (File No. 4–652); Technology Roundtable Transcript, *available at https://www.sec.gov/news/otherwebcasts/2012/ttr100212-transcript.pdf.* A webcast of the Roundtable is *available at www.sec.gov/news/otherwebcasts/2012/ttr100212.shtml.* The Technology Roundtable examined the relationship between the operational stability and integrity of the securities market and the ways in which market participants design, implement, and manage complex and interconnected trading technologies. The Technology Roundtable also highlighted that quality standards, testing, and improved response mechanisms were issues ripe for consideration. *See* SCI Proposing Release, *supra* note 14, at 18090–91 (providing for further discussion of the Technology Roundtable).

[16] *See* SCI Proposing Release, *supra* note 14, at 18091. *See also* SCI Adopting Release, *supra* note 1, at 72254–72255 (summarizing additional disruptions during the period between publication of the SCI Proposing and Adopting Releases).

[17] *See supra* note 13.

requirements, as policy statements rather than Commission rules, compliance was voluntary and in many instances the SROs did not fully disclose problems that occurred. In the SCI Proposing Release, the Commission stated that ''the continuing evolution of the securities markets to the current state, where they have become almost entirely electronic and highly dependent on sophisticated trading and other technology (including complex regulatory and surveillance systems, as well as systems relating to the provision of market data, intermarket routing and connectivity, and a variety of other member and issuer services), has posed challenges for the ARP Inspection Program.'' [18] Informed by its review of recent technology problems in the markets, the discussions at the Technology Roundtable, and its evaluation of the ARP Program,[19] the Commission proposed Regulation SCI in 2013 to help address the technological vulnerabilities, and improve Commission oversight, of the core technology of key U.S. securities markets entities, including national securities exchanges and associations, significant-volume ATSs, clearing agencies, and plan processors.[20] After considering the views of a wide variety of commenters, the Commission adopted Regulation SCI in 2014.[21] In the SCI Adopting Release, the Commission stated that it was taking a ''measured approach'' and pursuing an ''incremental expansion from the entities covered under the ARP Inspection Program'' given the potential costs of compliance with Regulation SCI.[22] It added, however, that this approach would allow it ''to monitor and evaluate the implementation of Regulation SCI, the risks posed by the systems of other market participants, and the continued evolution of the securities markets, such that it may consider, in the future, extending the types of requirements in Regulation SCI to additional categories of market participants, such as non-ATS broker-dealers, security-based swap dealers, investment advisers, investment companies, transfer agents, and other key market participants.'' [23] In 2021, the Commission amended Regulation SCI to add certain ''competing consolidators'' to the definition of SCI entity.[24] Specifically, a competing consolidator that exceeds a five percent consolidated market data gross revenue threshold over a specified time period is an SCI competing consolidator because it is a significant source of consolidated market data for NMS stocks on which market participants rely.[25]

*B. Current Regulation SCI*

1. SCI Entities and SCI Systems

Regulation SCI applies to ''SCI entities.'' [26] SCI entities are those that the Commission has determined are market participants that play a significant role in the U.S. securities markets and/or have the potential to impact investors, the overall market, or the trading of individual securities in the event of certain types of systems problems.[27] Today SCI entities comprise the self-regulatory organizations (excluding securities futures exchanges) (''SCI SROs''), ATSs meeting certain volume thresholds with respect to NMS stocks and non-NMS stocks (''SCI ATSs''), exclusive disseminators of consolidated market data (''plan processors''), certain competing disseminators of consolidated market (''SCI competing consolidators'' [28]), and certain exempt clearing agencies.[29]

An SCI entity has obligations with respect to its ''SCI systems,'' ''critical SCI systems,'' and ''indirect SCI

[18] SCI Proposing Release, *supra* note 14, at 18089.

[19] *See* SCI Proposing Release, *supra* note 14, at 18085–91 for a further discussion of these considerations.

[20] As further explained in the SCI Adopting Release, the term ''plan processor'' means ''any self-regulatory organization or securities information processor acting as an exclusive processor in connection with the development, implementation and/or operation of any facility contemplated by an effective national market system plan.'' *See* SCI Adopting Release, *supra* note 1, at 72270 n. 196. This term refers to the securities information processors that are exclusive processors (and frequently referred to as the ''SIPs'') that collect and process (for distribution) quotation data and/or transaction reports on behalf of the Consolidated Tape Association System (''CTA Plan''), Consolidated Quotation System (''CQS Plan''), Joint Self-Regulatory Organization Plan Governing the Collection, Consolidation, and Dissemination of Quotation and Transaction Information for Nasdaq-Listed Securities Traded on Exchanges on an Unlisted Trading Privileges Basis (''Nasdaq UTP Plan''), and Options Price Reporting Authority (''OPRA Plan''). The CTA Plan and Nasdaq UTP Plan (applicable to national market system (''NMS'') stocks) are each a ''transaction reporting plan'' as well as a ''national market system plan'' as defined in 17 CFR 242.600 (''Rule 600'' of Regulation NMS). The OPRA Plan (applicable to exchange-listed options) is a national market system plan. *See infra* note 212. *See also* text accompanying note 212 (discussing these Plans and how transaction reports containing the price and volume associated with a transaction involving the purchase or sale of a security are currently, and anticipated in the future to be, readily available to enable SCI ATSs and SCI broker-dealers to ascertain the total average daily dollar volume traded in NMS stock and exchange-listed options in a calendar month and self-assess if they exceed the proposed transaction activity thresholds discussed below).

[21] *See generally* SCI Adopting Release, *supra* note 1.

[22] *Id.* at 72259.

[23] *Id. See also supra* note 10 and accompanying text (referencing other cybersecurity rules proposed to apply to Commission registrants).

[24] *See* Securities Exchange Act Release No. 90610 (Dec. 9, 2020), 86 FR 18596, 18659–18676 (Apr. 9, 2021) (''Market Data Infrastructure Adopting Release'') (adopting rules with respect to competing consolidators and defining ''competing consolidator'' to mean a securities information processor required to be registered pursuant to 17 CFR 242.614 (''Rule 614'') or a national securities exchange or national securities association that receives information with respect to quotations for and transactions in NMS stocks and generates a consolidated market data product for dissemination to any person).

[25] An ''SCI competing consolidator'' is any competing consolidator, which during at least four of the preceding six calendar months, accounted for five percent or more of consolidated market data gross revenue paid to the effective national market system plan or plans required under 17 CFR 242.603(b) (''Rule 603(b)'') for NMS stocks (1) listed on the New York Stock Exchange, (2) listed on The Nasdaq Stock Market, or (3) listed on national securities exchanges other than the New York Stock Exchange or The Nasdaq Stock Market, as reported by such plan or plans pursuant to the terms thereof. *See* Rule 1000. An SCI competing consolidator is subject to Regulation SCI, and a competing consolidator for which Regulation SCI does not apply is subject the systems capability requirement in 17 CFR 242.614(d)(9) (''Rule 614(d)(9)'' of Regulation NMS). *See infra* note 28 and accompanying text.

[26] *See* 17 CFR 242.1000 (defining the term ''SCI entity'' and terms included therein).

[27] *See* SCI Adopting Release, *supra* note 1, at 72259. Although some commenters had urged that Regulation SCI apply to fewer entities and only the most systemically important entities, the Commission disagreed, stating, ''[L]imiting the applicability of Regulation SCI to only the most systemically important entities posing the highest risk to the markets is too limited of a category of market participants, as it would exclude certain entities that, in the Commission's view, have the potential to pose significant risks to the securities markets should an SCI event occur.'' *Id.*

[28] *See supra* notes 24–25 (stating the definitions of competing consolidator and SCI competing consolidator). SCI competing consolidators are subject to Regulation SCI after a one-year transition period. *See* Market Data Infrastructure Adopting Release, *supra* note 24, at 18604. Competing consolidators in the transition period and competing consolidators below the gross revenue threshold are subject to a tailored set of operational capability and resiliency obligations designed to help ensure that the provision of consolidated market data products is prompt, accurate, and reliable. *See* Market Data Infrastructure Adopting Release, *supra* note 24, at 18690–97 (providing for a full discussion of systems capability requirements for competing consolidators (that are not subject to Regulation SCI), but instead subject to Rule 614(d)(9)).

[29] *See* 17 CFR 242.1000 (defining the term SCI entity to mean ''an SCI self-regulatory organization, SCI alternative trading system, plan processor, exempt clearing agency subject to ARP, or SCI competing consolidator'' and also separately defining each of these terms). *See also* SCI Adopting Release, *supra* note 1, at 72258–72 (discussing the rationale for inclusion of SCI SROs, SCI ATSs, plan processors, and *certain* exempt clearing agencies in the original adopted definition of SCI entity); *infra* notes 83–84 and accompanying text (citing the releases explaining the expansion the definition of SCI entity to include SCI competing consolidators, and the recent proposal to further expand the definition of SCI entity to include certain ATSs that trade U.S. Treasury Securities or Agency Securities exceeding specified volume thresholds (''Government Securities ATSs'')).

systems.'' [30] ''SCI systems'' are, broadly, the technology systems of, or operated by or on behalf of, an SCI entity that, with respect to securities, directly support at least one of six market functions: (i) trading; (ii) clearance and settlement; (iii) order routing; (iv) market data; (v) market regulation; or (vi) market surveillance.[31] In addition, Regulation SCI defines ''critical SCI systems,'' which are a subset of SCI systems,[32] and designated as such because they represent potential single points of failure in the U.S. securities markets.[33]

The term ''indirect SCI systems'' describes systems of, or operated by or on behalf of, an SCI entity that, ''if breached, would be reasonably likely to pose a security threat to SCI systems.'' [34] The distinction between SCI systems and indirect SCI systems seeks to encourage SCI entities physically and/or logically to separate systems that perform or directly support securities market functions from those that perform other functions (*e.g.,* corporate email; general office systems for member regulation and recordkeeping).[35]

Currently, the application of Regulation SCI is triggered when an entity meets the definition of SCI entity. If an entity meets the definition of SCI entity, Regulation SCI applies to its SCI systems and indirect SCI systems. The scope of an SCI entity's technology systems is determined by whether they are operated ''by or on behalf of'' the SCI entity and whether they directly support any of the six market functions enumerated in the definition. As a result, the SCI systems and indirect SCI systems of an SCI entity are neither limited by the type of security nor by the type of business in which an SCI entity primarily conducts its securities market activities. Thus, if an SCI entity elects to, or obtains the necessary approvals to, engage in market functions in multiple types of securities, Regulation SCI's obligations apply to the relevant functional systems relating to all such securities.[36] Accordingly, the SCI systems of an SCI entity may include systems pertaining to any type of security, whether those securities are NMS stocks, over-the-counter (OTC) equity securities, listed options, debt securities, security-based swaps (''SBS''), crypto asset securities,[37] or another type of security.[38]

[30] *See* 17 CFR 242.1000 (defining the terms ''SCI systems,'' ''critical SCI systems,'' and ''indirect SCI systems'').

[31] *Id.* (defining SCI systems to mean ''all computer, network, electronic, technical, automated, or similar systems of, or operated by or on behalf of, an SCI entity that, with respect to securities, directly support trading, clearance and settlement, routing, market data, market regulation, or market surveillance'').

[32] *Id.* (defining critical SCI systems to mean any SCI systems of, or operated by or on behalf of, an SCI entity that: (1) Directly support functionality relating to: (i) Clearance and settlement systems of clearing agencies; (ii) Openings, reopenings, and closings on the primary listing market; (iii) Trading halts; (iv) Initial public offerings; (v) The provision of consolidated market data; or (vi) Exclusively listed securities; or (2) Provide functionality to the securities markets for which the availability of alternatives is significantly limited or nonexistent and without which there would be a material impact on fair and orderly markets).

[33] As discussed in the SCI Adopting Release, ''critical SCI systems'' are subject to certain heightened resilience and information dissemination provisions of Regulation SCI on the rationale that, lacking or having limited substitutes, these systems pose the greatest risks to the continuous and orderly function of the markets if they malfunction. *See* SCI Adopting Release, *supra* note 1, at 72277–79 (providing additional discussion of critical SCI systems).

[34] *Id.* at 72279.

[35] *See* SCI Adopting Release, *supra* note 1, at 72281 (''[I]f an SCI entity designs and implements security controls so that none of its non-SCI systems would be reasonably likely to pose a security threat to SCI systems, then it will have no indirect SCI systems. If, however, an SCI entity does have indirect SCI systems, then certain provisions of Regulation SCI will apply to those indirect SCI systems.'').

[36] The current definition of ''SCI systems,'' includes the clause, ''with respect to securities,'' without limitation. SCI systems ''means all computer, network, electronic, technical, automated, or similar systems of, or operated by or on behalf of, an SCI entity that, with respect *to securities,* directly support trading, clearance and settlement, order routing, market data, market regulation, or market surveillance.'' *See* 17 CFR 242.1000 (emphasis added). *But see infra* section III.A.2.b.iv (discussing the proposed limitation to the definition of SCI systems for certain SCI broker-dealers).

[37] The term ''digital asset'' refers to an asset that is issued and/or transferred using distributed ledger or blockchain technology (''distributed ledger technology''), including, but not limited to, so-called ''virtual currencies,'' ''coins,'' and ''tokens.'' *See Custody of Digital Asset Securities by Special Purpose Broker-Dealers,* Securities Exchange Act Release No. 90788 (Dec. 23, 2020), 86 FR 11627, 11627 n.1 (Feb. 26, 2021) (''Crypto Asset Securities Custody Release''). A digital asset may or may not meet the definition of a ''security'' under the Federal securities laws. *See, e.g., Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO,* Securities Exchange Act Release No. 81207 (July 25, 2017) (''DAO 21(a) Report''), *available at https://www.sec.gov/litigation/investreport/34-81207.pdf. See also SEC* v. *W.J. Howey Co.,* 328 U.S. 293 (1946). To the extent digital assets rely on cryptographic protocols, these types of assets also are commonly referred to as ''crypto assets,'' and ''digital asset securities'' can be referred to as ''crypto asset securities.'' For purposes of this release, the Commission does not distinguish between the terms ''digital asset securities'' and ''crypto asset securities.''

[38] Today, under the current definition of SCI systems, an SCI entity (current or future) that engages in market functions for any type of securities, including crypto asset securities, is required to assess whether the technological systems of, or operated by or on its behalf, with respect to securities, directly support at least one of six market functions: (i) trading; (ii) clearance and settlement; (iii) order routing; (iv) market data; (v) market regulation; or (vi) market surveillance. As discussed below, however, the Commission is proposing an amendment to the definition of SCI systems that would limit its scope solely for certain proposed SCI broker-dealers. *See infra* section III.A.2.b.iv.

[39] *See* 17 CFR 242.1001(a)(1).

[40] *See* 17 CFR 242.1001(a)(2).

[41] *See* 17 CFR 242.1001(a)(3).

[42] *See* 17 CFR 242.1001(a)(4).

2. Reasonably Designed Policies and Procedures

The foundational principles of Regulation SCI are set forth in Rule 1001, which requires each SCI entity to establish, maintain, and enforce written policies and procedures reasonably designed to ensure that its SCI systems and, for purposes of security standards, indirect SCI systems, have levels of capacity, integrity, resiliency, availability, and security adequate to maintain their operational capability and promote the maintenance of fair and orderly markets.[39] Rule 1001(a)(2) of Regulation SCI requires that, at a minimum, such policies and procedures include: current and future capacity planning; periodic stress testing; systems development and testing methodology; reviews and testing to identify vulnerabilities; business continuity and disaster recovery planning (inclusive of backup systems that are geographically diverse and designed to meet specified recovery time objectives); standards for market data collection, processing, and dissemination; and monitoring to identify potential systems problems.[40] Under 17 CFR 242.1001(a)(3) (''Rule 1001(a)(3)'' of Regulation SCI), SCI entities must periodically review the effectiveness of these policies and procedures and take prompt action to remedy any deficiencies.[41] Rule 1001(a)(4) of Regulation SCI provides that an SCI entity's policies and procedures will be deemed to be reasonably designed if they are consistent with ''current SCI industry standards,'' which is defined to be comprised of information technology practices that are widely available to information technology professionals in the financial sector and issued by an authoritative body that is a U.S. governmental entity or agency, association of U.S. governmental entities or agencies, or widely recognized organization; however, Rule 1001(a)(4) of Regulation SCI also makes clear that compliance with such ''current SCI industry standards'' is not the exclusive means to comply with these requirements.[42]

Under 17 CFR 242.1001(b)(1) (''Rule 1001(b)(1)'' of Regulation SCI), each SCI entity is required to establish, maintain,

and enforce written policies and procedures reasonably designed to ensure that its SCI systems operate in a manner that complies with the Exchange Act and the rules and regulations thereunder and the entity's rules and governing documents, as applicable, and specifies certain minimum requirements for such policies and procedures.[43] In addition, 17 CFR 242.1001(b)(2) (''Rule 1001(b)(2)'') requires that at a minimum, these policies and procedures must include: testing of all SCI systems and any changes to SCI systems prior to implementation; a system of internal controls over changes to SCI systems; a plan for assessments of the functionality of SCI systems designed to detect systems compliance issues, including by ''responsible SCI personnel'' (defined below) and by personnel familiar with applicable provisions of the Exchange Act and the rules and regulations thereunder and the SCI entity's rules and governing documents; and a plan of coordination and communication between regulatory and other personnel of the SCI entity, including by responsible SCI personnel, regarding SCI systems design, changes, testing, and controls designed to detect and prevent systems compliance issues.[44]

Under 17 CFR 242.1001(b)(3) (''Rule 1001(b)(3)'' of Regulation SCI), SCI entities must periodically review the effectiveness of these policies and procedures and take prompt action to remedy any deficiencies.[45] Under 17 CFR 242.1001(b)(4) (''Rule 1001(b)(4)'' of Regulation SCI), individuals are provided with a safe harbor from liability under Rule 1001(b) if certain conditions are met.[46]

Further, 17 CFR 242.1001(c) (''Rule 1001(c)'' of Regulation SCI), requires SCI entities to establish, maintain, and enforce reasonably designed written policies and procedures that include the criteria for identifying responsible SCI personnel, the designation and documentation of responsible SCI personnel, and escalation procedures to quickly inform responsible SCI personnel of potential SCI events.[47] Rule 1000 of Regulation SCI defines ''responsible SCI personnel'' to mean, for a particular SCI system or indirect SCI system impacted by an SCI event, such senior manager(s) of the SCI entity having responsibility for such system, and their designee(s).[48] Rule 1000 also defines ''SCI event'' to mean an event at an SCI entity that constitutes a systems disruption, a systems compliance issue, or a systems intrusion.[49] Under 17 CFR 242.1001(c)(2) (''Rule 1001(c)(2)'' of Regulation SCI), SCI entities are required periodically to review the effectiveness of these policies and procedures and take prompt action to remedy any deficiencies.[50]

3. SCI Events

Under Rule 1002 of Regulation SCI, SCI entities have certain obligations regarding SCI events. An ''SCI event'' is defined as: (i) a ''systems disruption,'' which is an event in an SCI entity's SCI systems that disrupts, or significantly degrades, the normal operation of an SCI system; and/or (ii) a ''systems intrusion,'' which is any unauthorized entry into the SCI systems or indirect SCI systems of an SCI entity; and/or (iii) a ''systems compliance issue,'' which is an event at an SCI entity that has caused any SCI system of such entity to operate in a manner that does not comply with the Exchange Act and the rules and regulations thereunder or the entity's rules or governing documents, as applicable.[51]

When any responsible SCI personnel has a reasonable basis to conclude that an SCI event has occurred, the SCI entity must begin to take appropriate corrective action which must include, at a minimum, mitigating potential harm to investors and market integrity resulting from the SCI event and devoting adequate resources to remedy the SCI event as soon as reasonably practicable.[52] With limited exceptions,[53] Rule 1002(b) provides the framework for notifying the Commission of SCI events including, among other things, requirements to: notify the Commission of the event immediately; provide a written notification on Form SCI within 24 hours that includes a description of the SCI event and the system(s) affected, with other information required to the extent available at the time; provide regular updates regarding the SCI event until the event is resolved; and submit a final detailed written report regarding the SCI event.[54]

Rule 1002(c) of Regulation SCI also requires that SCI entities disseminate information to their members or participants regarding SCI events.[55] These information dissemination requirements are scaled based on the nature and severity of an event. SCI entities are required to disseminate certain information about the event to certain of its members or participants (*i.e.,* those that are reasonably estimated to have been affected) promptly after any responsible SCI personnel has a reasonable basis to conclude that an SCI event has occurred. For ''major SCI events,'' such dissemination must be made to all of its members or participants. In addition, dissemination of information to members or participants is permitted to be delayed for systems intrusions if such dissemination would likely compromise the security of the SCI entity's systems or an investigation of the intrusion.[56] In addition, 17 CFR 242.1002(c)(4) (''Rule 1002(c)(4)'' of Regulation SCI) provides exceptions to the dissemination requirements under Rule 1002(c) of Regulation SCI for SCI events to the extent they relate to market regulation or market surveillance systems or SCI events that have had, or the SCI entity reasonably estimates would have, either a de minimis or no impact on the SCI entity's operations or on market participants.[57]

4. Systems Changes and SCI Review

Under 17 CFR 242.1003(a) (''Rule 1003(a)'' of Regulation SCI), SCI entities are required to provide reports to the Commission relating to system changes, including a report each quarter describing completed, ongoing, and planned material changes to their SCI systems and the security of indirect SCI systems, during the prior, current, and subsequent calendar quarters, including the dates or expected dates of commencement and completion.[58] Rule 1003(b) of Regulation SCI also requires that an SCI entity conduct an ''SCI review'' not less than once each calendar year.[59] ''SCI review'' is defined in Rule 1000 of Regulation SCI to mean a review, following established procedures and standards, that is performed by objective personnel having appropriate experience to conduct reviews of SCI systems and indirect SCI systems, and which review contains: a risk assessment with respect to such systems of an SCI entity; and an assessment of internal control design and effectiveness of its SCI systems and indirect SCI systems to include logical and physical security controls,

[43] *See* 17 CFR 242.1001(b)(1).

[44] *See* 17 CFR 242.1001(b)(2).

[45] *See* 17 CFR 242.1001(b)(3).

[46] *See* 17 CFR 242.1001(b)(4).

[47] *See* 17 CFR 242.1001(c).

[48] 17 CFR 242.1000.

[49] *Id.*

[50] *See* 17 CFR 242.1001(c)(2).

[51] *See* 17 CFR 242.1000.

[52] *See* 17 CFR 242.1002(a).

[53] *See* 17 CFR 242.1002(b)(5) (relating to the exception for de minimis SCI events).

[54] *See* 17 CFR 242.1002(b).

[55] *See* 17 CFR 242.1002(c).

[56] *See id.* The rule also requires that the SCI entity document its reasons for delayed notification. *Id.*

[57] *See* 17 CFR 242.1002(c)(4).

[58] *See* 17 CFR 242.1003(a).

[59] *See* 17 CFR 242.1003(b).

development processes, and information technology governance, consistent with industry standards.[60] Under Rule 1003(b)(2) and (3), SCI entities are also required to submit a report of the SCI review to their senior management, and must also submit the report and any response by senior management to the report, to their board of directors, as well as to the Commission.[61]

5. Business Continuity and Disaster Recovery Testing With Members/Participants

Rule 1004 of Regulation SCI sets forth certain requirements for testing an SCI entity's business continuity and disaster recovery plans with its members or participants. This rule requires that, with respect to an SCI entity's business continuity and disaster recovery plan, including its backup systems, each SCI entity shall: (a) establish standards for the designation of those members or participants that the SCI entity reasonably determines are, taken as a whole, the minimum necessary for the maintenance of fair and orderly markets in the event of the activation of such plans; (b) designate members or participants pursuant to the standards established and require participation by such designated members or participants in scheduled functional and performance testing of the operation of such plans, in the manner and frequency specified by the SCI entity, provided that such frequency shall not be less than once every 12 months; and (c) coordinate the testing of such plans on an industry- or sector-wide basis with other SCI entities.[62]

6. Recordkeeping and Other Provisions (Rules 1005–1007)

SCI entities are required by Rule 1005 of Regulation SCI to make, keep, and preserve certain records related to their compliance with Regulation SCI.[63] In addition, 17 CFR 242.1006 (''Rule 1006'' of Regulation SCI), provides for certain requirements relating to the electronic filing, on Form SCI, of any notification, review, description, analysis, or report to the Commission required to be submitted under Regulation SCI.[64] Finally, 17 CFR 242.1007 (''Rule 1007'' of Regulation SCI) requires a written undertaking when records required to be filed or kept by an SCI entity under Regulation SCI are prepared or maintained by a service bureau or other recordkeeping service on behalf of the SCI entity.[65]

*C. Overview of Proposed Amendments to Regulation SCI*

The Commission is proposing amendments to Regulation SCI that would expand the definition of ''SCI entity'' to include a broader range of key market participants in the U.S. securities market infrastructure and update certain provisions of Regulation SCI to take account of developments in the technology landscape of the markets and the Commission and its staff's oversight experience since the adoption of Regulation SCI in 2014. As discussed in section III.A, the Commission is proposing to expand the definition of SCI entity to include registered SBSDRs, registered broker-dealers exceeding a size threshold (''SCI broker-dealers''), and additional clearing agencies exempt from registration.[66] As discussed in section III.C, the Commission is also proposing to update several requirements of Regulation SCI to acknowledge certain technology changes in the market, including cybersecurity and third-party provider management challenges since the adoption of Regulation SCI in 2014, and to account for the experience and insights the Commission and its staff have gained with respect to technology issues surrounding SCI entities and their systems. These include:

- Amendments to Rule 1001(a) to require that an SCI entity's policies and procedures for SCI systems, critical SCI systems, and indirect SCI systems, address with specificity:
  - Systems classification and life cycle management;[67]
  - Management of third-party providers, including cloud service providers and providers of critical SCI systems;[68]
  - Access controls;[69] and
  - Identification of current SCI industry standards, if any;[70]
- Expansion of the definition of ''systems intrusion'' in Rule 1000 to include a wider range of cybersecurity events;[71]
- Amendments to Rule 1002 regarding notice of systems intrusions to the Commission and affected persons;[72]
- Amendments to the definition of ''SCI review'' and Rule 1003(b) to specify in greater detail the contents of the SCI review and associated report, and to require annual penetration testing;[73]
- Amendments to Rule 1004 to require that SCI entities designate key third-party providers for participation in annual business continuity/disaster recovery testing;[74]
- Amendments to Rule 1001(a)(4) to address how an SCI entity may avail itself of the safe harbor provision;[75]
- Amendments to Rule 1005 to address the maintenance of records by a former SCI entity; and
- Changes to Form SCI consistent with the proposed changes.[76]

The amendments to Regulation SCI are proposed independently of the proposals discussed in the Exchange Act Cybersecurity Proposal and Regulation S–P 2023 Proposing Release. However, the relationship of all three proposals, as each may apply to an SCI entity, is discussed in section III.D.

## III. Proposed Amendments to Regulation SCI

*A. Definition of SCI Entity*

1. Evolution: Current and Proposed SCI Entities

Currently, SCI entities are the SCI SROs, SCI ATSs, plan processors, certain exempt clearing agencies, and, as of 2020, SCI competing consolidators.[77] In 2013, the Commission proposed to include other entities: specifically, ATSs trading corporate debt or municipal securities (hereafter, ''Fixed Income ATSs'') exceeding specified volume thresholds.[78] The Commission did not include any Fixed Income ATSs as SCI entities at adoption in 2014, however, based on consideration of comments regarding the risk profile of Fixed

[60] *See* 17 CFR 242.1000. Rule 1003(b)(1) of Regulation SCI also states that penetration test reviews of an SCI entity's network, firewalls, and production systems must be conducted at a frequency of not less than once every three years, and assessments of SCI systems directly supporting market regulation or market surveillance must be conducted at a frequency based upon the risk assessment conducted as part of the SCI review, but in no case less than once every three years. *See* 17 CFR 242.1003(b)(1)(i) and (ii) (''Rule 1003(b)(1)(i) and (ii)'').

[61] *See* 17 CFR 242.1003(b)(2) and (3).

[62] *See* 17 CFR 242.1004.

[63] *See* 17 CFR 242.1005. Unlike 17 CFR 242.1005(a) (''Rule 1005(a)'') of Regulation SCI, which relates to recordkeeping provisions for SCI SROs, 17 CFR 242.1005(b) (''Rule 1005(b)'') relates to the recordkeeping provision for SCI entities other than SCI SROs.

[64] *See* 17 CFR 242.1006.

[65] *See* 17 CFR 242.1007.

[66] *See infra* section III.A.2.a. through c. (providing a detailed discussion of each of these categories of entities and associated proposed definitions).

[67] *See infra* section III.C.1.

[68] *See infra* section III.C.2.

[69] *See infra* section III.C.3.a.

[70] *See infra* section III.C.5.c.

[71] *See infra* section III.C.3.c.

[72] *See infra* section III.C.3.c.

[73] *See infra* sections III.C.3.b and III.C.4.

[74] *See infra* section III.C.2.d.

[75] *See infra* section III.C.5.

[76] *See infra* section III.C.6.

[77] *See supra* notes 27–29 and accompanying text; *infra* note 83 and accompanying text.

[78] *See* SCI Proposing Release, *supra* note 14, at 18097.

Income ATSs at that time.[79] In 2013, the Commission also solicited comment on the inclusion of several other types of entities, including SBSDRs and broker-dealers (beyond SCI ATSs).[80] At adoption in 2014, comments regarding these and other entities were summarized, with specific proposals deferred for possible future consideration.[81] In sum, the Commission stated in 2014 that it was neither limiting the applicability of Regulation SCI to only the most systemically important entities as urged by some commenters, nor taking a broad approach at the outset, but rather that it was taking a ''measured'' approach in establishing the initial scope of SCI entities.[82] Since the initial adoption of Regulation SCI, the Commission has considered expansion of the definition of SCI entity several times: first to propose and adopt certain competing consolidators as SCI entities,[83] and more recently to propose and repropose adding ATSs that trade U.S. Treasury Securities or Agency Securities exceeding specified volume thresholds (''Government Securities ATSs'') as SCI entities.[84]

The Commission now proposes a further expansion of the definition of SCI entity to include SBSDRs, certain registered broker-dealers (*i.e.,* SCI broker-dealers), and additional clearing agencies exempted from registration. The Commission also solicits comment on whether, in light of technological changes in the fixed income markets in recent years, Fixed Income ATSs should again be proposed to be subject to Regulation SCI, rather than 17 CFR 240.301(b)(6) (''Rule 301(b)(6)'' of Regulation ATS), and also whether and how broker-dealers trading corporate debt and municipal securities should be considered.[85]

2. New Proposed SCI Entities

When it adopted Regulation SCI, the Commission acknowledged that there may be other categories of entities not included in the definition of SCI entity that, given their increasing size and importance, could pose risks to the market should an SCI event occur, but decided to include only certain key market participants at that time.[86] The Commission proposes to expand the definition of SCI entity to include SBSDRs, certain types of broker-dealers, and additional clearing agencies exempted from registration as additional key market participants that would also have to comply with Regulation SCI because they play a significant role in the U.S. securities markets and/or have the potential to impact investors, the overall market, or the trading of individual securities in the event of a systems issue. If this amendment is adopted, these new SCI entities would become subject to all provisions of Regulation SCI, including the provisions proposed to be amended as discussed in section III.C of this release.

a. Registered Security-Based Swap Data Repositories (SBSDRs)

The Commission proposes to expand the application of Regulation SCI to SBSDRs. As registered securities information processors that disseminate market data and provide price transparency in the SBS market, and centralized trade repositories for SBS data for use by regulators, SBSDRs play a key role in the SBS market.[87]

As noted, the Commission solicited comment on the inclusion of SBSDRs as SCI entities when it first proposed Regulation SCI in 2013.[88] At that time, the Commission anticipated that SBSDRs would ''play an important role in limiting systemic risk and promoting the stability of the SBS market [and] also would serve as information disseminators in a manner similar to plan processors in the equities and options markets.'' [89] But it also acknowledged that there may be differences between the equities and options markets and the SBS market, ''including differing levels of automation and stages of regulatory development.'' [90]

Comments received on the inclusion of SBSDRs as SCI entities in the SCI Proposing Release were limited. One commenter stated that ''the similarities between certain SCI entities and SB SDRs . . . do not provide a clear justification for a different set of rules.'' [91] Another commenter stated that SBSDRs should have standards that are consistent with, but not identical to, those of SCI entities because the

[79] *See* SCI Adopting Release, *supra* note 1, at 72270, 72409 (discussing determination not to apply Regulation SCI to ATSs trading only corporate debt and municipal securities at that time).

[80] *See* SCI Proposing Release, *supra* note 14, at 18133–41. The Commission also solicited comment on the inclusion of security-based swap execution facilities (''SB SEFs''), which entities are now the subject of another proposal. *See Rules Relating to Security-Based Swap Execution and Registration and Regulation of Security-Based Swap Execution Facilities,* Release No. 94615 (Apr. 6, 2022), 87 FR 28872 (May 11, 2022) (proposing that SB SEFs be subject to 17 CFR 242.800 through 242.835 (''Regulation SE'') which includes operational capability requirements closely modeled on a detailed CFTC rule for SEFs (17 CFR 37.1401)). SB SEFs are not further discussed herein.

[81] *See* SCI Adopting Release, *supra* note 1, at 72364–66 (contemplating possible future proposals).

[82] *See* SCI Adopting Release, *supra* note 1, at 72259 (stating that this measured approach would enable the Commission to ''monitor and evaluate the implementation of Regulation SCI, the risks posed by the systems of other market participants, and the continued evolution of the securities markets, such that it may consider, in the future, extending the types of requirements in Regulation SCI to additional categories of [key] market participants . . . .'').

[83] *See* Market Data Infrastructure Adopting Release, *supra* note 24, at 18659–18676.

[84] *See* Securities Exchange Act Release Nos. 90019 (Sept. 28, 2020), 85 FR 87106 (Dec. 31, 2020) (''Government Securities ATS Proposing Release''); 94062 (Jan. 26, 2022), 87 FR 15496 (Mar. 18, 2022) (''Government Securities ATS Reproposal'') (among other things, citing operational similarities between Government Securities ATSs and NMS stock ATSs). In the Government Securities ATS Reproposal, the Commission proposed amendments to 17 CFR 240.3b–16(a) (''Rule 3b–16(a)'' of the Exchange Act), which defines certain terms used in the statutory definition of ''exchange'' under section 3(a)(1) of the Exchange Act, to include systems that offer the use of non-firm trading interest and provide communication protocols to bring together buyers and sellers of securities. Trading systems that may fall within the criteria of proposed 17 CFR 240.3b–16 (''Rule 3b–16''), as proposed to be amended, would likely operate as ATSs, and possibly SCI ATSs. Because the proposed amendments to Rule 3b–16(a) could result in a greater number of ATSs, and the amendments proposed to expand and update SCI could impact newly designated ATSs, commenters are encouraged to review both the Government Securities ATS Reproposal and this proposal to determine whether it might affect their comments on this proposal, as well as their responses to the Commission's request for comment on application of Regulation SCI to Fixed Income ATS contained herein.

[85] Currently, Rule 301(b)(6) of Regulation ATS applies to Fixed Income ATSs exceeding a volume threshold. Under Rule 301(b)(6), an ATS that trades only municipal securities or corporate debt at a threshold of 20% or more of the average daily volume traded in the United States, during at least four of the preceding six calendar months, is required to comply with capacity, integrity, and security requirements with respect to those systems that support order entry, order routing, order execution, transaction reporting, and trade comparison. *See* 17 CFR 242.301(b)(6). As discussed further below, the amendments proposed in this release do not include amendments to modify the numerical volume thresholds or to otherwise modify Rule 301(b)(6) of Regulation ATS, or move systems requirements for Fixed Income ATSs from Regulation ATS to Regulation SCI. The Commission does, however, request comment on the state of electronic trading and automation in the corporate debt and municipal securities markets, as well as the risks associated with entities with significant activity in these markets. *See infra* section III.B.

[86] *See* SCI Adopting Release, *supra* note 1, at 72259. *See also supra* note 82 and accompanying text.

[87] Rule 1000 would define the term registered security-based swap data repository to mean ''a security-based swap data repository, as defined in 15 U.S.C. 78c(a)(75), and that is registered with the Commission pursuant to 15 U.S.C. 78m(n) and § 240.13n–1,'' with a proviso that compliance with Regulation SCI would not be required until six months after the entity's registration is effective. *See* proposed Rule 1000.

[88] *See supra* text accompanying note 80.

[89] SCI Proposing Release, *supra* note 14, at 18135 (citation omitted).

[90] *Id.*

[91] SCI Adopting Release, *supra* note 1, at 72364.

functions that SBSDRs perform are significantly different from those performed by SCI entities.[92] Other commenters, however, felt the practical differences between options and equities and derivatives called for some form of harmonization of rules, but not direct application of Regulation SCI to these entities.[93] The Commission deferred and stated in the SCI Adopting Release that, ''should [it] decide to propose to apply the requirements of Regulation SCI to SB SDRs [it] would issue a separate release discussing such a proposal.'' [94] Taking into account the role of SBSDRs in the SBS market, their reliance on technology to perform their functions, and the current state of regulatory development in the SBS market, the Commission is doing so now.

i. Role of SBSDRs and Associated Risks

Title VII of the Dodd-Frank Act, enacted in 2010, provided for a comprehensive, new regulatory framework for swaps and security-based swaps, including regulatory reporting and public dissemination of transactions in security-based swaps.[95] In 2015, the Commission established a regulatory framework for SBSDRs to provide improved transparency to regulators and help facilitate price discovery and efficiency in the SBS market.[96] Under this framework, SBSDRs are registered securities information processors and disseminators of market data in the SBS market,[97] thereby serving Title VII's goal of having public dissemination of price information for all security-based swaps, to enhance price discovery for market participants.[98] Like FINRA's Trade Reporting and Compliance Engine (''TRACE'') and the MSRB's Electronic Municipal Market Access (''EMMA''),[99] SBSDRs serve an important function for market participants because they disseminate market data, thereby providing price transparency in the SBS market.[100] Just as TRACE and EMMA provide price transparency to market participants and regulatory information to regulators, SBSDRs are designed to meet two purposes as mandated by Title VII of the Dodd-Frank Act: (1) to provide SBS data and information to regulators to surveil the markets and assess for market risks; and (2) to enhance price discovery to market participants.[101] As discussed in detail below, given that SBSDRs rely on automated systems and are designed to limit systemic risk and promote the stability of the markets they serve, the Commission believes that including SBSDRs in the definition of SCI entities would better ensure that SBSDR systems are robust, resilient, and secure. Additionally, this approach is reasonable and consistent as other entities that play a key price transparency role in their respective markets, such as plan processors, SCI competing consolidators, FINRA and the MSRB, are SCI entities, and their systems that directly support market data, among other functions, are currently SCI systems.[102]

As centralized repositories for SBS data for use by regulators, SBSDRs provide important infrastructure that assists relevant authorities in performing their market oversight.[103] Data maintained by SBSDRs may assist regulators in preventing market abuses, performing supervision, and resolving issues and positions if an institution fails.[104] SBSDRs are required to collect and maintain accurate SBS transaction data so that relevant authorities can access and analyze the data from secure, central locations, thereby putting the regulators in a better position to monitor for potential market abuse and risks to financial stability.[105] SBSDRs also have the potential to reduce operational risk and enhance operational efficiency, such as by maintaining transaction records that would help counterparties to ensure that their records reconcile on all of the key economic details.[106]

Furthermore, SBSDRs themselves are subject to certain operational risks that may impede the ability of SBSDRs to meet the goals set out in Title VII of the Dodd-Frank Act and the Commission's rules.[107] For instance, the links established between an SBSDR and other entities, including unaffiliated clearing agencies and other SBSDRs, may expose the SBSDR to vulnerabilities outside of its direct control.[108] Without appropriate

[92] *See id.*

[93] *See id.*

[94] SCI Adopting Release, *supra* note 1, at 72364; SCI Proposing Release, *supra* note 14, at 18134.

[95] Public Law 111–203, section 761(a) (adding Exchange Act section 3(a)(75) (defining SBSDR)) and section 763(i) (adding Exchange Act section 13(n) (establishing a regulatory regime for SBSDRs)).

[96] *See Security-Based Swap Data Repository Registration, Duties, and Core Principles,* Securities Exchange Act Release No. 74246 (Feb. 11, 2015), 80 FR 14438, 14441 (Mar. 19, 2015) (''SBSDR Adopting Release''); *Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information,* Securities Exchange Act Release No. 74244 (Feb. 11, 2015), 80 FR 14563 (Mar. 19, 2015) (''SBSR Adopting Release'').

[97] *See* 17 CFR 242.909 (''A registered security-based swap data repository shall also register with the Commission as a securities information processor on Form SDR.''); *see also* Form SDR (''With respect to an applicant for registration as a security-based swap data repository, Form SDR also constitutes an application for registration as a securities information processor.'').

[98] *See, e.g.,* SBSR Adopting Release, *supra* note 96, at 14604–05.

[99] FINRA members are subject to transaction reporting obligations under FINRA Rule 6730, while municipal securities dealers are subject to transaction reporting obligations under MSRB Rule G–14. *See* FINRA Rule 6730(a)(1) (requiring FINRA members to report transactions in TRACE-Eligible Securities, which FINRA Rule 6710 defines to include a range of fixed-income securities). *See also* MRSB Rule G–14 (requiring transaction reporting by municipal bond dealers). EMMA, established by the MSRB in 2009, serves as the official repository of municipal securities disclosure providing the public with free access to relevant municipal securities data, and is the central database for information about municipal securities offerings, issuers, and obligors. Additionally, the MSRB's Real-Time Transaction Reporting System (''RTRS''), with limited exceptions, requires municipal bond dealers to submit transaction data to the MSRB within 15 minutes of trade execution, and such near real-time post-trade transaction data can be accessed through the MSRB's EMMA website.

[100] *See* Committee on Payment and Settlement Systems and Technical Committee of the International Organization of Securities Commissions, *Principles for financial market infrastructures,* at 1.14, Box 1 (Apr. 16, 2012) (''PFMI''), *available at https://www.bis.org/publ/cpss101a.pdf* (stating that ''[a] TR [trade repository] may serve a number of stakeholders that depend on having effective access to TR services, both to submit and retrieve data. In addition to relevant authorities and the public, other stakeholders can include exchanges, electronic trading venues, confirmation or matching platforms, and third-party service providers that use TR data to offer complementary services.'').

[101] *See, e.g.,* SBSR Adopting Release, *supra* note 96, at 14604–05.

[102] *See* SBSDR Adopting Release, *supra* note 96.

[103] *See generally* PFMI, *supra* note 100, at 1.14 *(stating that ''[b]*y centralising the collection, storage, and dissemination of data, a well-designed TR that operates with effective risk controls can serve an important role in enhancing the transparency of transaction information to relevant authorities and the public, promoting financial stability, and supporting the detection and prevention of market abuse.'').

[104] *See* Security-Based Swap Data Repository Registration, Duties, and Core Principles, Exchange Act Release No. 63347 (Nov. 19, 2010), 75 FR 77306, 77307 (Dec. 10, 2010), corrected at 75 FR 79320 (Dec. 20, 2010) and 76 FR 2287 (Jan. 13, 2011) (''SBSDR Proposing Release'').

[105] *See* SBSDR Adopting Release, *supra* note 96, at 14440 (stating that ''SDRs are required to collect and maintain accurate SBS transaction data so that relevant authorities can access and analyze the data from secure, central locations, thereby putting them in a better position to monitor for potential market abuse and risks to financial stability.'').

[106] *See* SBSDR Proposing Release, *supra* note 104, at 77307 (stating that ''[t]he enhanced transparency provided by an SDR is important to help regulators and others monitor the build-up and concentration of risk exposures in the SBS market . . . . In addition, SDRs have the potential to reduce operational risk and enhance operational efficiency in the SBS market.'').

[107] *See* SBSDR Adopting Release, *supra* note 96 at 14450 (''SDRs themselves are subject to certain operational risks that may impede the ability of SDRs to meet these goals, and the Title VII regulatory framework is intended to address these risks.'').

[108] *See* PFMI, *supra* note 100, at 3.20.20 (stating that ''A TR should carefully assess the additional operational risks related to its links to ensure the scalability and reliability of IT [information

safeguards in place for the systems of SBSDRs, their vulnerabilities could lead to significant failures, disruptions, delays, and intrusions, which could disrupt price transparency and oversight of the SBS market. For instance, an SBSDR processes and disseminates trade data using electronic systems, and if these systems fail, public access to timely and reliable trade data for the derivatives markets could potentially be compromised.[109] Also, if the data stored at an SBSDR is corrupted, the SBSDR would not be able to provide accurate data to relevant regulatory authorities, which could hinder the oversight of the derivatives markets. Moreover, because SBSDRs receive and maintain proprietary and sensitive information (*e.g.,* trading data, non-public personal information), it is essential that their systems be capable of ensuring the security and integrity of this data.

Along with the reliance of SBSDRs on automated systems to perform their functions, regulatory development of the SBS market has proceeded significantly since 2015. In particular, security-based swap dealers have registered with the Commission,[110] SBSDRs have registered with the Commission,[111] security-based swap execution facilities (''SBSEF'') registration has been proposed,[112] and straight-through processing has increased in the market.[113] On November 8, 2021, SBS data began being reported to SBSDRs, which in turn began disseminating such data to the Commission and the public.[114] In light of the important role of SBSDRs in the markets for security-based swaps, their level of automation, and the regulatory development of the SBS market in recent years, the Commission believes it is timely to propose enhanced requirements for registered SBSDRs with respect to their technology systems that are central to the performance of their regulated activities.

ii. Current Regulation

The Commission believes the current technology regulation framework for SBSDRs should be strengthened. SBSDR technology regulation is currently governed by 17 CFR 240.13n–6 (''Rule 13n–6''), a broad, principles-based operational risk rule,[115] which the Commission adopted in 2015 when regulatory development of the SBS market was still nascent and SBSDRs were not yet registered with the Commission under 17 CFR 240.13n–1 (''Rule 13n–1'').[116] Additionally, Rule 13n–6 was adopted shortly after the adoption of Regulation SCI, with modifications that did not include some of the more detailed proposed requirements.[117] As a result, the two currently-registered SBSDRs (which are affiliated with registered clearing agencies that are subject to Regulation SCI)[118] remain subject to the broad principles-based rule, Rule 13n–6, which is the only applicable operational risk requirement for SBSDRs in the Commission's current regulatory framework.

Rule 13n–6 requires that SBSDRs, with respect to those systems that support or are integrally related to the performance of their activities, establish, maintain, and enforce written policies and procedures reasonably designed to ensure that their systems provide adequate levels of capacity, integrity, resiliency, availability, and

technology] and related resources. A TR can establish links with another TR or with another type of FMI. Such links may expose the linked FMIs to additional risks if not properly designed. Besides legal risks, a link to either another TR or to another type of FMI may involve the potential spillover of operational risk. The mitigation of operational risk is particularly important because the information maintained by a TR can support bilateral netting and be used to provide services directly to market participants, service providers (for example, portfolio compression service providers), and other linked FMIs.'').

[109] *See* PFMI, *supra* note 100, at 1.14, Box 1 (stating that ''[t]he primary public policy benefits of a TR, which stem from the centralisation and quality of the data that a TR maintains, are improved market transparency and the provision of this data to relevant authorities and the public in line with their respective information needs. Timely and reliable access to data stored in a TR has the potential to improve significantly the ability of relevant authorities and the public to identify and evaluate the potential risks posed to the broader financial system.'').

[110] *See List of Security-Based Swap Dealers and Major Security-Based Swap Participants,* Commission (last updated Jan. 4, 2023), *available at: https://www.sec.gov/files/list_of_sbsds_msbsps_1_4_2023locked_final.xlsx.*

[111] The Commission approved the registration of two SBSDRs in 2021. *See* Security-Based Swap Data Repositories, DTCC Data Repository (U.S.), LLC, Order Approving Application for Registration as a Security-Based Swap Data Repository, Securities Exchange Act Release No. 91798 (May 7, 2021), 86 FR 26115 (May 12, 2021); Security-Based Swap Data Repositories, ICE Trade Vault, LLC, Order Approving Application for Registration as a Security-Based Swap Data Repository, Securities Exchange Act Release No. 92189 (Jun. 16, 2021), 86 FR 32703 (Jun. 22, 2021).

[112] *See* Rules Relating to Security-Based Swap Execution and Registration and Regulation of Security-Based Swap Execution Facilities, Securities Exchange Act Release No. 94615 (Apr. 6, 2022), 87 FR 28872 (May 11, 2022).

[113] *See, e.g.,* Security-Based Swap Data Repositories, DTCC Data Repository (U.S.), LLC, Notice of Filing of Application for Registration as a Security-Based Swap Data Repository, Securities Exchange Act Release No. 91071 (Feb. 5, 2021), 86 FR 8977 (Feb. 10, 2021) (''[T]he SDR process is an end-to-end straight through process; from the receipt of data, processing and maintenance of data, and dissemination of data, processes are automated and do not require manual intervention.'').

[114] *See* SEC Approves Registration of First Security-Based Swap Data Repository; Sets the First Compliance Date for Regulation SBSR, Press Release, Commission (May 7, 2021), available at: *https://www.sec.gov/news/press-release/2021-80.*

[115] *See* 17 CFR 240.13n–6.

[116] *See* SBSDR Adopting Release, *supra* note 96, at 14499, 14550 (''[T]he Commission may consider the application of any features of Regulation SCI to SDRs in the future.''); SCI Adopting Release, *supra* note 1, at 72364.

[117] *See* SBSDR Adopting Release, *supra* note 96, at 14499 (stating that ''[t]he Commission is not adopting Rule 13n–6 as proposed because, after proposing Rule 13n–6, the Commission considered the need for an updated regulatory framework for certain systems of the U.S. securities trading markets and adopted Regulation Systems Compliance and Integrity ('Regulation SCI').''). Specifically, the Commission stated that the rule as adopted better sets an appropriate core framework for the policies and procedures of SBSDRs with respect to automated systems and that the framework adopted is ''broadly consistent'' with Regulation SCI. *See id.* Therefore, the Commission declined to adopt more prescriptive elements of the rule as proposed, including proposed Rule 13n–6(b), which would have required that every security-based swap data repository, with respect to those systems that support or are integrally related to the performance of its activities: (1) establish, maintain, and enforce written policies and procedures reasonably designed to ensure that its systems provide adequate levels of capacity, resiliency, and security. These policies and procedures shall, at a minimum: (i) establish reasonable current and future capacity estimates; (ii) conduct periodic capacity stress tests of critical systems to determine such systems' ability to process transactions in an accurate, timely, and efficient manner; (iii) develop and implement reasonable procedures to review and keep current its system development and testing methodology; (iv) review the vulnerability of its systems and data center computer operations to internal and external threats, physical hazards, and natural disasters; and (v) establish adequate contingency and disaster recovery plans; (2) on an annual basis, submit an objective review to the Commission within thirty calendar days of its completion. Where the objective review is performed by an internal department, an objective, external firm shall assess the internal department's objectivity, competency, and work performance with respect to the review performed by the internal department. The external firm must issue a report of the objective review, which the security-based swap data repository must submit to the Commission on an annual basis, within 30 calendar days of completion of the review; (3) promptly notify the Commission of material systems outages and any remedial measures that have been implemented or are contemplated (prompt notification includes the following: (i) immediately notify the Commission when a material systems outage is detected; (ii) immediately notify the Commission when remedial measures are selected to address the material systems outage; (iii) immediately notify the Commission when the material systems outage is addressed; and (iv) submit to the Commission within five business days of the occurrence of the material systems outage a detailed written description and analysis of the outage and any remedial measures that have been implemented or are contemplated); and (4) notify the Commission in writing at least thirty calendar days before implementation of any planned material systems changes. *See* SBSDR Proposing Release, *supra* note 104, at 77370.

[118] The two registered SBSDRs, DTCC Data Repository (U.S.), LLC and ICE Trade Vault, LLC, are affiliated with the registered clearing agencies, Depository Trust Company and ICE Clear Credit LCC, respectively.

security.[119] The operational risk principles underlying Rule 13n–6 are an essential part of the rules that comprise the core framework for SBSDRs that the Commission established in 2015 at the opening of its regulatory regime governing SBSDRs. The core framework influences all applicable requirements relevant to SBSDRs that follow. The core framework not only addresses SBSDR operational risk, but also other SBSDR enumerated duties, including registration, market access to services and data, governance arrangements, conflicts of interest, data collection and maintenance, privacy and disclosure requirements, and chief compliance officers,[120] thereby implementing the provisions of Exchange Act section 13(n).[121] Therefore, the SBSDR core framework, which Rule 13n–6 is a part, is different in focus and broader in scope than proposed Regulation SCI—as it relates to SBSDRs—which is focused on, among things, protecting the security of SBSDR systems. While Rule 13n–6 may not provide the absolute requirements relating to SBSDR operational risk, as the Commission's regulatory regime continues to evolve, Rule 13n–6 sets forth an enumerated duty for operational risk concerns that registered SBSDRs must address—at the time of registration and throughout its registration with the Commission. Compliance with the core principles and requirements in the SBSDR rules, including Rule 13n–6, is, thus, an important building block for better ensuring the integrity of an SBSDR's data quality upon which the Commission and the securities markets rely. In this regard, the Commission believes that Rule 13n–6 should be preserved, with the requirements of this proposal, if adopted, working to complement Rule 13n–6.[122]

Specifically, the proposed requirements of Regulation SCI on SBSDRs would exist and operate in conjunction with Rule 13n–6 and would prescribe certain key features and more detailed functional requirements to help ensure that SBSDR market systems are robust, resilient, and secure.[123]

Regulation SCI, among other things, defines the scope of systems covered, and requires: the establishment, maintenance, and enforcement of written policies and procedures to ensure that SCI systems have levels of capacity, integrity, resiliency, availability, and security adequate to maintain operational capacity and promote the maintenance of fair and orderly markets, with minimum elements that include, among others, standards designed to facilitate the successful collection, processing, and dissemination of market data and robust business continuity and disaster recovery plans; policies and procedures designed to ensure compliance with the federal securities laws; corrective action and reporting and dissemination of SCI events, quarterly reporting of material systems changes, and an annual SCI review; and participation of key members in SCI entity's business continuity and disaster recovery plans.

The Commission believes that SBSDRs operate with similar complexity and in a similar fashion as other registered securities information processors that are currently subject to Regulation SCI and that they play an important role in the SBS market and face similar technological vulnerabilities as existing SCI entities, such as FINRA's TRACE and MSRB's EMMA. For example, were an SBSDR to experience a systems issue, market participants could be prevented from receiving timely information regarding accurate prices for individual SBSs. Given SBSDRs' reliance on automated systems and their dual Dodd-Frank mandated role of providing price transparency to market participants and SBS data to regulators to surveil markets to better ensure that systemic risk is limited and market stability is enhanced, the Commission believes it appropriate to include SBSDRs into the scope of the Regulation SCI proposal.

Currently, there are two registered SBSDRs that would become subject to Regulation SCI should the Regulation SCI amendments be adopted.[124]

iii. Request for Comment

1. The Commission requests comment generally on the inclusion of SBSDRs as SCI entities. Is their inclusion appropriate? Why or why not? Please be specific and provide examples, if possible, to illustrate your points.

2. Should all or some aspects of Regulation SCI apply to SBSDRs? Why or why not? If only a portion, please specify which portion(s) and explain why. If all, explain why.

3. Are the definitions of SCI systems and indirect SCI systems appropriate for SBSDRs? Why or why not? Are there any systems of SBSDRs that should be included but would not be covered by these definitions? Please explain. Are there any systems of SBSDRs that should be excluded by these definitions? Please explain. Do SBSDRs have any systems that would or should be covered by the definition of critical SCI systems? Please explain.

4. Is current Rule 13n–6 sufficient to govern the technology of SBSDRs? If not, why not? Would the Regulation SCI proposed requirements, together with Rule 13n–6, be sufficient to address operational risk concerns posed by SBSDRs? Why or why not? Should Rule 13n–6 serve as an operational risk requirement for new SBSDR registrants during the first year registered with the Commission, with Regulation SCI proposed requirements imposed after the first year of registration? Why or why not? Please be specific and respond with examples, if possible.

5. Given the current practices of SBSDRs, would the proposed Regulation SCI requirements pose unreasonable or unworkable difficulties

[119] *See* 17 CFR 240.13n–6.

[120] *See* 17 CFR 240.13n–1 through 240.13n–12; *See* SBSDR Adopting Release, *supra* note 96, at 14440–42.

[121] 15 U.S.C. 78m(n).

[122] When adopting Rule 13n–6, the Commission acknowledged the potential application of Regulation SCI provisions to SBSDRs in the future. *See* SBSDR Adopting Release, *supra* note 96, at 14438, 14499 (stating that ''[c]onsistent with this approach and in recognition of the importance of SDRs as the primary repositories of SBS trade information, the Commission may consider the application of any features of Regulation SCI to SDRs in the future.''). Additionally, as guidance, the Commission stated that, in preparing their policies and procedures to comply with Rule 13n–6, SBSDRs may consider whether to incorporate aspects of Regulation SCI that may be appropriate for their particular implementation of Rule 13n–6. *See id.,* at 14499, n.826 (stating that ''[i]n preparing their policies and procedures, SDRs may consider whether to incorporate aspects of Regulation SCI that may be appropriate for their particular implementation of Rule 13n–6, including where an SDR is related by virtue of its corporate structure to an entity subject to Regulation SCI.'').

[123] In 2014, the SEC's SBSDR regulatory framework was subject to a Level 2 assessment by the Bank for International Settlements' Committee on Payments and Market Infrastructures (''CPMI'') and the International Organization of Securities Commissions (''IOSCO''), which concluded that ''the U.S. jurisdiction has developed rules or proposed rules that completely and consistently implement the majority of Principles that are applicable to CCPs [central counterparties] [but that] [t]he progress of the U.S. jurisdiction towards completely and consistently implementing the Principles for [trade repositories] has been more limited.'' *See* CPMI–IOSCO, *Implementation Monitoring of PFMIs: Level 2 assessment report for central counterparties and trade repositories—United States* (Feb. 26, 2015), *available at https://www.iosco.org/library/pubdocs/pdf/IOSCOPD477.pdf.* Additionally, CPMI–IOSCO issued guidance for cyber resilience for financial market infrastructures (''FMIs''), including trade repositories. *See* CPMI–IOSCO, *Guidance on cyber resilience for financial market infrastructures* (June 2016), *available at https://www.iosco.org/library/pubdocs/pdf/IOSCOPD535.pdf*; *see also* CPMI–IOSCO, *Implementation monitoring of the PFMI: Level 3 assessment on Financial Market Infrastructures' Cyber Resilience* (Nov. 2022), *available at https://www.iosco.org/library/pubdocs/pdf/IOSCOPD723.pdf* (presenting the results of an assessment of the state of cyber resilience (as of Feb. 2021) at 37 FMIs from 29 jurisdictions that participated in this exercise in 2020 to 2022).

[124] *See supra* note 118.

for them, technologically, legally, operationally, or procedurally? Why or why not? Please be specific and respond with examples, if possible.

6. Should Regulation SCI distinguish among different types of SBSDRs such that some requirements of Regulation SCI might be appropriate for some SBSDRs but not others? Why or why not? If so, what are those distinctions and what are those requirements? For example, should any requirements be based on criteria such as number of transactions or notional volume reported to a SBSDR? If so, what would be an appropriate threshold for any such criteria, and why? Please be specific and provide examples, if possible.

7. Because proposed Regulation SCI would include SBSDRs as ''SCI entities,'' SBSDRs that share systems with affiliated clearing agencies could be required to classify those shared systems as SCI systems of the SBSDR and indirect SCI systems of the clearing agency, and vice versa. Is this outcome appropriate? Why or why not? Please be specific and provide examples, if possible.

8. Is Regulation SCI, including as proposed to be amended, comprehensive and robust enough to address SBSDRs that rely on third-party providers to support core SBSDR operations? Why or why not? Please be specific and provide examples, if possible.

b. SCI Broker-Dealers

The Commission further proposes to expand the application of Regulation SCI by including certain broker-dealers—to be referred to as ''SCI broker-dealers''—in the definition of SCI entity. An SCI broker-dealer would be a broker or dealer registered with the Commission pursuant to section 15(b) of the Exchange Act that exceeds one or more size thresholds. An SCI broker-dealer would be a broker-dealer that meets or exceeds: (i) a total assets threshold, or (ii) one or more transaction activity thresholds.

The proposed thresholds are designed to identify the largest U.S. broker-dealers by size, as measured in two different ways. The first is analysis of broker-dealer size based on total assets reported on Form X–17A–5 (Financial and Operational Combined Uniform Single (''FOCUS'') Report Part II, Item 940),[125] which reveals the largest firms based on their balance sheets at a point in time, and which is a measure used by the Board of Governors of the Federal Reserve System (''Federal Reserve Board'') to calculate and provide to the public on a quarterly basis a measure of total assets of all security broker-dealers.[126] The second is a measure of broker-dealer size using transaction activity to identify significant firms active in certain enumerated types of securities. As discussed further below, the total assets threshold is expressed in terms of the broker-dealer's total assets at specified points in time as a percentage of the ''total assets of all security broker-dealers'' with ''total assets of all security-broker-dealers'' being calculated and made publicly available by the Federal Reserve Board for the associated preceding calendar quarter, or any subsequent provider of such information.[127] The trading activity threshold is expressed in terms of the sum of buy and sell transactions that the broker-dealer transacted during a specified time period as a percentage of reported total average daily dollar volume in one or more enumerated types of securities. The proposed total assets threshold is broadly similar to the approach banking regulators use to assess the appropriate capital and liquidity requirements for banks.[128] The proposed transaction activity thresholds are similar to, but distinguishable from, the market share thresholds for SCI ATSs.[129] The proposed threshold approaches in the proposed definition of SCI broker-dealer are designed to identify entities that play key roles in the U.S. securities markets due to the magnitude of their activity in these markets.[130]

i. Background

There are approximately 3,500 broker-dealers registered with the Commission pursuant to section 15(b) of the Exchange Act, and these entities encompass a broad range of sizes, business activities, and business models.[131] In 2013, the Commission proposed to include significant volume ATSs in the definition of SCI entity but at that time did not propose to include any other aspects of broker-dealer operations.[132] Rather, the Commission solicited comment on whether certain classes of broker-dealers should be covered. In particular, the Commission sought comment on whether Regulation SCI should apply, for example, to OTC market makers [133] (either all or those

[125] *See* Form X–17A–5, FOCUS Report, Part II, at 3, *available at https://www.sec.gov/files/formx-17a-5_2_2.pdf* (requiring broker-dealers to report their total assets in Item 940).

[126] *See infra* note 127.

[127] For additional detail on the calculation of total assets of all security broker-dealers, *see* Z.1: Financial Accounts of the United States, *available at https://www.federalreserve.gov/apps/fof/Guide/z1_tables_description.pdf;* ((i) stating that the term ''security broker-dealers'' refers to firms that buy and sell securities for a fee, hold an inventory of securities for resale, or do both; and firms that make up this sector are those that submit information to the Commission on one of two reporting forms, either the Financial and Operational Combined Uniform Single Report of Brokers and Dealers (FOCUS) or the Report on Finances and Operations of Government Securities Brokers and Dealers (FOGS); and (ii) describing the major assets of the security brokers and dealers sector). Currently, this information is readily accessible on the Federal Reserve Economic Data (''FRED'') website. *See* Board of Governors of the Federal Reserve System (US), Security Brokers and Dealers; Total Assets (Balance Sheet), Level [BOGZ1FL664090663Q], retrieved from FRED, Federal Reserve Bank of St. Louis, available at: *https://fred.stlouisfed.org/series/BOGZ1FL664090663Q* (making publicly available the total assets of all security brokers and dealers, as calculated and updated quarterly by the Federal Reserve Board).

[128] *See infra* notes 178–180 and accompanying text.

[129] *See infra* section III.A.b.iii.

[130] *See infra* text accompanying notes 138–142 (summarizing comments on the SCI Proposing Release from commenters urging that application of Regulation SCI to broker-dealers should be limited to those with substantial transaction volume or having a large ''footprint'').

[131] This estimate is derived from information on broker-dealer FOCUS Report Form X–17A–5 Schedule II filings as of Dec. 31, 2021, as well as the third quarter of 2022. *See also* FINRA, *2022 FINRA Industry Snapshot* (Mar. 2022), *available at https://www.finra.org/sites/default/files/2022-03/2022-industry-snapshot.pdf*. Section 15(b)(8) of the Exchange Act prohibits any broker-dealer from effecting transactions in securities unless it is a member of a registered national securities association (*i.e.,* FINRA) or effects securities transactions solely on a national securities exchange of which it is a member. *See* 15 U.S.C. 78*o*(b)(8); *see also* 17 CFR 240.15b9–1 (''Rule 15b9–1'') (exempting proprietarily trading dealers from section 15(b)(8)'s national securities association membership requirement if they are a member of a national securities exchange and meet certain other requirements). *But see* Securities Exchange Act Release No. 95388 (July 29, 2022), 87 FR 49930 (Aug. 12, 2022) (proposing amendments to Exchange Act Rule 15b9–1 that would generally require proprietary trading firms that are registered broker-dealers to become a registered member of a national securities association (*i.e.,* FINRA) if they effect securities transactions otherwise than on an exchange of which they are a member). *See also* Securities Exchange Act Release No. 94524 (Mar. 28, 2022), 87 FR 23054 (Apr. 18, 2022) (''Dealer-Trader Release'') (proposing to further define ''dealer'' and ''government securities dealer'' to identify certain activities that would constitute a ''regular business'' requiring a person engaged in those activities to register as a ''dealer'' or a ''government securities dealer,'' absent an exception or exemption). Because the proposed amendments to further define the definition of dealer could result in a greater number of dealers and the amendments proposed to expand and update Regulation SCI could impact these newly designated dealers, commenters also are encouraged to review the Dealer-Trader Release to determine whether it might affect their comments on this proposal.

[132] *See* SCI Proposing Release, *supra* note 14, at 18138–42.

[133] An OTC market maker is a dealer that holds itself out as willing to buy and sell NMS stocks on a continuous basis in amounts of less than block

Continued

that execute a significant volume of orders), exchange market makers [134] (either all or those that trade a significant volume on exchanges), order-entry firms that handle and route order flow for execution (either all or those that handle a significant volume of investor orders), clearing broker-dealers (either all or those that engage in a significant amount of clearing activities), and/or large multi-service broker-dealers that engage in a variety of order handling, trading, and clearing activities.[135] Although OTC market makers and clearing broker-dealers were noted specifically as examples of categories of broker-dealers that could pose significant risk to the market if a large portion of the order flow they handle or process were disrupted due to a systems issue, the Commission broadly solicited commenters' views on the importance of different categories of broker-dealers to the stability of overall securities market infrastructure and the risks posed by their systems.[136]

As summarized in the SCI Adopting Release, commenters' views varied.[137] One commenter opined that market makers and brokers or dealers that execute orders internally by trading as a principal or crossing orders as an agent and handle market share that exceeds that of certain SCI ATSs should be subject to Regulation SCI.[138] Others stated that market makers, high frequency trading firms, or any firm with market access should be included, arguing that these market participants could present systemic risks to the market and had ''a significant footprint in the markets.'' [139] Others stated that broker-dealers should be SCI entities because 17 CFR 240.15c3–5 (''Rule 15c3–5'' or ''Market Access Rule''),[140] requiring the implementation of risk management and supervisory controls to limit risk associated with routing orders to exchanges or ATSs, was not sufficient by itself, as it does not address the reliability or integrity of the systems that implement such controls.[141] One commenter stated that Regulation SCI should be extended to any trading platforms that transact significant volume, including systems that are not required to register as an ATS because all executions are against the bids and offers of a single dealer.[142] In contrast, other commenters argued that broker-dealers should not be subject to Regulation SCI because they must comply with other Exchange Act and FINRA rules and the proposed Regulation SCI requirements would be ''duplicative and unduly burdensome.'' [143] At adoption, the Commission stated that ''should [it] decide to propose to apply the requirements of Regulation SCI to [broker-dealer operations other than ATSs, it] would issue a separate release discussing such a proposal and would take these comments into account.'' [144]

In considering expansion of Regulation SCI to broker-dealers or broker-dealer operations beyond SCI ATSs, the Commission has considered the extent to which current Commission and FINRA rules affect how broker-dealers design and review their systems for capacity, integrity, resiliency, availability, and/or security adequate to maintain operational capability and promote the maintenance of fair and orderly markets and compliance with federal securities laws and regulations, and whether additional technology oversight is appropriate for certain broker-dealers based on the magnitude of their activity in the markets today.[145] The Commission proposes to apply Regulation SCI to a limited number of the approximately 3,500 broker-dealers registered with the Commission. The proposed thresholds are designed to identify firms that, by virtue of their total assets or level of transaction activity over a period of time and on a consistent basis, play a significant role in the orderly functioning of U.S. securities markets. The thresholds are designed to identify firms that, if adversely affected by a technology event, could disrupt or impede orderly and efficient market operations more broadly.

ii. Current Regulatory Oversight of Broker-Dealer Systems Technology

There are a number of Commission and FINRA rules that affect how broker-dealers design and maintain their technology and promote business continuity and regulatory compliance.[146] Although these rules may support the goal of more resilient broker-dealer systems, they are not designed to address the same concerns that Regulation SCI addresses and are not a substitute for Regulation SCI.[147]

As some commenters on the SCI Proposing Release stated, the Market Access Rule is relevant to certain broker-dealer systems. The Market Access Rule requires broker-dealers with market access to implement, on a market-wide basis, effective financial and regulatory risk management controls and supervisory procedures reasonably designed to limit financial exposure and ensure compliance with applicable regulatory requirements, and thus seeks to address, among other things, certain risks posed to the markets by broker-dealer systems.[148] Pursuant to the Market Access Rule, a broker or dealer with market access, or that provides a customer or any other

size otherwise than on an exchange. *See* 17 CFR 242.600(b)(64).

[134] An exchange market maker is any member of a national securities exchange that is registered as a specialist or market maker pursuant to the rules of such exchange. *See* 17 CFR 242.600(b)(32).

[135] *See* SCI Proposing Release, *supra* note 14, at 18139–40.

[136] *See* SCI Proposing Release, *supra* note 14, at 18138–40 (including questions 194–196 soliciting comment on whether and how to distinguish between and among categories of broker-dealers, such as OTC market makers, order entry firms that handle and route order flow for execution, clearing broker-dealers, and large multi-service broker-dealers that engage in a variety of order handling, trading, and clearing activities).

[137] *See* SCI Adopting Release, *supra* note 1, at 72365.

[138] *See id.* (citing letter from the New York Stock Exchange, Inc. (''NYSE'')).

[139] *See id.* (citing letters from Liquidnet, Inc., David Lauer, and R.T. Leuchtkafer).

[140] *See* 17 CFR 240.15c3–5.

[141] *See* SCI Adopting Release, *supra* note 1, at 72365 (citing letters from David Lauer and the NYSE).

[142] *See id.* (citing letter from BlackRock at 4, in which BlackRock stated that trading systems that ''transact significant volume'' are ''venues that have a meaningful role and impact on the equity market'').

[143] *See id.*

[144] SCI Adopting Release, *supra* note 1, at 72366.

[145] As noted above, the concurrently issued Exchange Act Cybersecurity Proposal would establish minimum ''cybersecurity rules'' for all broker-dealers. That proposal does not, however, independently address weaknesses in broker-dealer operational capacity or resiliency not attributable to cybersecurity breaches.

[146] 17 CFR 240.3a1–1(a)(2) (''Rule 3a1–1(a)(2)''), exempts from the Exchange Act section 3(a)(1) definition of ''exchange'' an organization, association, or group of persons that complies with Regulation ATS. All such exempted ATSs must be a registered broker-dealer and become a member of an SRO, which typically is FINRA. Accordingly, FINRA rules applicable to broker-dealers apply to ATSs. A similar discussion of FINRA rules applicable to ATSs appears in the SCI Adopting Release, *supra* note 1, at 72263.

[147] *See infra* notes 148–166 and accompanying text. *See also* SCI Adopting Release, *supra* note 1, at 72263 (n. 115 and accompanying text), 72365 (discussing comments received).

[148] *See* Securities Exchange Act Release No. 63241 (Nov. 3, 2010), 75 FR 69792 (Nov. 15, 2010) (''Market Access Release''). Under 17 CFR 240.15c3–5(a)(1) (''Rule 15c3–5(a)(1)''), ''market access'' is defined to mean: (i) access to trading in securities on an exchange or ATS as a result of being a member or subscriber of the exchange or ATS, respectively; or (ii) access to trading in securities on an ATS provided by a broker-dealer operator of an ATS to a non-broker-dealer. *See* 17 CFR 240.15c3–5(a)(1). In adopting Rule 15c3–5(a)(1), the Commission stated that ''the risks associated with market access . . . are present whenever a broker-dealer trades as a member of an exchange or subscriber to an ATS, whether for its own proprietary account or as agent for its customers, including traditional agency brokerage and through direct market access or sponsored access arrangements.'' *See* Market Access Release at 69798. As such, the Commission stated that ''to effectively address these risks, Rule 15c3–5 must apply broadly to all access to trading on an Exchange or ATS.'' *Id.*

person with access to a national securities exchange or ATS through use of its market participant identifier or otherwise, must establish, document, and maintain a system of risk management controls and supervisory procedures reasonably designed to manage the financial, regulatory, and other risks of this business activity.[149] The Market Access Rule specifies standards for financial and regulatory risk management controls and supervisory procedures.[150] It requires that the financial risk management controls and supervisory procedures must be reasonably designed to limit systematically the financial exposure of the broker or dealer that could arise from market access.[151] In addition, the Market Access Rule requires that regulatory risk management controls and supervisory procedures be reasonably designed to ensure compliance with all regulatory requirements.[152] As such, the focus of the Market Access Rule requires controls to prevent technology and other errors that can create some of the more significant risks to broker-dealers and the markets, namely those that arise when a broker-dealer enters orders into a national securities exchange or ATS, including when it provides sponsored or direct market access to customers or other persons, where the consequences of such an error can rapidly magnify and spread throughout the markets. Further, the Market Access Rule requires specific controls and procedures around a broker-dealer entering orders on a national securities exchange or ATS that Regulation SCI does not and would not prescribe.

In contrast, the policies and procedures required by Regulation SCI apply broadly to technology that supports trading, clearance and settlement, order routing, market data, market regulation, and market surveillance and, among other things, address their overall capacity, integrity, resilience, availability, and security independent of market access. Whereas the Market Access Rule prescribes specific controls and procedures around a broker-dealer entering orders on an exchange or ATS, it is not designed to ensure that the key technology pervasive and important to the functioning of the U.S. securities markets is robust, resilient, and secure.[153] Among other requirements, the policies and procedures requirements of Regulation SCI are designed to help ensure that the systems of SCI entities are adequate to maintain operational capability independent of any specific SCI event (*i.e.,* a systems issue such as a systems disruption, systems intrusion, or systems compliance issue). Further, the SCI review requirement obligates an SCI entity to assess the risks of its systems and effectiveness of its technology controls at least annually, identify weaknesses, and ensure compliance with the safeguards of Regulation SCI. The Market Access Rule and Regulation SCI, therefore, have different requirements and would operate in conjunction with each other to help ensure that SCI broker-dealer SCI systems, whether used for access to the national securities exchanges or ATSs or not, are robust, resilient, and secure.

Broker-dealers are also subject to the Commission's financial responsibility rules (17 CFR 240.15c3–1 (''Rule 15c3–1'') and 17 CFR 240.15c3–3 (''Rule 15c3–3'')) under the Exchange Act. Rule 15c3–1 requires broker-dealers to maintain minimum amounts of net capital, ensuring that the broker-dealer at all times has enough liquid assets to promptly satisfy all creditor claims if the broker-dealer were to go out of business.[154] Rule 15c3–3 imposes requirements relating to safeguarding customer funds and securities.[155] These rules provide protections for broker-dealer counterparties and customers and can help to mitigate the risks to, and impact on, customers and other market participants by protecting them from the consequences of financial failure that may occur because of a systems issue at a broker-dealer, and thus have a different scope and purpose from Regulation SCI.[156]

Pursuant to 17 CFR 240.17a–3 (''Rule 17a–3'' under the Exchange Act) and 17 CFR 240.17a–4 (''Rule 17a–4'' under the Exchange Act), broker-dealers are required to make and keep current records detailing, among other things, securities transactions, money balances, and securities positions.[157] A systems issue at a broker-dealer would not excuse the broker-dealer for noncompliance with these requirements.[158] Further, a broker-dealer that fails to make and keep current the records required by Rule 17a–3 must give notice to the Commission of this fact on the same day and, thereafter, within 48 hours transmit a report to the Commission stating what the broker-dealer has done or is doing to correct the situation.[159] Regulation SCI, however, more directly addresses mitigating the impact of technology failures with respect to SCI systems and indirect SCI systems (which include systems that are not used to make and keep current the records required by Rule 17a–3). Specifically, it requires notifications to the Commission for a different set of events—systems intrusions, systems compliance issues, and systems disruptions—than the notification requirements of 17 CFR 240.17a–11 (''Rule 17a–11''), and is therefore not duplicative of Rule 17a–11. In addition, it requires that, when an SCI event has occurred, an SCI entity must begin to take appropriate corrective action which must include, at a minimum, mitigating potential harm to investors and market integrity resulting from the SCI event and devoting adequate resources to remedy the SCI event as soon as reasonably practicable.

FINRA also has several rules that are similar to, but take a different approach from, Regulation SCI. For example, FINRA Rule 4370 requires that each broker-dealer create and maintain a written business continuity plan identifying procedures relating to an emergency or significant business disruption that are reasonably designed to enable them to meet their existing obligations to customers. The procedures must also address the broker-dealer's existing relationships

[149] *See* 17 CFR 240.15c3–5(b).

[150] *See* 17 CFR 240.15c3–5(c).

[151] *See* 17 CFR 240.15c3–5(c)(1).

[152] *See* 17 CFR 240.15c3–5(c)(2). *See also* 17 CFR 240.15c3–5(a)(2) (defining ''regulatory requirements'' to mean all Federal securities laws, rules and regulations, and rules of self-regulatory organizations, that are applicable in connection with market access).

[153] *See also supra* note 141 and accompanying text.

[154] *See* 17 CFR 240.15c3–1.

[155] *See* 17 CFR 240.15c3–3.

[156] Similarly, 17 CFR 248.30 (''Rule 30'' of Regulation S–P), which requires registered brokers and dealers to have written policies and procedures that are reasonably designed to safeguard customer records and information—to insure their security and confidentiality, protect against threats or hazards to their security and integrity and protect against unauthorized access or use that could result in substantial harm or inconvenience to any customer—is not designed to help ensure operational capability of market related systems. In addition, 17 CFR 248.201 (''Regulation S–ID'') requires financial institutions or creditors (defined to include registered broker-dealers) that have one or more covered accounts, as defined in 17 CFR 248.201(b)(3) (*e.g.,* brokerage account), to develop and implement a written identity theft prevention program to detect, prevent, and mitigate identity theft in connection with covered accounts that includes policies and procedures to identify and incorporate red flags into the program, detect and respond to red flags, and incorporate periodic updates to the program. This rule, however, is also not designed to ensure operational capability of market related systems.

[157] *See* 17 CFR 240.17a–3; 17 CFR 240.17a–4.

[158] *See, e.g.,* Securities Exchange Act Release No. 40162 (July 2, 1998), 63 FR 37668 (July 13, 1998) (stating that computer systems with ''Year 2000 Problems'' may be deemed not to have accurate and current records and be in violation of Rule 17a–3).

[159] *See* 17 CFR 240.17a–11.

with other broker-dealers and counterparties. A broker-dealer is required to update its plan in the event of any material change to the member's operations, structure, business, or location and must conduct an annual review of its business continuity plan to determine whether any modifications are necessary in light of changes to the member's operations, structure, business, or location. The rule sets forth general minimum elements that a broker-dealer's business continuity plan must address.[160]

This rule is akin to Regulation SCI's Rule 1001(a)(2)(v) requiring policies and procedures for business continuity and disaster recovery plans.[161] However, unlike Regulation SCI, the FINRA rule does not include the requirement that the business continuity and disaster recovery plans be reasonably designed to achieve next business day resumption of trading and two-hour resumption of critical SCI systems following a wide-scale disruption, nor does it require the functional and performance testing and coordination of industry or sector-testing of such plans, which are instrumental in achieving the goals of Regulation SCI with respect to SCI entities.[162] In addition, FINRA Rule 4370 contains certain provisions that Regulation SCI does not.[163] For example, a broker-dealer must disclose to its customers through public disclosure statements how its business continuity plan addresses the possibility of a future significant business disruption and how the member plans to respond to events of varying scope.[164] Accordingly, FINRA Rule 4370 and Regulation SCI would operate in conjunction with one another to help ensure that an SCI broker-dealer has business continuity and disaster recovery plans to achieve the goals of each rule.

FINRA Rule 3110(b)(1) requires each broker-dealer to establish, maintain, and enforce written procedures to supervise the types of business in which it engages and to supervise the activities of registered representatives, registered principals, and other associated persons that are reasonably designed to achieve compliance with applicable securities laws and regulations.

This supervisory obligation extends to member firms' outsourcing of certain ''covered activities''—activities or functions that, if performed directly by a member firm, would be required to be the subject of a supervisory system and written supervisory procedures pursuant to FINRA Rule 3110.[165] This rule is broadly similar to Rule 1001(b) of Regulation SCI regarding policies and procedures to ensure systems compliance. However, unlike Rule 1001(b), which focuses on ensuring that an entity's systems operate in compliance with the Exchange Act, the rules and regulations thereunder, and the entity's rules and governing documents, this FINRA rule does not specifically address compliance of broker-dealers' *systems.* Further, this provision does not cover more broadly policies and procedures akin to those in Rule 1001(a) of Regulation SCI regarding ensuring the SCI entity's operational capability. FINRA Rule 3110(b)(1) and Regulation SCI would operate in conjunction to help ensure that the SCI systems of SCI broker-dealers, including those operated by third parties, are robust, resilient, and operate as intended.

FINRA Rule 3130 requires a broker-dealer's chief compliance officer to certify annually that the member has in place processes to establish, maintain, review, test, and modify written policies and procedures reasonably designed to achieve compliance with applicable FINRA rules, MSRB rules, and federal securities laws and regulations. This rule is similar to Rule 1001(b) of Regulation SCI regarding policies and procedures to ensure systems compliance; however, like FINRA Rule 3130(b)(1), it does not specifically address compliance of broker-dealers' *systems,* and does not require similar policies and procedures to those in Rule 1001(a) of Regulation SCI regarding operational capability of SCI entities. Therefore, FINRA Rule 3130 and Regulation SCI would operate in conjunction with each other to help ensure compliance with applicable law.

FINRA Rule 4530 imposes a regime for reporting certain events to FINRA, including, among other things, compliance issues and other events where a broker-dealer has concluded, or should have reasonably concluded, that a violation of securities or other enumerated law, rule, or regulation of any domestic or foreign regulatory body or SRO has occurred. This requirement is similar to Regulation SCI's reporting requirements under Rule 1002 with respect to systems compliance issues; however, it does not cover reporting of systems disruptions and systems intrusions that did not also involve a violation of a securities law, rule, or regulation. Further, the FINRA reporting rule differs from the Commission notification requirements with respect to the scope, timing, content and required recipient of the reports. FINRA Rule 4530 addressing reporting of certain issues to FINRA is thus not duplicative of Regulation SCI, which, among other things, was designed to enhance direct Commission oversight of entities designated as key entities because they play a significant role in the U.S. securities markets.

Additionally, while regulations and associated guidance applicable to bank holding companies promulgated by the Federal Reserve Board and other bank regulators address operational resilience, their direct application is to bank holding companies rather than broker-dealers registered with the Commission. For example, a 2020 interagency paper issued by the Federal Reserve Board, the Office of the Comptroller of the Currency, and the Federal Deposit Insurance Corporation sets forth ''sound practices'' for the largest, most complex firms, including U.S. bank holding companies, to follow to strengthen their operational resilience. While this publication offers key strategies for covered entities to follow to remain resilient, many of which are similar to what Regulation SCI requires, they are not mandatory for registered broker-dealers.[166] Thus,

[160] Specifically, FINRA Rule 4370 requires that each plan must, at a minimum, address: data back-up and recovery; all mission critical systems; financial and operational assessments; alternate communications between customers and the member; alternate communications between the member and its employees; alternate physical location of employees; critical business constituent, bank, and counter-party impact; regulatory reporting; communications with regulators; and how the member will assure customers' prompt access to their funds and securities in the event that the member determines that it is unable to continue its business.

[161] *See* SCI Adopting Release, *supra* note 1, at 72263–64.

[162] *Id.*

[163] *See supra* note 160.

[164] *See* FINRA Rule 4370(e).

[165] *See* FINRA, *Regulatory Notice 21–29: Vendor Management and Outsourcing* (Aug. 13, 2021), *available at https://www.finra.org/sites/default/files/2021-08/Regulatory-Notice-21-29.pdf; FINRA, Notice to Members 05–48: Outsourcing* (July 2005), *available at https://www.finra.org/sites/default/files/NoticeDocument/p014735.pdf.*

[166] *See* Federal Reserve Board, *SR 20–24: Interagency Paper on Sound Practices to Strengthen Operational Resilience* (Nov. 2, 2020), (''Banking Interagency Paper''), *available at https://www.federalreserve.gov/supervisionreg/srletters/SR2024.htm* (''To help large and complex domestic firms address unforeseen challenges to their operational resilience, the sound practices are drawn from existing regulations, guidance, and statements as well as common industry standards that address operational risk management, business continuity management, third-party risk management, cybersecurity risk management, and recovery and resolution planning.''). The paper applies to national banks, state member banks, state nonmember banks, savings associations, U.S. bank holding companies, and savings and loan holding companies that have average total consolidated assets greater than or equal to (a) $250 billion or (b) $100 billion and have $75 billion or more in average cross-jurisdictional activity, average

although some Exchange Act and FINRA rules other than Regulation SCI support the goal of robust and resilient broker-dealer systems, the Commission believes that additional protections, reporting of systems problems, and direct Commission oversight of broker-dealer technology is appropriate for the largest broker-dealers.

iii. Proposed Thresholds for an ''SCI Broker-Dealer''

Overview

As proposed, Regulation SCI would apply to a limited number of broker-dealers that satisfy: (i) a total assets threshold, or (ii) one or more transaction activity thresholds.

The Commission preliminarily believes that a broker-dealer that meets the proposed thresholds for assets or transaction activity, whether operating in multiple markets or predominantly in a single market, that becomes unreliable or unavailable due to a systems issue, risks disrupting fair and orderly market functioning.

Current Regulation SCI applies to all national securities exchanges and certain significant-volume ATSs, all of which are highly dependent on sophisticated automated and interconnected systems. As electronic trading has grown, and continues to grow in some asset classes, many broker-dealers are similarly dependent on sophisticated and interconnected automated systems.[167] These broker-dealer systems contribute to the orderly functioning of U.S. securities markets, encompassing, for example, systems for trading and quoting, order handling, dissemination and processing of market data, and the process of clearance and settlement.

An ''SCI broker-dealer'' would be a broker or dealer registered with the Commission pursuant to section 15(b) of the Exchange Act which:

- In at least two of the four preceding calendar quarters, ending March 31, June 30, September 30, and December 31, reported to the Commission, on Form X–17A–5 (§ 249.617),[168] total assets in an amount that equals five percent (5%) or more of the total assets of all security brokers and dealers; or[169]
- During at least four of the preceding six calendar months:
  - With respect to transactions in NMS stocks, transacted average daily dollar volume in an amount that equals ten percent (10%) or more of the average daily dollar volume[170] reported by or pursuant to applicable effective transaction reporting plans, provided, however, that for purposes of calculating its activity in transactions effected otherwise than on a national securities exchange or on an alternative trading system, the broker-dealer shall exclude transactions for which it was not the executing party; or
  - With respect to transactions in exchange-listed options contracts, transacted average daily dollar volume in an amount that equals ten percent (10%) or more of the average daily dollar volume[171] reported by an applicable effective national market system plan; or
  - With respect to transactions in U.S. Treasury Securities, transacted average daily dollar volume in an amount that equals ten percent (10%) or more of the total average daily dollar volume[172] made available by the self-regulatory organizations[173] to which such transactions are reported; or
  - With respect to transactions in Agency Securities, transacted average daily dollar volume in an amount that equals ten percent (10%) or more of the total average daily dollar volume[174] made available by the self-regulatory organizations[175] to which such transactions are reported.

An SCI broker-dealer would be required to comply with the requirements of Regulation SCI six months after the SCI broker-dealer satisfied either threshold for the first time.

The proposed thresholds are designed to identify the largest U.S. broker-dealers. To assess which broker-dealers should be subject to Regulation SCI,[176] the Commission has taken into account the size of registered broker-dealers based on analyses of: (i) total assets reported on Form X–17A–5 (Financial and Operational Combined Uniform Single (''FOCUS'') Report Part II, Item 940),[177] and (ii) transaction activity in certain asset classes.

Proposed Total Assets Threshold

A broker-dealer would be an SCI broker-dealer and included in the definition of SCI entity if, in at least two of the four preceding calendar quarters ending March 31, June 30, September 30, and December 31, it reported to the Commission on Form X–17A–5, FOCUS Report Part II, Item 940 total assets in an amount that equals five percent or more of the total assets of all security brokers and dealers. Congress and multiple regulators have used total assets as a factor in assessing whether an entity warrants heightened oversight. For example, under the Dodd-Frank Act, the Financial Stability Oversight Council (''FSOC'') considers financial assets as one factor to determine whether a U.S. non-bank financial services company is supervised by the Federal Reserve Board and subject to enhanced prudential standards.[178] Furthermore, the Dodd-Frank Act requires the Federal Reserve Board to establish enhanced prudential standards for bank holding companies over a certain threshold of total assets.[179] Additionally, the Federal

weighted short-term wholesale funding, average nonbank assets, or average off-balance sheet exposure. As discussed below, the Commission's proposed approach to identifying SCI broker-dealers similarly takes into account the size of the firm, as measured by a total assets threshold and/or market activity thresholds.

[167] For example, *see* Algorithmic Trading Report, *supra* note 3 (discussing many uses of computer systems in contemporary markets, particularly with respect to the trading of equity and debt securities).

[168] Broker-dealers that file Form X–17A–5 on a monthly basis would use their total assets, as reported on Item 940 of Form X–17A–5, for the months ending Mar. 31, June 30, Sept. 30, and Dec. 31. Broker-dealers that file Form X–17A–5 on a quarterly basis would use their total assets, as reported on Item 940 of Form X–17A–5, for the quarters ending Mar. 31, June 30, Sept. 30, and Dec. 31.

[169] *See* definition of SCI broker-dealer in proposed amended Rule 1000. The term ''total assets of all security brokers and dealers'' would, for purposes of this threshold, mean the total assets calculated and made publicly available by the Board of Governors of the Federal Reserve, or any subsequent provider of such information, for the associated preceding calendar quarter. *Id. See supra* note 127; *infra* text accompanying notes 181–185.

[170] For June 2022, the average daily dollar volume in NMS stocks, as reported by applicable effective transaction reporting plans, was approximately $560 billion, with 10% of that reflecting approximately $56 billion.

[171] For June 2022, the average daily dollar volume in exchange-listed options contracts, as reported by an applicable effective national market system plan, was approximately $23.8 billion, with 10% of that reflecting approximately $2.4 billion.

[172] For June 2022, the average daily dollar volume in U.S Treasury Securities, according to FINRA TRACE data, was approximately $634.1 billion, with 10% of that reflecting approximately $63.4 billion.

[173] Currently, there is one self-regulatory organization to which transactions in U.S Treasury Securities are reported (*i.e.,* FINRA).

[174] For June 2022, the average daily dollar volume in Agency Securities, according to FINRA TRACE data was approximately $223 billion, with 10% of that reflecting approximately $22.3 billion.

[175] Currently, there is one self-regulatory organization to which transactions in U.S Treasury Securities are reported (*i.e.,* FINRA) and one organization to which transactions in Agency securities are reported (*i.e.,* FINRA).

[176] *See supra* note 82 and accompanying text.

[177] *See* Form X–17A–5, FOCUS Report, Part II, at 3, *available at https://www.sec.gov/files/formx-17a-5_2_2.pdf* (requiring broker-dealers to report their total assets in Item 940).

[178] *See* Dodd-Frank Act section 113(a)(2), 12 U.S.C. 5323(a)(2).

[179] *See* Dodd-Frank Act section 165, 12 U.S.C. 5365(a)(1). *See also* Federal Reserve Board, Prudential Standards for Large Bank Holding Companies, Savings and Loan Holding Companies, and Foreign Banking Organizations, 84 FR 59032 (Nov. 1, 2019), and Federal Reserve Board, Changes

Continued

Deposit Insurance Corporation (''FDIC'') increases its Deposit Insurance Fund assessment for large and highly complex institutions as compared to small banks.[180]

Although a broker-dealer's total assets alone could be used as the proposed rule's measure of an entity's size and significance, to ensure that a total assets measure reflects significant activity in relative terms, the Commission proposes to scale each broker-dealer's total assets (the numerator) to a quarterly measure of ''total assets of all security brokers and dealers,'' as calculated by the Federal Reserve Board (the denominator).[181] The firm's total assets filed on FOCUS reports (of which each firm has current and direct knowledge) would be divided by the broader measure of total assets for all securities brokers and dealers calculated and made publicly available by the Federal Reserve Board, or any subsequent provider of such information, for the purpose of comparing the size of a broker-dealer to the group of entities tracked by the Federal Reserve Board.[182] The Commission understands that the Federal Reserve Board publishes total assets for all security brokers and dealers approximately ten weeks after the end of the quarter (*e.g.,* 2022 third quarter results ((for quarter ending September 30, 2022)) were published on December 13, 2022). Therefore, the information for the preceding quarter should be available prior to the date on which the firm's FOCUS report is required to be filed with the Commission for the relevant quarter. To enable each firm to calculate whether it exceeds the threshold at the time it files its FOCUS report (which is due 17 days after the end of the quarter/month),[183] broker-dealers would compare their total assets to the previous quarter on or before the FOCUS report filing deadline. Accordingly, to assess whether it exceeds the threshold for a relevant calendar quarter, a broker-dealer would divide its total assets reported on Form X–17A–5, FOCUS Report Part II, Item 940 for that quarter by the total assets of all security brokers and dealers for the preceding quarter, as made available by the Federal Reserve.[184] Although it is possible that the total assets of all security brokers and dealers could increase or decrease sharply from one quarter to the next, the FRED data shows that this has occurred rarely and that the asset totals in the Federal Reserve Board's data generally do not change significantly from quarter to quarter.[185] The Commission therefore believes that overall, the data made available by the Federal Reserve Board is an appropriate and consistent figure for use as a denominator in the proposed threshold.[186]

If a firm meets or exceeds the threshold in two of the four preceding calendar quarters, it would be required to comply with Regulation SCI beginning six months after the end of the quarter in which the SCI broker-dealer satisfied the proposed asset threshold for the first time. Based on data from recent quarters, at the proposed threshold, a broker-dealer registered with the Commission pursuant to section 15(b) of the Exchange Act and having total assets on its balance sheet in excess of approximately $250 billion in two of the preceding four calendar quarters would be an SCI broker-dealer for as long as it continued to satisfy the threshold.[187]

The Commission believes that the proposed threshold of five percent of total assets is a reasonable approach to identifying the largest broker-dealers. In addition to its broad consistency with the approach taken by banking regulators,[188] this approach takes into consideration the multiple roles that the largest broker-dealers play in the U.S. securities markets. Not only do the largest broker-dealers generate liquidity in multiple types of securities, but many also operate multiple types of trading platforms.[189] Further, entities with assets at this level also take risk that they seek to hedge, in some cases using ''central risk books'' for that and other purposes, and engage in routing substantial order flow to other trading venues.[190] For these reasons, the

to Applicability Thresholds for Regulatory Capital and Liquidity Requirements, 84 FR 59230 (Nov. 1, 2019). *See* SCI Adopting Release, *supra* note 1, at 72259, and also definition of ''critical SCI systems'' in 17 CFR 142.1000.

[180] *See* FDIC, *Deposit Insurance Fund, Assessment Rates & Methodology* (last updated July 20, 2021), *available at https://www.fdic.gov/resources/deposit-insurance/deposit-insurance-fund/dif-assessments.html.*

[181] *See supra* note 127. This figure has been calculated by the Federal Reserve Board and made available on the Federal Reserve Economic Data (FRED) website for many years. As stated above, the total assets figure calculated by the Federal Reserve Board is based on the information reported to the Commission by ''security broker-dealers'' on either the FOCUS report or the FOGS report. *See id.*

[182] *Id.*

[183] Form X–17A–5 must be filed within 17 business days after the end of each calendar quarter, within 17 business days after the end of the fiscal year where that date is not the end of a calendar quarter, and/or monthly, in accordance with 17 CFR 240.17a–5, 240.17a–12, or 240.18a–7, as applicable. *See* Instructions to Form X–17A–5, FOCUS Report, Part II, at 2, *available at https://www.sec.gov/files/formx-17a-5_22.pdf.*

[184] *See supra* note 127. For example, to assess whether it exceeds the threshold for the calendar quarter ending Dec. 31, a broker-dealer would divide its total assets reported Form X–17A–5, FOCUS Report Part II, Item 940 for the quarter ending Dec. 31, and divide that by the total assets of security brokers and dealers for the third quarter (ending Sept. 30) of the same year, as obtained from the Federal Reserve Board. If a broker-dealer reported $350 billion, $385 billion, $359 billion, and $386 billion in total assets on its FOCUS reports for Q4 2022, Q3 2022, Q2 2022, and Q1 2022, respectively, the broker-dealer would divide its total assets for each quarter by 5.07 trillion (for Q3 2022), $5.07 trillion (for Q2 2022), $5.23 trillion (for Q1 2022), and $4.96 trillion (for Q1 2021), respectively. *See infra* note 185. The broker-dealer's total assets as a percentage of the total assets of all security broker-dealers would be 6.9% for Q4 2022, 7.6% for Q3 2022. 6.9% for Q2 2022, and 7.8% for Q1 2022. In all four quarters, the broker-dealer would exceed the 5% threshold and therefore meet the definition of SCI broker-dealer.

[185] *See* Board of Governors of the Federal Reserve System (US), *Security Brokers and Dealers; Total Assets (Balance Sheet), Level [BOGZ1FL664090663Q],* retrieved from FRED, Federal Reserve Bank of St. Louis; *https://fred.stlouisfed.org/series/BOGZ1FL664090663Q.* The total assets data from the Federal Reserve shows a sharp drop at the time of the financial crisis, from Q3 2008 to Q4 2008. *See id.* More recent data show total assets for all security-broker dealers for purpose of the proposed denominator in recent quarters in trillion dollars as follows: Q3 2022: 5.07 trillion; Q2 2022: $5.07 trillion; Q1 2022: $5.23 trillion; Q4 2021: $4.96 trillion; Q3 2021: $5.05 trillion; Q2 2021: $4.94 trillion. *See id.*

[186] The Federal Reserve Board data includes total assets reported on both FOCUS and FOGS forms. Its use would result in a conservative number of broker-dealers meeting the total assets threshold (*i.e.,* because elimination of FOGS data would reduce the size of the denominator). The Commission solicits comment below on whether another figure would be a more appropriate and useful measure for determining if a broker-dealer is in the top 5% of all broker-dealers in terms of its total assets, and if a percentage threshold is better measure than a dollar measure.

[187] As a specific example, based on totals retrieved from FRED (*see supra* note 127) a broker-dealer assessing its total assets in Dec. 2022 would determine if that level exceeded 5% of total assets in two of the preceding four quarters (approximately $253 billion, $253 billion, $261 billion, and $248 billion, for Q3 of 2022, Q2 of 2022, Q1 of 2022, and Q4 of 2021, respectively). *See also* Banking Interagency Paper, *supra* note 166 (applicable to banking institutions having in excess of an average of $250 billion in total assets).

[188] *See, e.g., supra* notes 166 and 187 (discussing Banking Interagency Paper).

[189] For a broad discussion of these roles, *see, e.g.,* Rosenblatt Securities, *2022 US Equity Trading Venue Guide* (May 24, 2022) (discussing among other things the features of single-dealer platforms for equity securities that are operated by broker-dealers); *Regulation of NMS Stock Alternative Trading Systems,* Securities Exchange Act Release No. 83663 (July 18, 2018), 83 FR 38768 at 38770–72 (Aug. 7, 2018) (discussing among other things the operational complexity of multi-service broker-dealer with significant brokerage and dealing activity apart from operation of one or more ATSs).

[190] *See, e.g.,* Rosenblatt Securities, *Central Risk Books: What the Buy Side Needs to Know* (Oct. 18, 2018) (stating that all of the biggest bank-affiliated broker-dealers have some form of central risk book and that the ''critical mass of order flow or principal activity, spread across asset classes and regions'' may not justify the operation of these books for smaller more focused firms). *See also* Algorithmic Trading Report, *supra* note 3, at 41–42 (describing central risk books as an important source of block liquidity). All of the firms that satisfy the proposed total assets threshold also satisfy at least one of the proposed trading activity thresholds. *See infra* text accompanying note 219.

Commission believes that systems issues at firms having assets at this level would have the potential to impact investors, the overall market, and the trading of individual securities, and that therefore their market technology should be subject to the requirements and safeguards of Regulation SCI. The threshold is designed to be appropriately high enough to ensure that only the largest broker-dealers are subject to the obligations, and associated burdens and costs, of Regulation SCI. It is also designed to be a relative measure that does not become outdated over time, as the size of the overall market expands or contracts.

As noted, the proposed total assets threshold for SCI broker-dealers would include a proposed time period measurement of ''at least two of the four preceding calendar quarters.'' Requiring that the threshold is met in two out of the four preceding quarters would help mitigate the effect of a steep increase/decrease in total assets in any individual quarter.

Further, this measurement is designed to capture only the broker-dealers that are consistently at or above the proposed five percent threshold, and would not include a broker-dealer that may have had an anomalous quarterly increase, so that a short-term spike in total assets uncharacteristic of the broker-dealer's overall total asset history would not cause it to become subject to Regulation SCI. Although the Commission is also proposing a time period measurement of ''at least four of the preceding six calendar months'' for the trading activity thresholds discussed below (consistent with the time period measurement for SCI ATSs),[191] using a quarterly measure for the total asset threshold is appropriate because FOCUS reports are required at least quarterly for all broker-dealers and the proposed scaling measure is one that is updated quarterly. Based on its analysis of FOCUS reports during the period from Q4 2021 through Q3 2022, the Commission estimates that five entities would exceed the proposed threshold (with the fifth-ranked firm in each quarter reporting total assets in excess of $300 billion, and all firms ranging from approximately seven to 14 percent of the total assets reported by the Federal Reserve Board for the previous quarter), and further anticipates that this threshold would result in little, if any, variation in which firms exceed the threshold over the course of four calendar quarters.[192]

Proposed Transaction Activity Threshold

In the Commission's view, a broker-dealer's transaction activity is another reasonable measure for estimating the significance of a broker-dealer's role in contributing to fair and orderly markets. In several asset classes, the transaction activity of each of a relatively small number of broker-dealers constitutes a share of trading that could, if affected by a systems issue, negatively impact fair and orderly markets. For example, in NMS stocks, some broker-dealers constitute significant concentrations of on-exchange trading, and some broker-dealers execute off-exchange transactions at levels that rival or exceed the volume of trading on current SCI entities.[193] For listed options, which are required to execute on a national securities exchange, a small number of firms participate in a high proportion of trades.[194] Similarly, transaction reporting data for U.S. Treasury Securities and Agency Securities reveal that a handful of broker-dealers each represent a significant percentage of the average weekly (for U.S. Treasury Securities) or daily (for Agency Securities) dollar volume reported by FINRA (currently the only SRO to which such transactions are reported).[195]

Accordingly, the Commission is proposing to include as an SCI entity any registered broker-dealer that, irrespective of the size of its balance sheet, consistently engages in transaction activity at a substantially high level in certain enumerated asset classes, scaled as a percentage of total average daily dollar volume over a specified time period.[196] If a significant systems issue at a broker-dealer that meets the proposed thresholds were to occur, the concern is that its effect would have widespread impact, for example, by impeding the ability of other market participants to trade securities in one or more of the identified asset classes, interrupting the price discovery process, or contributing to capacity issues at other broker-dealers. Further, if executions were delayed by a systems disruption in an SCI broker-dealer's trading, order routing, clearance and settlement, or market data system, due to the magnitude of the proposed covered transaction activity in which these firms consistently engage, the delay could have cascading effects disruptive to the broader market.[197]

The proposed transaction thresholds are broadly similar across different types of securities. However, because of differences in market structure, there are notable differences in the application of the thresholds across types of securities.

Regulation SCI currently applies to, among other entities, national securities exchanges for both listed equities and listed options, and to ATSs trading significant volume in NMS stocks. A national securities exchange and an ATS are a type of ''trading center,'' as that term is defined in 17 CFR 242.600 through 242.614 (''Regulation NMS'').[198] For purposes of counting

[191] *See* Rule 1000 (definition of ''SCI ATS'') (providing a time period measurement of ''at least four of the preceding six calendar months'').

[192] As with other entities that are SCI entities because they satisfy a threshold (*e.g.,* SCI ATSs), an SCI broker-dealer would no longer be an SCI broker-dealer, and thus no longer be subject to Regulation SCI, in the quarter when it no longer satisfies the total assets test (*i.e.,* it does not meet the threshold in two of the previous four quarters). This assumes the broker-dealer also does not meet or no longer satisfies the proposed transaction activity threshold.

[193] For example, in Sept. 2022, one broker-dealer executed a greater proportion of shares in NMS stocks than all but two national securities exchanges. *See, e.g.,* FINRA, *OTC Transparency Data, available at https://otctransparency.finra.org/otctransparency*; CBOE, *Historical Market Volume Data, available at https://www.cboe.com/us/equities/market_statistics/historical_market_volume/.*

[194] As discussed further below in this section, the Commission estimates that six firms would satisfy the 10% options transaction activity threshold.

[195] As discussed further below in this section, the Commission estimates that four firms would satisfy the 10% U.S. Treasury Security transaction activity threshold, and six firms would satisfy the 10% Agency Security transaction activity threshold.

[196] As discussed further below, the Commission proposes that average daily dollar volume be the denominator used as the scaling measure for each relevant asset class. *See infra* notes 211–217 and accompanying text (discussing entities that currently and may in the future receive and make available transaction reports, or aggregated volume statistics in NMS stocks, exchange-listed options, U.S. Treasury Securities, and Agency Securities).

[197] For example, capacity constraints, whether due to risk management, or operational capability limitations of systems, could limit how much one broker-dealer could handle a sudden increase in order flow from a large broker-dealer. For context, based on analysis of data from the Consolidated Audit Trail, in 2022, two large market makers in NMS stocks engaged in over-the counter transactions (all purchases and all sales effected otherwise than on a national securities exchange or ATS) having a total dollar volume of at least $37 billion on most trading days; with at least a quarter of trading days in 2022 having total dollar volume of $42.3 billion or more, and all trading days having an average total dollar volume of $37.3 billion. Counting volume across all venues (all purchases and all sales effected over-the counter, on a national securities exchange, or on ATS), these figures for the same two firms, respectively, are: at least $82.2 billion, ($67.6 marked as principal/riskless principal) on most trading days; at least $97.1 billion ($83.7 billion marked as principal/riskless principal) on at least a quarter of the trading days; and $83.5 billion ($69.4 billion marked as principal/riskless principal) as the average for all trading days.

[198] Rule 600 of Regulation NMS defines the term trading center to mean: a national securities

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transaction activity in NMS stocks, the proposed thresholds are anchored to broker-dealer activity conducted on or as a trading center. Therefore, the Commission is proposing, with respect to the transaction thresholds for NMS stocks, to include broker-dealer activity on national securities exchanges and NMS Stock ATSs, as well as broker-dealer activity as a trading center. Broker-dealer activity ''as a trading center'' refers in this context to trading activity in NMS stocks not effected on a national securities exchange or on an ATS, but by the broker-dealer, where the broker-dealer is the executing party, either as principal or as agent.[199] A similar distinction is not made for exchange-listed options contracts because those transactions are executed on a national securities exchange.[200]

The ''trading center'' term in Regulation NMS applies only to NMS securities; however, there exist today electronic venues for fixed income securities that perform similar functions as trading centers and that are equally important to investors to execute trades in fixed income securities. Such electronic trading venues, particularly for U.S. Treasury Securities and Agency Securities (where electronic trading is prevalent[201]), have developed from a market structure in which electronic bilateral trading was and continues to be important. For this reason, the Commission is proposing to include under the SCI broker-dealer threshold all trades for U.S. Treasury Securities and Agency Securities in which a broker-dealer may participate.

As proposed, an ''SCI broker-dealer'' would include a broker-dealer that, during at least four of the preceding six calendar months: (i) with respect to transactions in NMS stocks, transacted average daily dollar volume in an amount that equals ten percent (10%) or more of the average daily dollar volume reported by or pursuant to applicable effective transaction reporting plans, provided, however, that for purposes of calculating its activity in transactions effected otherwise than on a national securities exchange or on an alternative trading system, the broker-dealer shall exclude transactions for which it was not the executing party; (ii) with respect to transactions in exchange-listed options contracts, transacted average daily dollar volume in an amount that equals ten percent (10%) or more of the average daily dollar volume reported by an applicable effective national market system plan; (iii) with respect to transactions in U.S. Treasury Securities, transacted average daily dollar volume in an amount that equals ten percent (10%) or more of the total average daily dollar volume made available by the self-regulatory organizations to which such transactions are reported; or (iv) with respect to transactions in Agency securities, transacted average daily dollar volume in an amount that equals ten percent (10%) or more of the total average daily dollar volume made available by the self-regulatory organizations to which such transactions are reported.[202]

The Commission proposes to add a definition of ''U.S. Treasury Security'' and ''Agency Security'' to clarify how the transaction activity threshold for these asset classes would operate.[203] A ''U.S. Treasury Security'' would mean a security issued by the U.S. Department of the Treasury. ''Agency Security'' would mean a debt security issued or guaranteed by a U.S. executive agency, as defined in 5 U.S.C. 105, or government-sponsored enterprise, as defined in 2 U.S.C. 622(8). These definitions are designed to provide the scope of securities an SCI broker-dealer must include when assessing whether it has satisfied the proposed transaction activity threshold. The proposed definitions are similar to and consistent with those in FINRA's rules,[204] to avoid confusion and facilitate the comparison between data used to create the numerator and denominator when assessing whether a broker-dealer surpassed the U.S. Treasury Security or Agency Security transaction thresholds.

As is the case currently for the thresholds applicable to SCI ATSs,[205] the proposed thresholds for SCI broker-dealers would include a proposed time period measurement of ''at least four of the preceding six calendar months.'' Specifically, the proposed time measurement period is designed to capture broker-dealers that consistently meet the proposed thresholds and not capture broker-dealers with relatively low transaction activity that may have had an anomalous increase in trading on a given day or few days. In other words, a short-term spike in transaction activity uncharacteristic of a broker-dealer's overall activity should not cause it to become subject to Regulation SCI; using the proposed time period of at least four of the preceding six calendar months would help ensure this.

The proposed thresholds would generally take into account all of a broker-dealer's transactions.[206] The thresholds proposed are designed to identify firms whose transaction activity is of such a magnitude that a systems issue negatively impacting that activity could contribute to a disruption in fair and orderly markets, and for which the application of Regulation SCI is therefore appropriate.

With respect to NMS stocks, only transactions which the broker-dealer (i) trades on a national securities exchange or an ATS, or (ii) executes off of a national securities exchange or an ATS would be counted. When a broker-dealer is the non-executing counterparty to an off-exchange, non-ATS transaction that transaction would not be counted for that broker-dealer.[207] The purpose of this approach is to count towards the threshold for NMS stocks broker-dealer activity on or as a trading center.

To assess whether it satisfies the proposed thresholds, a broker-dealer would need to determine its average daily dollar volume in an enumerated asset class each calendar month, and

exchange or national securities association that operates an SRO trading facility, an alternative trading system, an exchange market maker, an OTC market maker, or any other broker or dealer that executes orders internally by trading as principal or crossing orders as agent. 17 CFR 242.600(b)(95).

[199] *See* 17 CFR 242.600(a)(95), defining ''trading center'' to include, among other entities, ''an OTC market maker, or any other broker or dealer that executes orders internally by trading as principal or crossing orders as agent.''

[200] In some cases, matching of orders for exchange-listed options occur on an ATS, with matches then routed to one or more national securities exchange for execution.

[201] *See* Government Securities ATS Reproposal, *supra* note 84.

[202] The proposed definition of SCI broker-dealer does not include a transaction activity threshold for equity securities that are not NMS stocks and for which transactions are reported to an SRO as a category in the proposed transaction activity threshold. The size of this market, as currently measured, is substantially smaller than the other asset classes enumerated. Based on its analysis of data from the Consolidated Audit Trail, between Oct. 2021 and Sept. 2022, for example, the average daily dollar volume for this market segment was approximately $2.6 billion. Nor do the proposed amendments to Regulation SCI include Fixed Income ATSs or broker-dealers that exceed a transaction activity threshold in corporate debt or municipal securities. *But see infra* section III.A.3 (requesting comment on the matter).

[203] The Commission believes that the terms NMS stock and exchange-listed options are currently well understood. *See* Rule 600 of Regulation NMS (defining the terms NMS stock and NMS security and distinguishing NMS stocks from listed options on the basis of how transaction reports are made available).

[204] *See* FINRA Rules 6710(l) and 6710(p). FINRA Rule 6710 also establishes which securities are eligible for transaction reporting to the ''Trade Reporting and Compliance Engine'' (TRACE), which is the automated system developed by FINRA that, among other things, accommodates reporting and dissemination of transaction reports where applicable.

[205] *See* Rule 1000 (definition of ''SCI ATS'').

[206] As described further above and below, the proposed threshold for NMS stocks would operate slightly differently.

[207] The volume for that trade, as reported through an effective transaction reporting plan, would still be included in the overall calculation of market volume used as the denominator in threshold calculations.

divide that figure by the total reported average daily dollar volume for that month. More specifically, its numerator would be the average daily dollar volume during the calendar month, taking into account all relevant purchase and sale transactions [208] in which the broker-dealer engaged during that calendar month, as determined by the broker-dealer from information in its books and records, as required to be kept pursuant to Exchange Act Rule 17a–3.[209] The denominator would be the total average daily dollar volume for each calendar month, as that total is determined from one or more sources that receive and make available transaction reports, or, as the case may be, aggregated price and volume statistics.

With respect to NMS stocks, information necessary to calculate the denominator currently is available from the plan processors (*i.e.,* the SIPs) of the CTA/CQ Plans and Nasdaq UTP Plan. These Plans are effective transaction reporting plans, and effective national market systems plans.[210] Following implementation of the Market Data Infrastructure rules, the information necessary to calculate the denominator would be available from a competing consolidator or may be self-determined by a self-aggregator that obtains the information pursuant to effective transaction reporting plans, as required by 17 CFR 242.601 (''Rule 601'' of Regulation NMS) and 17 CFR 242.603(b) (''Rule 603(b)'' of Regulation NMS).[211] For listed options, total average daily dollar volume may be determined from consolidated information made available by the plan processor of the OPRA Plan.[212]

With respect to U.S. Treasury Securities and Agency Securities, total average daily dollar volume may be determined from information made available by SROs to which transactions in U.S. Treasury Securities and Agency Securities are reported. Currently there is only one SRO to which this information is reported: FINRA.[213] In connection with its TRACE system, FINRA is currently the most complete source of aggregate volume in U.S. Treasury Securities and Agency Securities.[214] Specifically, FINRA Rule 6750(a) requires FINRA to disseminate information on Agency Securities, immediately upon receipt of the transaction report.[215] With respect to U.S. Treasury Securities, information in TRACE regarding individual transactions is for regulatory purposes only and is not disseminated publicly. However, pursuant to FINRA Rule 6750, on March 10, 2020, FINRA began posting on its website weekly, aggregate data on the trading volume of U.S. Treasury Securities reported to TRACE, and the Commission recently approved website posting of aggregate data more frequently (*i.e.,* daily).[216] Notwithstanding the transparency provided by FINRA/TRACE, aggregate trading volume in U.S. Treasury and Agency securities does not purport to reflect the whole of these markets, as aggregate volume statistics are limited to volume reported by TRACE reporters, including ATSs, registered-broker dealers that are members of FINRA, and

[208] For NMS stocks, this would exclude those purchases or sales off-exchange and not effected through an ATS, in which the broker-dealer was not the executing party. As specific examples, when broker-dealer A routes a customer order to broker-dealer B for routing and execution, and broker-dealer B executes the customer order as principal or crosses it against another order it is holding, the volume for that order would contribute towards the threshold for broker-dealer B but not for broker-dealer A. Similarly, if broker-dealer A sends an order to the single-dealer platform operated by broker-dealer B, and broker-dealer B executes a trade against that order, the volume would contribute towards the threshold for broker-dealer B but not for broker-dealer A. For any asset class, the proposed definition of SCI broker-dealer would not exclude from a broker-dealer operator's transaction tally transactions executed on its own ATS. For example, if the broker-dealer operator trades as a participant on its ATS, or where a broker-dealer operator acts as a counterparty to every trade on its own ATS, its volume would be counted as trading activity of the broker-dealer.

[209] *See* 17 CFR 240.17a–3(a)(6) (requiring a broker-dealer to keep a memorandum of each brokerage order given or received for the purchase or sale of a security, to include the price at which the order executed); 17 CFR 240.17a–3(a)(7) (requiring a memorandum of purchases and sales of a security for its own account, to include the price).

[210] *See supra* note 20 and *infra* note 211. *See also infra* note 262 (stating that an ATS that trades NMS stocks is subject to Regulation SCI if its trading volume reaches: (i) 5% or more in any single NMS stock and 0.25% or more in all NMS stocks of the average daily dollar volume reported by applicable transaction reporting plans; or (ii) 1% or more in all NMS stocks of the average daily dollar volume reported by applicable transaction reporting plans).

[211] With respect to NMS stocks, Rule 601 of Regulation NMS (17 CFR 242.601) requires national securities exchanges and national securities associations to report transactions and last sale data pursuant to an effective transaction reporting plan filed with the Commission in accordance with 17 CFR 242.608 (''Rule 608'' of Regulation NMS). *See* 17 CFR 242.601. The national securities exchanges and FINRA comply with Rule 601 by satisfying the requirements of Rule 603(b) of Regulation NMS (which requires the national securities exchanges and FINRA to act jointly pursuant to one or more effective national market system plans, to disseminate consolidated information, including transactions, in NMS stocks). Currently, transaction information is consolidated by the (exclusive) plan processor of each effective national market system plan (*i.e.,* the CTA/CQ Plan and Nasdaq UTP Plan for NMS stocks). *See* CTA Plan, *available at https://www.ctaplan.com*; Nasdaq UTP Plan, *available at https://www.utpplan.com.* After the implementation of the Market Data Infrastructure rules (*see* Market Data Infrastructure Adopting Release, *supra* note24) national securities exchanges and FINRA will be required to provide transaction reports to competing consolidators and/or self-aggregators pursuant to new effective national market system plans that satisfy the requirements of Rule 603(b). Pursuant to 17 CFR 242.600(a)(14) (Rule 600(a)(14) of Regulation NMS) the term ''competing consolidator'' means a securities information processor required to be registered pursuant to Rule 614 of Regulation NMS or a national securities exchange or national securities association that receives information with respect to quotations for and transactions in NMS stocks and generates a consolidated market data product for dissemination to any person. Pursuant to 17 CFR 242.600(a)(83) (Rule 600(a)(83) of Regulation NMS) the term ''self-aggregator'' means a broker, dealer, national securities exchange, national securities association, or investment adviser registered with the Commission that receives information with respect to quotations for and transactions in NMS stocks, including all data necessary to generate consolidated market data, and generates consolidated market data solely for internal use (with a proviso that a self-aggregator may make consolidated market data available to its affiliates that are registered with the Commission for their internal use). *See* Market Data Infrastructure Adopting Release, *supra* note 24 (providing a full discussion of these terms). Following implementation of the Market Data Infrastructure rules, a broker-dealer may obtain consolidated average daily dollar volume from its chosen competing consolidator, or independently calculate that figure itself, as a ''self-aggregator.''

[212] *See* OPRA Plan, *available at https://www.opraplan.com.*

[213] However, should a national securities exchange (an SRO) trade U.S. Treasury or Agency Securities in the future, if transaction reports are made available by that SRO, they would be relevant to determining consolidated average daily dollar volume.

[214] *See* FINRA, *Trade Reporting and Compliance Engine (TRACE), available at https://www.finra.org/filing-reporting/trace.* FINRA Rule 6730(a)(1) requires FINRA members to report transactions in TRACE-Eligible Securities, which FINRA Rule 6710 defines to include U.S. Treasury Securities and Agency Securities. For each transaction in U.S. Treasury Securities and Agency Securities, a FINRA member would be required to report the CUSIP number or similar numeric identifier or FINRA symbol; size (volume) of the transaction; price of the transaction (or elements necessary to calculate price); symbol indicating whether transaction is a buy or sell; date of trade execution (''as/of'' trades only); contra-party's identifier; capacity (principal or agent); time of execution; reporting side executing broker as ''give-up'' (if any); contra side introducing broker (in case of ''give-up'' trade); the commission (total dollar amount), if applicable; date of settlement; if the member is reporting a transaction that occurred on an ATS pursuant to FINRA Rule 6732, the ATS's separate Market Participant Identifier (''MPID''); and trade modifiers as required. For when-issued transactions in U.S. Treasury Securities, a FINRA member would be required to report the yield in lieu of price. *See* FINRA Rule 6730(c).

[215] *See* FINRA Rule 6750(a).

[216] *See* Securities Exchange Act Release No. 95438 (Aug. 5, 2022), 87 FR 49626 (Aug. 11, 2022) (Order Approving a Proposed Rule Change to Amend FINRA Rule 6750 Regarding the Publication of Aggregated Transaction Information on U.S. Treasury Securities). The implementation date for these TRACE enhancements for U.S. Treasury Securities was Feb. 13, 2023, at which point the weekly data reports were replaced with daily and monthly reports. Using daily reports of U.S. Treasury Security data, broker-dealers should have the information necessary to complete the calculations needed to assess if they satisfy the proposed threshold.

depository institutions meeting transaction volume thresholds in U.S. Treasury Securities, agency-issued debt and mortgage-backed securities.[217]

Counting all relevant purchases and sales from all broker-dealers may result in counting a transaction more than once across the market, and would sum to total volume across broker-dealers that exceeds what is reported pursuant to the relevant plans or SRO. Similarly, summing the percentages that result from dividing the total activity of each broker-dealer by the total volume reported by the relevant plans or SRO would result in a value greater than 100 percent.[218] Accordingly, the proposed ten percent (10%) transaction activity thresholds for measuring a broker-dealer's significance in the markets are not market share thresholds analogous to the current SCI ATS volume thresholds. However, because the types of transactions proposed to be counted are a measure of a broker-dealer's size and significance, it is particularly useful if that measure continues to reflect significant activity as the size of the overall market expands or contracts and remains stable relative to a recognizable measure so that it does not become outdated over time. Therefore, the Commission proposes as a denominator a measure that would scale each broker-dealer's average daily dollar transaction volume to consolidated average daily dollar transaction volume, the latter being determinable from information reported by, or made available by or pursuant to, applicable effective transaction reporting or national market system plans or self-regulatory organizations, as described above.

Any broker-dealer that transacts, as proposed, ten percent (10%) or more of the average daily dollar volume in an enumerated asset class, during at least four of the preceding six calendar months would be an SCI broker-dealer. The proposed trading activity thresholds are designed to measure the size of a broker-dealer's footprint in the market in terms that provide a method for assessing the size of its footprint as the market grows (or shrinks). In this way, the proposed thresholds identify broker-dealers by their transaction activity as compared to a consistent measure of market volume, and give a sense of the size and significance of a broker-dealer activity in the markets in a manner that should not become outdated over time.

The Commission also believes that a threshold of ten percent (10%) or more in the identified asset classes is appropriately high enough to apply Regulation SCI only to the large broker-dealers on which the maintenance of fair and orderly markets depend. The Commission estimates that 17 entities would satisfy one or more of the proposed transaction activity thresholds (the same five entities identified by the total assets threshold plus 12 additional entities).[219] In sum, the Commission believes that the proposed total assets threshold and transaction activity thresholds are appropriate measures for identifying broker-dealers that would pose a substantial risk to the maintenance of fair and orderly markets in the event of a systems issue.

SCI broker-dealers would not have to comply with the requirements of Regulation SCI until six months after the end of the quarter in which the SCI broker-dealer satisfied the proposed asset threshold for the first time, or six months after the end of the month in which the SCI broker-dealer satisfied one of the proposed activity thresholds for the first time. The Commission believes this is an appropriate amount of time for firms to come into compliance with Regulation SCI.

iv. Proposed Revision to Definition of ''SCI Systems'' for Certain SCI Broker-Dealers; SCI Entities Trading Multiple Asset Classes, Which May Include Crypto Asset Securities

In conjunction with the proposed inclusion of SCI broker-dealers as SCI entities, the Commission proposes to limit the definition of ''SCI systems'' for an SCI broker-dealer that qualifies as an SCI entity only because it satisfies a transaction activity threshold. Specifically, the Commission is proposing to revise the definition of ''SCI systems'' to add a limitation that states, ''*provided, however,* that with respect to an SCI broker-dealer that satisfies only the requirements of paragraph (2) of the definition of 'SCI broker-dealer,' such systems shall include only those systems with respect to the type of securities for which an SCI broker-dealer satisfies the requirements of paragraph (2) of the definition.''

The current definition of ''SCI systems'' does not contain the limitation that is proposed for SCI broker-dealers. For example, an SCI ATS that exceeds the average daily dollar volume threshold for NMS stocks is subject to Regulation SCI requirements for all of its SCI systems (*i.e.,* that meet the definition of SCI systems discussed in section II.B.1 above) and indirect SCI systems. Thus, to the extent that the SCI systems and indirect SCI systems of an SCI ATS (or any other SCI entity) relate to equity securities that are non-NMS stocks, exchange-listed options, debt securities, security-based swaps, or any other securities, including crypto asset securities, such systems are subject to the Regulation SCI requirements.[220]

As it considers the expansion of Regulation SCI to broker-dealers, many of which operate multiple business lines and transact in different types of securities, the Commission preliminarily believes that an SCI broker-dealer that qualifies as an SCI entity based only on a transaction activity threshold for a particular type of security should have its obligations limited to systems with respect to that type of security. If a broker-dealer meets only the transaction activity threshold for NMS stocks, for example, its systems that directly support trading, clearance and settlement, order routing, market data, market regulation, or market surveillance for NMS stocks are those that raise the concerns Regulation SCI is meant to address. If the broker-dealer's activity with respect to other classes of securities is nominal, it is unlikely to pose risk to the maintenance of fair and orderly markets if the systems with respect to those types of securities were unavailable (assuming the systems for the distinct asset class are separate). If a system of the broker-dealer is used for

[217] *See* Federal Reserve Board, Agency Information Collection Activities: Announcement of Board Approval Under Delegated Authority and Submission to OMB (Oct. 21, 2021) 86 FR 59716 (Oct. 28, 2021).

[218] Transaction reporting systems generally report volume for trades, rather than volume for purchase and sales separately. Consequently, adding up the total purchase and sale activity for all broker-dealers will not equal the total volume reported through these systems. For example, a trade for 100 shares of an NMS stock between two broker-dealers on a national securities exchange would be reported by the effective transaction reporting plan as 100 shares, even though one broker-dealer bought 100 shares and another sold 100 shares. Similarly, because broker-dealers often trade with customers, doubling the transaction volume reported through these systems does not provide an accurate measure of total broker-dealer purchase and sale activity. After the implementation of the Market Data Infrastructure rules (*see* Market Data Infrastructure Adopting Release, *supra* note 24) national securities exchanges on which NMS stocks are traded and FINRA, each of which is required by Rule 601 of Regulation NMS to file a transaction reporting plan in accordance with Rule 608 of Regulation NMS, will be further required, pursuant to Rule 603(b) of Regulation NMS, to make available to all competing consolidators and self-aggregators its information with respect to quotations for and transactions in NMS stocks, including all data necessary to generate consolidated market data. Following implementation of the Market Data Infrastructure rules, a broker-dealer may determine average daily dollar volume from information provided by its chosen competing consolidator, or independently calculate that figure itself, as a ''self-aggregator.''

[219] *See supra* text accompanying notes 189–190.

[220] *See supra* notes 37–38 and 36 and accompanying text (discussing the scope of the current definition of ''SCI systems'').

more than one type of securities (*i.e.,* an asset class that triggered the threshold and an asset class that did not or is not subject to SCI thresholds), such system would still meet the definition of ''SCI system.'' [221] Current SCI entities are and will continue to be, and proposed SCI entities other than SCI broker-dealers that satisfy a transaction activity threshold would be, required to assess whether the technology systems of, or operated by or on their behalf, with respect to any type of security (including crypto asset securities, discussed further below) are SCI systems covered by Regulation SCI because they directly support: (i) trading; (ii) clearance and settlement; (iii) order routing; (iv) market data; (v) market regulation; or (vi) market surveillance.

v. Crypto Asset Securities

Public information about the size and characteristics of the crypto asset securities market is limited.[222] However, the Commission, currently understands that only a small portion of crypto asset security trading activity is occurring within Commission registered entities, and particularly, registered broker-dealers. This may be due in part to the fact that there are currently no special purpose broker-dealers authorized to maintain custody of crypto asset securities.[223] Without the ability to custody a customer's crypto-asset securities, a broker-dealer is limited in the amount of agency business in crypto-asset securities that it could do. Similarly, today, only a limited amount of crypto asset security volume occurs on ATSs operating pursuant to the Regulation ATS exemption.[224] This may be due in part to the significant trading activity in crypto asset securities that may be in non-compliance with the federal securities laws.[225] Nonetheless, if an SCI entity (current or proposed) trades crypto asset securities, the systems used for trading crypto asset securities may currently and in the future be subject to the requirements of Regulation SCI.[226]

SCI Broker-Dealer Activity in Crypto Asset Securities

As discussed above, the Commission is proposing to include as SCI entities large broker-dealers: those that satisfy a total assets threshold or a transaction activity threshold. The total assets threshold applies to broker-dealers irrespective of asset classes in which they conduct significant transaction activity. In contrast, the proposed transaction activity threshold specifies four enumerated asset classes: NMS stocks, exchange-listed options, U.S.

[221] For example, if a broker-dealer operator of an SCI ATS uses an SCI system to trade both a type of security that triggered the SCI threshold and a type of security that did not trigger the threshold, that system will be an SCI system for both types of securities. A broker-dealer operator of such SCI ATS could wish to use the SCI system only for trading the type of security that triggered the SCI threshold and create a separate system only to trade the type of security that did not trigger the SCI threshold.

[222] *See, e.g.,* Fin. Stability Oversight Council, *Report on Digital Asset Financial Stability Risks and Regulation* 119 (2022) (''FSOC Report''), *available at https://home.treasury.gov/system/files/261/FSOC-Digital-Assets-Report-2022.pdf* (''The crypto-asset ecosystem is characterized by opacity that creates challenges for the assessment of financial stability risks.''); U.S. Dep't of the Treasury, *Crypto-Assets: Implications for Consumers, Investors, and Businesses* 12 (Sept. 2022) (''Crypto-Assets Treasury Report''), *available at https://home.treasury.gov/system/files/136/CryptoAsset_EO5.pdf* (finding that data pertaining to ''off-chain activity'' is limited and subject to voluntary disclosure by trading platforms and protocols, with protocols either not complying with or not subject to obligations ''to report accurate trade information periodically to regulators or to ensure the quality, consistency, and reliability of their public trade data''); Fin. Stability Bd., *Assessment of Risks to Financial Stability from Crypto-assets* 18–19 (Feb. 16, 2022) (''FSB Report''), *available at https://www.fsb.org/wp-content/uploads/P160222.pdf* (finding that the difficulty in aggregating and analyzing available data in the crypto asset space ''limits the amount of insight that can be gained with regard to the [crypto asset] market structure and functioning,'' including who the market participants are and where the market's holdings are concentrated, which, among other things, limits regulators' ability to inform policy and supervision); Raphael Auer et al., *Banking in the Shadow of Bitcoin? The Institutional Adoption of Cryptocurrencies* 4, 9 (Bank for Int'l Settlements, Working Paper No. 1013, May 2022), *available at https://www.bis.org/publ/work1013.pdf* (stating that data gaps, which can be caused by limited disclosure requirements, risk undermining the ability for holistic oversight and regulation of cryptocurrencies); Int'l Monetary Fund, *The Crypto Ecosystem and Financial Stability Challenges, in Global Financial Stability Report* 41, 47 (Oct. 2021), *available at https://www.imf.org/-/media/Files/Publications/GFSR/2021/October/English/ch2.ashx* (finding that crypto asset service providers provide limited, fragmented, and, in some cases, unreliable data, as the information is provided voluntarily without standardization and, in some cases, with an incentive to manipulate the data provided).

[223] For background on Rule 15c3–3 as it relates to digital asset securities, *see* Commission, *Joint Staff Statement on Broker-Dealer Custody of Digital Asset Securities* (July 8, 2019), *available at https://www.sec.gov/news/public-statement/joint-staff-statement-broker-dealer-custody-digital-asset-securities*; FINRA, SEC Staff No-Action Letter, *ATS Role in the Settlement of Digital Asset Security Trades* (Sept. 25, 2020), *available at https://www.sec.gov/divisions/marketreg/mr-noaction/2020/finra-ats-role-in-settlement-of-digital-asset-security-trades-09252020.pdf.* To date, five offerings of crypto asset securities have been registered or qualified under the Securities Act of 1933, and five classes of crypto asset securities have been registered under the Exchange Act. The Commission issued a statement describing its position that, for a period of five years, special purpose broker-dealers operating under the circumstances set forth in the statement will not be subject to a Commission enforcement action on the basis that the broker-dealer deems itself to have obtained and maintained physical possession or control of customer fully paid and excess margin digital asset securities for purposes of 17 CFR 240.15c3–3(b)(1) (''Rule 15c3–3(b)(1)'' under the Exchange Act). *See* Crypto Asset Securities Custody Release, *supra* note 37. To date, no such special purpose broker-dealer registration applications have been granted by FINRA.

[224] ATSs that do not trade NMS stocks file with the Commission a Form ATS notice, which the Commission does not approve. Form ATS requires, among other things, that ATSs provide information about: classes of subscribers and differences in access to the services offered by the ATS to different groups or classes of subscribers; securities the ATS expects to trade; any entity other than the ATS involved in its operations; the manner in which the system operates; how subscribers access the trading system; procedures governing entry of trading interest and execution; and trade reporting, clearance, and settlement of trades on the ATS. In addition, all ATSs must file quarterly reports on Form ATS–R with the Commission. Form ATS–R requires, among other things, volume information for specified categories of securities, a list of all securities traded in the ATS during the quarter, and a list of all subscribers that were participants. To the extent that an ATS trades crypto asset securities, the ATS must disclose information regarding its crypto asset securities activities as required by Form ATS and Form ATS–R. Form ATS and Form ATS–R are deemed confidential when filed with the Commission. Based on information provided on these forms, a limited number of ATSs have noticed on Form ATS their intention to trade certain crypto asset securities and a subset of those ATSs have reported transactions in crypto asset securities on their Form ATS–R. *See also supra* note 223, referencing, Commission, *Joint Staff Statement on Broker-Dealer Custody of Digital Asset Securities* (July 8, 2019), *available at https://www.sec.gov/news/public-statement/joint-staff-statement-broker-dealer-custody-digital-asset-securities*; FINRA, SEC Staff No-Action Letter, *ATS Role in the Settlement of Digital Asset Security Trades* (Sept. 25, 2020), *available at https://www.sec.gov/divisions/marketreg/mr-noaction/2020/finra-ats-role-in-settlement-of-digital-asset-security-trades-09252020.pdf.*

[225] *See also* FSOC Report, *supra* note 222, at 5, 87, 94, 97 (emphasizing the importance of the existing financial regulatory structure while stating that certain digital asset platforms may be listing securities while not in compliance with exchange, broker-dealer, or other registration requirements, which may impose additional risk on banks and investors and result in ''serious consumer and investor protection issues''); Crypto-Assets Treasury Report, *supra* note 222, at 26, 29, 39, 40 (stating that issuers and platforms in the digital asset ecosystem may be acting in non-compliance with statutes and regulations governing traditional capital markets, with market participants that actively dispute the application of existing laws and regulations, creating risks to investors from non-compliance with, in particular, extensive disclosure requirements and market conduct standards); FSB Report, *supra* note 222, at 4, 8, 18 (stating that some trading activity in crypto assets may be failing to comply with applicable laws and regulations, while failing to provide basic investor protections due to their operation outside of or in non-compliance with regulatory frameworks, thereby failing to provide the ''market integrity, investor protection or transparency seen in appropriately regulated and supervised financial markets'').

[226] *But see supra* section II.B.1 (discussing how current SCI entities that trade crypto asset securities must assess whether their systems for trading crypto asset securities are SCI systems). As a specific example, if an SCI SRO were to obtain Commission approval to add a crypto asset security trading facility, that facility would be part of an SCI SRO that is subject to Regulation SCI.

Treasury Securities, and Agency Securities.

The proposal would affect an SCI broker-dealer that engages in crypto asset security activity as follows: for purposes of assessing whether it meets a transaction activity threshold, a broker-dealer would need to consider if it trades crypto asset securities that are NMS stocks, exchange-listed options, U.S. Treasury Securities, or Agency securities, and if so, include those transactions in its transaction tally of NMS stocks, exchange-listed options, U.S. Treasury Securities, or Agency securities, to assess if it satisfies one or more of the proposed thresholds. In addition, as proposed, the SCI systems and indirect SCI systems pertaining to crypto asset securities that are NMS stocks, exchange-listed options, U.S. Treasury Securities, or Agency securities would be subject to Regulation SCI, including as it is proposed to be amended, as discussed in section III.C, with respect to the asset class for which the SCI broker-dealer satisfies the transaction activity threshold.

Furthermore, as proposed, an SCI broker-dealer that meets the proposed total assets threshold would need consider its crypto asset security activities and assess whether any systems pertaining to crypto asset securities meet the current definition of SCI systems or indirect SCI systems. Any such systems would be subject to Regulation SCI, including as it is proposed to be amended, as discussed in section III.C.[227]

vi. Request for Comment

9. Should Regulation SCI apply to broker-dealers? If not, why not? If so, should Regulation SCI apply to all broker-dealers, or just a subset? Please explain. At what size or level of a broker-dealer's activity would market integrity or the protection of investors be affected if the broker-dealer were no longer able to operate due to a systems disruption, systems compliance issue, or a systems intrusion? Are broker-dealers subject to more market discipline than current SCI entities? Please explain. Conversely, does a lack of transparency regarding events like SCI events limit this market discipline? Why or why not?

10. Would it be more appropriate to define an SCI broker-dealer using an approach that identifies a broker-dealer by category, rather than by size? For example, what are commenters' views on the impact to overall market integrity or the protection of investors if an OTC market maker was no longer able to operate due to a systems disruption, systems compliance issue, or a systems intrusion? Or an exchange market maker? Or a clearing broker-dealer? What are commenters' views on the importance of different categories of broker-dealers to the stability of the overall U.S. securities market infrastructure, in the context of requiring them to comply with Regulation SCI? What risks do the systems of broker-dealers pose to the U.S. securities markets?

11. If the Commission were to identify an SCI broker-dealer by category, rather than by size, which categories should be covered and how should they be defined? For example, if commenters believe that Regulation SCI should apply to significant ''OTC market makers,'' how should they be defined? Is it sufficiently clear which entities are ''OTC market makers,'' as that term is defined under the Exchange Act? If not, why not? If so, should a threshold be used to identify those that are the most significant? What should that threshold be and how should it be calculated?

12. Is the current broker-dealer regulatory regime, including the Market Access Rule and other Commission and FINRA rules, sufficient to reasonably ensure the operational capability of the technological systems of the proposed SCI broker-dealers?

13. As discussed above, an SCI broker-dealer would be a broker-dealer registered with the Commission pursuant to section 15(b) of the Exchange Act, which: (1) in at least two of the four preceding calendar quarters, ending March 31, June 30, September 30, and December 31, reported to the Commission on Form X–17A–5 total assets in an amount that equals five percent (5%) or more of the quarterly total assets level of all security brokers and dealers; or (2) during at least four of the preceding six calendar months: (i) with respect to transactions in NMS stocks, transacted average daily dollar volume in an amount that equals ten percent (10%) or more of the average daily dollar volume reported by or pursuant to applicable effective transaction reporting plans, provided, however, that for purposes of calculating its activity in transactions effected otherwise than on a national securities exchange or on an ATS, the broker-dealer shall exclude transactions for which it was not the executing party; (ii) with respect to transactions in exchange-listed options contracts, transacted average daily dollar volume reported by an applicable effective national market system plan; (iii) with respect to transactions in U.S. Treasury Securities, transacted average daily dollar volume in an amount that equals ten percent (10%) or more of the total average daily dollar volume made available by the self-regulatory organization to which such transactions are reported; or (iv) with respect to transactions in Agency Securities, transacted average daily dollar volume in an amount that equals ten percent (10%) or more of the total average daily dollar volume made available by the self-regulatory organization to which such transactions are reported. The Commission solicits comment with respect to all aspects of the proposed definition, including those aspects identified in the succeeding questions.

14. Is the proposed total assets threshold an appropriate way to identify broker-dealers that would pose a substantial risk to the maintenance of fair and orderly markets in the event of a systems issue?

15. Should the proposed total assets threshold be scaled using the proposed sources as the denominator? Why or why not? Is use of data made available by the Federal Reserve Board appropriate as the denominator for the measure of all security broker-dealer total assets? If not, what metric, if any, would be appropriate for the Commission to use as the denominator? Should the denominator be different in the event that such data is no longer made available by the Federal Reserve Board? Recognizing that the proposed numeric thresholds ultimately represent a matter of judgment by the Commission as it proposes to apply Regulation SCI to the largest broker-dealers, the Commission solicits comment on the proposed thresholds levels. Is the proposed five percent numeric threshold appropriate? Why or why not? Is the proposed two of the preceding four quarter methodology, with lookback to the previous quarter for the denominator appropriate? Why or why not?

16. Are the proposed transaction activity thresholds an appropriate way to identify broker-dealers that would pose a substantial risk to the maintenance of fair and orderly markets in the event of a systems issue?

[227] Likewise, an ATS currently is an SCI ATS if it satisfies a trading volume threshold for NMS stocks or equity securities that are not NMS stocks. For purposes of assessing whether it meets an SCI ATS trading volume threshold, an ATS needs to consider if it trades crypto asset securities that are equity securities; and if it does trade such securities, those transactions need to be included in its transaction tally as (i) NMS stocks or (ii) equity securities that are not NMS stocks, as they case may be, in order to calculate the volume threshold. Additionally, the definition of SCI systems and indirect SCI systems do not contain an asset class limitation with respect to SCI SROs (or any other current SCI entity). *See supra* note 36 and accompanying text.

17. With respect to the proposed transaction activity thresholds, are the asset classes identified appropriate? Are there asset classes that are included that should be excluded, or asset classes that are excluded that should be included? Which ones and why? For example, should U.S. Treasury Securities and Agency Securities be included? Why or why not? Should OTC equity securities be included? Or security-based swaps? Is the size of the market in each asset class relevant? Why or why not?

18. With respect to the proposed transaction activity thresholds, recognizing that the proposed numeric thresholds ultimately represent a matter of judgment by the Commission as it proposes to apply Regulation SCI to the largest broker-dealers, the Commission solicits comment on the proposed threshold levels. Are the 10 percent transaction activity threshold levels proposed appropriate? Would higher or lower thresholds be appropriate? Should thresholds vary based on asset class? Is there a different approach that would be more appropriate?

19. For purposes of the numerator in each transaction activity threshold, is use of average daily dollar volume of all purchase and sale transactions, as proposed appropriate? If not, why not? Is there an alternative measure of market activity that could be consistently determined by broker-dealers, as well as the Commission, and that would identify large broker-dealer activity that, if disrupted, could disrupt market functioning more broadly? Would share volume be more appropriate for any of the proposed asset classes?

20. Is it clear what average daily dollar volume, as made available by or pursuant to applicable effective transaction reporting plans, would be following implementation of the Market Data Infrastructure rules? Why or why not?

21. Should the transaction activity thresholds denominator have a minimum, so that if the market for a particular product shrinks significantly, entities that have a significant portion of that small market would not be scoped into the test? For example, should an options trading activity threshold specify that the threshold is exceeded if average daily dollar volume equals the greater of ten percent (10%) or more of the average daily dollar volume reported by or pursuant to an applicable effective transaction reporting plan, applicable national market system plan, applicable SRO, or $x billion? Why or why not? What would be an appropriate minimum dollar threshold and why? Please be specific.

22. Is the four out of the preceding six-month measurement period an appropriate timeframe for the transaction activity thresholds? Why or why not? Is there a different timeframe or approach that would be more appropriate? Please explain.

23. Do commenters believe that six months after the end of the quarter in which the broker-dealer satisfies the total assets threshold and six months after the end of the month in which the broker-dealer satisfies the transaction activity threshold constitute an appropriate amount of time to allow them to come into compliance with the requirements of Regulation SCI? Why or why not? Is there a different time period that would be more appropriate? Please explain.

24. What are the differences between the current practices of broker-dealers and the practices that would be necessary if the proposed changes to Regulation SCI are adopted? Please describe and be specific.

25. Should all of the current or newly proposed requirements set forth in Regulation SCI apply to SCI broker-dealers? If only a portion, please specify which portion(s) and explain why. If all, explain why.

26. Is it appropriate to limit the application of the definition of ''SCI systems'' for SCI broker-dealers that meet the definition of an SCI broker-dealer only because of a transaction activity threshold only to those systems related to the types of securities for which the entity has triggered the threshold, as the Commission is proposing? Why or why not?

27. Should the definition of SCI systems as it applies to SCI broker-dealers be modified further than as proposed? Is the limitation of the definition of SCI systems as proposed to apply to SCI broker-dealers (and not applicable to broker-dealers that satisfy the total assets threshold) appropriate? Should the Commission instead provide a unique definition of SCI systems and indirect SCI systems for broker-dealers? If so, what should it be and why? For example, in the context of broker-dealers, would systems that ''directly support trading'' be a category of systems that is overbroad, or too narrow? Why or why not? Please explain. Are there any types of systems of broker-dealers to which Regulation SCI would apply that should not be covered? Which ones and why? Are there any types of systems of broker-dealers that would not be covered by the definitions of SCI systems and indirect SCI systems as proposed that should be covered? Which types and why? Please be specific.

28. Is it clear how Regulation SCI would apply to proposed new SCI entities that trade crypto asset securities? Why or why not? Please be specific.

29. Are any of the proposed amendments to Regulation SCI (as discussed in section III.C below) inappropriate for broker-dealers? If so, which ones? As discussed in section III.C.6 below, the Commission proposes to add language to Rule 1002(c) of Regulation SCI regarding dissemination of information about SCI events by an SCI broker-dealer to its ''customers,'' as a broker-dealer does not have ''members and participants.'' Should the Commission require an SCI broker-dealer to notify its customers of an SCI event in the same manner as other SCI entities? Why or why not? Should the term ''customers'' be defined? If so, how? Should Rule 1002(c) be specifically tailored to SCI broker-dealers in a way that differs from the current rule? If so, how? Please be specific. Is the proposed requirement that, pursuant to Rule 1002(b)(4)(ii)(B), notices to the Commission include a copy of the information disseminated to customers appropriate? Why or why not?

30. Do commenters believe that different or unique requirements should apply to an SCI broker-dealer or systems of broker-dealers? What should they be, and why?

31. What effect, if any, would there be of having the largest broker-dealers subject to Regulation SCI, while others are not? Should the Commission include additional broker-dealers as SCI entities, based on size or function? Why or why not? For example, should the largest carrying broker-dealers, based on a size threshold, be subject to Regulation SCI? If so, should the size threshold be based on total assets or number of customer accounts, or some other metric? If application of all of Regulation SCI is not appropriate for these entities, should they be required to adopt and implement reasonably designed policies and procedures to address their ability to continue to process customer and account transactions in a timely manner during reasonably anticipated surges in demand?

32. Should the proposed thresholds take into account whether a broker-dealer is affiliated with another broker-dealer? For example, should the Commission aggregate the transaction activity of affiliated broker-dealers for purposes of determining whether the transaction activity threshold test has been satisfied and, if it has, apply Regulation SCI to each broker-dealer?

Why or why not? Should it aggregate total assets of affiliated broker-dealers? Why or why not?

33. Is the proposed six-month period during which a broker-dealer that meets the threshold to become an SCI broker-dealer does not have to comply with Regulation SCI appropriate? Should the Commission adopt a different time period? If so, how long should the period be and why?

34. Are there characteristics specific to SCI broker-dealers that would make applying Regulation SCI, either broadly or by specific existing/proposed provision(s), unduly burdensome or inappropriate for SCI broker-dealers? How much time would an SCI broker-dealer reasonably need to come into compliance with Regulation as proposed?

c. Exempt Clearing Agencies (Deletion of ''Subject to ARP'')

The Commission proposes to include all ''exempt clearing agencies'' as SCI entities. This proposed approach would expand the scope of exempt clearing agencies covered by Regulation SCI, which currently covers certain exempt clearing agencies—those that are ''subject to ARP.'' [228] The technology systems that underpin operations of both registered clearing agencies and exempt clearing agencies are critical systems that drive the global financial markets. Further, the activities of exempt clearing agencies subject to ARP and those not subject to ARP are similar. For example, for covered clearing agencies in particular,[229] such systems include those that set and calculate margin obligations and other charges, perform netting and calculate payment obligations, facilitate the movement of funds and securities, or effectuate end-of-day settlement. Increasingly, the technology behind these systems are subject to both rapid innovation and interconnectedness.[230] For the exempt clearing agencies not subject to ARP, they also provide CSD functions for transactions in U.S. securities between U.S. and non-U.S. persons, using similar technologies.[231] More generally, all exempt clearing agencies offer services that centralize a variety of technology functions, increasing access to services that help improve the efficiency of the clearance and settlement process by, for example, standardizing and automating functions necessary to complete clearance and settlement.[232] Over time, the increasing availability of, and access to, such technologies has also increased the dependence that market participants have on such services, raising the potential that such services could become single points of failure for U.S. market participants.[233] Further, as the services that exempt clearing agencies provide have evolved over time, they have become increasingly reliant on the provision of new technologies to market participants, and so the Commission has increasingly focused its oversight of exempt clearing agencies on the ways that such services might introduce operational risk to U.S. market participants.[234] Therefore, the Commission proposes to expand the scope of SCI entities to cover all exempt clearing agencies. As a result, there would no longer be a difference in how exempt clearing agencies are addressed by Regulation SCI.

i. Current Regulatory Framework for Exempt Clearing Agencies

The registration and supervisory framework for clearing agencies under the Exchange Act provides the Commission with broad authority to provide exemptive relief from certain of the Commission's regulatory requirements under the Exchange Act. Specifically, section 17A(b)(1) of the Exchange Act provides the Commission with authority to exempt a clearing agency or any class of clearing agencies from any provision of section 17A or the

[228] *See* Rule 1000; SCI Adopting Release, *supra* note 1, at 72271 (an ''exempt clearing agency subject to ARP'' is an entity that has received from the Commission an exemption from registration as a clearing agency under section 17A of the Exchange Act, and whose exemption contains conditions that relate to the Commission's Automation Review Policies, or any Commission regulation that supersedes or replaces such policies (such as Regulation SCI)).

[229] 17 CFR 240.17Ad–22 (''Rule 17Ad–22'' under the Exchange Act) provides for two categories of registered clearing agencies and contains a set of rules that apply to each category. The first category is covered clearing agencies, which are subject to 17 CFR 240.17Ad–22(e) (Rule 17Ad–22(e)), which includes requirements intended to address the activity and risks that their size, operation, and importance pose to the U.S. securities markets, the risks inherent in the products they clear, and the goals of both the Exchange Act and the Dodd-Frank Act. *See* Securities Exchange Act Release No. 78961 (Sept. 28, 2016), 81 FR 70786, 70793 (Oct. 13, 2016) (''CCA Standards Adopting Release''). Covered clearing agencies are registered clearing agencies that provide central counterparty (''CCP'') or central securities depository (''CSD'') services. *See* 17 CFR 240.17Ad–22(a)(5). A CCP is a type of registered clearing agency that acts as the buyer to every seller and the seller to every buyer, providing a trade guaranty with respect to transactions submitted for clearing by the CCP's participants. *See* 17 CFR 240.17Ad–22(a)(2); Securities Exchange Act Release No. 88616 (Apr. 9, 2020), 85 FR 28853, 28855 (May 14, 2020) (''CCA Definition Adopting Release''). A CCP may perform a variety of risk management functions to manage the market, credit, and liquidity risks associated with transactions submitted for clearing. If a CCP is unable to perform its risk management functions effectively, however, it can transmit risk throughout the financial system. A CSD is a type of registered clearing agency that acts as a depository for handling securities, whereby all securities of a particular class or series of any issuer deposited within the system are treated as fungible. Through use of a CSD, securities may be transferred, loaned, or pledged by bookkeeping entry without the physical delivery of certificates. A CSD also may permit or facilitate the settlement of securities transactions more generally. *See* 15 U.S.C. 78c(a)(23)(A); 17 CFR 240.17Ad–22(a)(3); CCA Definition Adopting Release, at 28856. If a CSD is unable to perform these functions, market participants may be unable to settle their transactions, transmitting risk through the financial system. Currently, all clearing agencies registered with the Commission that are actively providing clearance and settlement services are covered clearing agencies. They are The Depository Trust Company (''DTC''), FICC, NSCC, ICE Clear Credit (''ICC''), ICE Clear Europe (''ICEEU''), The Options Clearing Corporation (''OCC''), and LCH SA.

[230] The second category includes registered clearing agencies other than covered clearing agencies; such clearing agencies must comply with 17 CFR 240.17Ad–22(d) (''Rule 17Ad–22(d)''). *See* 17 CFR 240.17Ad–22(d). Rule 17Ad–22(d) establishes a regulatory regime to govern registered clearing agencies that do not provide CCP or CSD services. *See* CCA Standards Adopting Release, at 70793. Although subject to Rule 17Ad–22(d), the Boston Stock Exchange Clearing Corporation (''BSECC'') and Stock Clearing Corporation of Philadelphia (''SCCP'') are currently registered with the Commission as clearing agencies but conduct no clearance or settlement operations. *See* Securities Exchange Act Release No. 63629 (Jan. 3, 2011), 76 FR 1473, 1474 (Jan. 10, 2011) (''BSECC Notice''); Securities Exchange Act Release No. 63268 (Nov. 8, 2010), 75 FR 69730, 69731 (Nov. 15, 2010) (''SCCP Notice'').

[231] *See, e.g.,* Release No. 79577 (Dec. 16, 2016), 81 FR 93994 (Dec. 22, 2016) (''Euroclear Exemption''); Release No. 38328 (Feb. 24, 1997), 62 FR 9225 (Feb. 28, 1997) (''Clearstream Exemption''). To manage the potential risks associated with these functions, the Commission's exemptions impose volume limits on the amount of transactions in U.S. Government securities for which each entity may perform clearance and settlement.

[232] *See, e.g.,* Euroclear Exemption, *supra* note 231 (adding services for collateral management); Release No. 44188 (Apr. 17, 2001), 66 FR 20494 (Apr. 23, 2001) (granting an exemption to provide a central matching service to Global Joint Venture Matching Services US LLC, now known as DTCC ITP Matching US LLC, to facilitate the settlement of transactions between broker-dealers and their institutional customers) (''ITPM Exemption'').

[233] *See* Securities Exchange Act Release No. 76514 (Nov. 25, 2015), 80 FR 75387, 75401 (Dec. 1, 2015) (granting an exemption to provide matching services to each of Bloomberg STP LLC and SS&C Technologies, Inc. and stating that ''[o]n balance, the Commission believes that the redundancy created by more interfaces and linkages within the settlement infrastructure increases resiliency''); SEC Division of Trading and Markets and Office of Compliance Inspections and Examinations, *Staff Report on the Regulation of Clearing Agencies* (Oct. 1, 2020) (''Staff Report on Clearing Agencies''), *available at https://www.sec.gov/files/regulation-clearing-agencies-100120.pdf* (staff stating that ''consolidation among providers of clearance and settlement services concentrates clearing activity in fewer providers and has increased the potential for providers to become single points of failure.'').

[234] For example, in 2016 the Commission approved modifications to the Euroclear Exemption that included, among other things, a new set of conditions for the reporting of service outages. *See* Euroclear Exemption, *supra* note 231, at 94003 (setting forth eight ''Operational Risk Conditions Applicable to the Clearing Agency Activities'').

rules or regulations thereunder.[235] Such an exemption may be effected by rule or order, upon the Commission's own motion or upon application, either conditionally or unconditionally. The Commission's exercise of authority to grant exemptive relief must be consistent with the public interest, the protection of investors, and the purposes of section 17A, including the prompt and accurate clearance and settlement of securities transactions and the safeguarding of securities and funds.[236] The Commission has granted exemptions from clearing agency registration to three entities that provide matching services. These exempt clearing agencies are DTCC ITP Matching US, LCC (successor in name to Omgeo and Global Joint Venture Matching Services US, LLC), Bloomberg STP LLC (''BSTP''), and SS&C Technologies, Inc. (''SS&C'').[237] In certain instances, non-U.S. clearing agencies also have received exemptions from registration as a clearing agency. These exempt clearing agencies include Euroclear Bank SA/NV (successor in name to Morgan Guaranty Trust Company of NY) [238] and Clearstream Banking, S.A. (successor in name to Cedel Bank, société anonyme, Luxembourg).[239] Each has an exemption to provide clearance and settlement for U.S. Government and agency securities for U.S. participants, subject to limitations on the volume of transactions set forth in their exemptions. The Euroclear Exemption also provides an exemption from registration to provide collateral management services for transactions in U.S. equity securities between U.S. persons and non-U.S. persons.

As previously discussed, each of these exempt clearing agencies makes available to market participants an increasingly wide array of technology services that help centralize and automate the clearance and settlement of securities transactions for market participants. This increasing reliance on new technologies has focused the Commission's attention on the potential for such services to introduce operational risk or introduce single points of failure into the national system for clearance and settlement. Given this important role of exempt clearing agencies in helping to ensure the functioning, resilience, and stability of U.S. securities markets, and their growing technological innovations and interconnectedness, the Commission proposes to expand the scope of ''SCI entity'' to cover all exempt clearing agencies, rather than only those ''subject to ARP'' to help ensure that the risks associated with the greater dispersal, sophistication, and interconnection of such technologies are appropriately mitigated.[240] In this regard, pursuant to the terms and conditions of the clearing agency exemptive orders, the Commission may modify by order the terms, scope, or conditions if the Commission determines that such modification is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Exchange Act.[241]

ii. Request for Comment

35. Is expanding the scope of ''SCI entity'' to cover all exempt clearing agencies, not just those exempt clearing agencies subject to ARP, appropriate? Why or why not? Please be specific and provide examples, if possible, to illustrate your points.

36. Should all or some aspects of Regulation SCI apply to all exempt clearing agencies? Why or why not? If only a portion, please specify which portion(s) and explain why. If all, explain why.

37. Would the Regulation SCI proposed requirements, together with the conditions under which the exempt clearing agency is subject in the Commission exemptive order, be sufficient to address operational risk concerns posed by exempt clearing agencies? Why or why not? Please be specific and respond with examples, if possible.

38. Given the proposed new requirements of Regulation SCI, should exempt clearing agencies be subject to a revised Commission exemptive order? Why or why not?

39. In support of the public interest and the protection of investors, the Commission is proposing to amend the clearing agency exemptive orders to replace all operational risk conditions with a condition that each exempt clearing agency must comply with Regulation SCI requirements. Should the ordering language provide that the exempt clearing agency must comply with all requirements in Regulation SCI? If so, explain why. If not, explain why not.

40. Should proposed Regulation SCI distinguish among different types of exempt clearing agencies such that some requirements of Regulation SCI might be appropriate for some exempt clearing agencies, but not others? Why or why not? If so, what are those distinctions and what are those requirements? Please be specific and provide examples, if possible.

41. To what extent do exempt clearing agencies rely on third-party providers to provide systems that support their clearance and settlement functions? Do such third-party providers introduce operational or other risks that would be subject to the requirements of Regulation SCI? Are there any

[235] The Commission has also provided temporary relief from registration to certain clearing agencies under section 36 of the Exchange Act. On July 1, 2011, the Commission published a conditional, temporary exemption from clearing agency registration for entities that perform certain post-trade processing services for security-based swap transactions. *See, e.g.,* Release No. 64796 (July 1, 2011), 76 FR 39963 (July 7, 2011) (providing an exemption from registration under section 17A(b) of the Exchange Act, and stating that ''[t]he Commission is using its authority under section 36 of the Exchange Act to provide a conditional temporary exemption [from clearing agency registration], until the compliance date for the final rules relating to registration of clearing agencies that clear security-based swaps pursuant to sections 17A(i) and (j) of the Exchange Act, from the registration requirement in section 17A(b)(1) of the Exchange Act to any clearing agency that may be required to register with the Commission solely as a result of providing Collateral Management Services, Trade Matching Services, Tear Up and Compression Services, and/or substantially similar services for security-based swaps''). The order facilitated the Commission's identification of entities that operate in that area and that accordingly may fall within the clearing agency definition. Recently, the Commission indicated that the 2011 Temporary Exemption may no longer be necessary. *See* Securities Exchange Act Release No. 94615 (Apr. 6, 2022), 87 FR 28872, 28934 (May 11, 2022) (stating that the ''Commission preliminarily believes that, if it adopts a framework for the registration of [security-based swap execution facilities (''SBSEFs'')], the 2011 Temporary Exemption would no longer be necessary because entities carrying out the functions of SBSEFs would be able to register with the Commission as such, thereby falling within the exemption from the definition of 'clearing agency' in existing [17 CFR 240.17Ad–24 (Rule 17Ad–24)]'').

[236] *See* 15 U.S.C. 78q–1(b)(1).

[237] *See* exemption, *supra* note 233 (granting an exemption to provide matching services to each of BSTP and SS&C).

[238] *See* Euroclear Exemption, *supra* note 231.

[239] *See* Clearstream Exemption, *supra* note 231.

[240] *See supra* note 228. Pursuant to the Commission's statement on CCPs in the European Union (''EU'') authorized under the European Markets Infrastructure Regulation (''EMIR''), an EU CCP may request an exemption from the Commission where it has determined that the application of SEC requirements would impose unnecessary, duplicative, or inconsistent requirements in light of EMIR requirements to which it is subject. *See Statement on Central Counterparties Authorized under the European Markets Infrastructure Regulation Seeking to Register as a Clearing Agency or to Request Exemptions from Certain Requirements Under the Securities Exchange Act of 1934,* Securities Exchange Act Release No. 90492 (Nov. 23, 2020), 85 FR 76635, 76639 (Nov. 30, 2020), *available at https://www.govinfo.gov/content/pkg/FR-2020-11-30/pdf/FR-2020-11-30.pdf* (stating that in seeking an exemption, an EU CCP could provide ''a self-assessment. . . [to] explain how the EU CCP's compliance with EMIR corresponds to the requirements in the Exchange Act and applicable SEC rules thereunder, such as Rule 17Ad–22 and Regulation SCI'').

[241] *See* ITPM Exemption, *supra* note 231; Euroclear Exemption, *supra* note 231; Clearstream Exemption, *supra* note 231.

circumstances in which the use of a third-party provider would prevent compliance with Regulation SCI? Why or why not? Please be specific and provide examples, if possible.

42. For EU CCPs authorized under EMIR, the Commission stated that exemptive relief may be considered under section 17A(b)(1) of the Exchange Act in scenarios where SEC requirements are unnecessary, duplicative, or inconsistent relative to EMIR requirements. The Commission recognizes that the EU and other jurisdictions may have requirements similar those being proposed in Regulation SCI. Should the Commission provide foreign CCPs with exemptive relief from newly proposed Regulation SCI? Why or why not? In the context of exemptive requests for newly proposed Regulation SCI, what factors should the Commission take into account in assessing whether SEC requirements may be ''unnecessary, duplicative, or inconsistent'' relative to home jurisdiction requirements for foreign CCPs, including EU CCPs authorized under EMIR? Please be specific and provide examples, if possible.

3. General Request for Comment on Proposed Expansion of SCI Entities

43. The Commission requests comment generally on the proposed expansion of the definition of SCI entity. Are there are other entities that should be included as SCI entities? If so, which entities and why? Further, are there any entities, which if included as SCI entities, would have critical SCI systems? Please explain.

*B. Request for Comment Regarding Significant-Volume Fixed Income ATSs and Broker-Dealers Using Electronic or Automated Systems for Trading of Corporate Debt Securities or Municipal Securities*

1. Discussion

As stated above, the Commission did not include Fixed Income ATSs as SCI entities when it adopted Regulation SCI based on consideration of comments regarding the risk profile of these ATSs at that time.[242] In light of the evolution of technology since then, and specifically, the technology for trading corporate debt and municipal securities, the Commission requests comment on whether significant-volume ATSs and/or broker-dealers with significant transaction activity in corporate debt or municipal securities should be subject to Regulation SCI.[243]

Currently, an ATS is subject to Rule 301(b)(6) of Regulation ATS if its trading volume reaches ''20 percent or more of the average daily volume traded in the United States'' in either corporate debt or municipal securities.[244] Among other things, Rule 301(b)(6) requires such a significant-volume Fixed Income ATS to notify the Commission staff of material systems outages and significant systems changes and to establish adequate contingency and disaster recovery plans.[245] The requirements of Rule 301(b)(6) applicable to significant-volume Fixed Income ATSs, which date to 1998 and have not been updated since that time, are less rigorous than the requirements of Regulation SCI.[246] The Commission explained in the SCI Adopting Release that it adopted Regulation SCI to expand upon, update, and modernize the requirements of Rule 301(b)(6) for those ATSs trading NMS stocks and equity securities that are not NMS stocks that it had identified as playing a significant role in the U.S. securities markets.[247] Regulation SCI did this by, for example, moving from the Commission's 1980s and 90s-era technology precepts to a framework that speaks to a broader set of systems that are subject to an overarching standard: that they be subject to policies and procedures reasonably designed to maintain operational capability and promote the maintenance of fair and orderly markets. Regulation SCI also requires tested business continuity and disaster recovery plans that include geographic diversity to achieve specified recovery time objectives. In addition, Regulation SCI requires notice and dissemination of information regarding a wider range of systems problems (*i.e.,* SCI events) to the Commission and affected market participants, and also requires that corrective action be taken with respect to such problems.[248]

When proposing Regulation SCI in 2013, the Commission sought to include as SCI entities those ATSs that are reliant on automated systems and represent a significant pool of liquidity in certain asset classes.[249] Regarding Fixed Income ATSs, the Commission proposed to include those exceeding five percent or more of either average daily dollar volume or average daily transaction volume traded in the United States, but it did not adopt that proposal.[250] Instead, for ATSs trading corporate debt or municipal securities

[242] *See supra* text accompanying note 79.

[243] For purposes of this release, the term Fixed Income ATSs refers only to ATSs trading corporate debt and municipal securities and excludes Government Securities ATSs, which are the subject of a separate proposal. *See supra* notes 84–85 and accompanying text.

[244] *See* 17 CFR 242.301(b)(6). Until Regulation SCI was adopted, Rule 301(b)(6) applied to an ATS trading NMS stocks, equity securities that are not NMS stocks, corporate debt securities, or municipal securities exceeding a 20% volume threshold. Since the adoption of Regulation SCI, Rule 301(b)(6) has applied only to ATSs trading corporate debt securities or municipal securities exceeding a 20% volume threshold. Rule 301(b)(6) currently does not specify whether the thresholds refer to share, dollar, or transaction volume. In the Government Securities ATS Reproposal, the Commission has proposed to specify that these thresholds refer to ''average daily dollar volume.'' *See* Government Securities ATS Reproposal, *supra* note 84, at 15572.

[245] More specifically, with regard to systems that support order entry, order routing, order execution, transaction reporting, and trade comparison, Rule 301(b)(6)(ii) of Regulation ATS requires significant-volume ATSs to: establish reasonable current and future capacity estimates; conduct periodic capacity stress tests of critical systems to determine their ability to accurately, timely and efficiently process transactions; develop and implement reasonable procedures to review and keep current system development and testing methodology; review system and data center vulnerability to threats; establish adequate contingency and disaster recovery plans; perform annual independent reviews of systems to ensure compliance with the above listed requirements and perform review by senior management of reports containing the recommendations and conclusions of the independent review; and promptly notify the Commission of material systems outages and significant systems changes. *See* 17 CFR 242.301(b)(6)(ii). As discussed in the SCI Adopting Release, the application of Rule 301(b)(6) to Fixed Income ATSs is in addition to various Exchange Act and FINRA rules applicable to broker-dealers operating ATSs. *See* SCI Adopting Release, *supra* note 1, at 72263. *See also supra* notes 146–166 and accompanying text (providing an updated discussion of various Exchange Act, FINRA, and certain other regulations applicable to broker-dealers, including those operating ATSs).

[246] *See* Securities Exchange Act Release No. 40760 (Dec. 8, 1998), 63 FR 70844, (Dec. 22, 1998) (''Regulation ATS Adopting Release'').

[247] *See* SCI Adopting Release, *supra* note 1, at 72264.

[248] As discussed further below, the Commission is now proposing updates to Regulation SCI that are designed to take account of new and emerging technology challenges. If adopted, these changes to Regulation SCI will render Rule 301(b)(6) even more outdated by comparison. Below the Commission solicits comment on whether, in lieu of applying Regulation SCI to these entities, Rule 301(b)(6) should be updated instead.

[249] *See* SCI Proposing Release, *supra* note 14, at 18094–96.

[250] *See* SCI Proposing Release, *supra* note 14, at 18093, 18095. At adoption, the Commission included only ATSs that trade NMS stocks and equity securities that are not NMS stocks exceeding a specified volume threshold. Rule 1000 of Regulation SCI defines SCI ATS to mean an ATS, which, during at least four of the preceding six calendar months, had: (1) With respect to NMS stocks: (i) 5% or more in any single NMS stock, and 0.25% or more in all NMS stocks, of the average daily dollar volume reported by an effective transaction reporting plan, or (ii) 1% or more, in all NMS stocks, of the average daily dollar volume reported by an effective transaction reporting plan; or (2) with respect to equity securities that are not NMS stocks and for which transactions are reported to an SRO, 5% or more of the average daily dollar volume as calculated by the SRO to which such transactions are reported. *See* 17 CFR 242.1000. Rule 1000 also states that an ATS that meets one of these thresholds is not required to comply with Regulation SCI until six months after satisfying the threshold for the first time. *See id.*

exceeding a 20 percent ''average daily volume'' threshold, it left in place the older, more limited technology regulations in Rule 301(b)(6) of Regulation ATS.[251] In support of that determination, the Commission distinguished the equity markets from the corporate debt and municipal securities markets, stating that the latter markets generally relied much less on automation and electronic trading than markets that trade NMS stocks or equity securities that are not NMS stocks, and also tended to be less liquid than the equity markets, with slower execution times and less complex routing strategies.[252]

Due to changes in the market and updates to technology, the Commission again requests comment on applying Regulation SCI to significant-volume Fixed Income ATSs, and further requests comment regarding broker-dealers trading significant volume in corporate debt or municipal securities.[253] In particular, the Commission is soliciting comment on whether the distinctions drawn by the Commission in its original adoption of Regulation SCI, between equities markets on the one hand, and the corporate debt and municipal securities markets on the other, based on differences in their reliance on automation and electronic trading strategies have diminished such that Fixed Income ATSs or broker-dealers with significant activity in corporate debt and municipal securities should be subject to increased technology oversight pursuant to Regulation SCI.

As noted above, the Commission proposed and then recently re-proposed to extend Regulation SCI to ATSs that trade U.S. Treasury Securities or Agency Securities (*i.e.,* Government Securities ATSs) exceeding a five percent dollar volume threshold in at least four out of the preceding six months, citing the increased reliance on technology in the government securities markets in recent years and the resulting operational similarities and technological vulnerabilities and risks of such ATSs to existing SCI entities.[254] In the Government Securities ATS Reproposal, the Commission discussed ways in which the government securities markets have become increasingly dependent on electronic trading in recent years.[255] The Commission solicits comment on whether trading in corporate debt securities or municipal securities by ATSs and/or broker-dealers has evolved similarly.

The growth in electronic trading in the corporate debt and municipal securities markets in recent years appears to be substantial,[256] and accelerating.[257] Although traditional methods of bilateral corporate bond trading conducted through either dealer-to-dealer or dealer-to-customer negotiations (often using telephone calls) remain important (with an estimated 71.4 percent of trading in corporate bonds facilitated via bilateral voice trading during the first half of 2021),[258] more recent data suggest that dependencies on electronic protocols have increased in the last year alone.[259]

In the municipal securities markets, a majority (56.4%) of all inter-dealer trades and 26% of inter-dealer par value traded were executed on ATSs during the period from August 2016 through April 2021.'' [260] Moreover, as recently reported by the MSRB, the number of transactions with a dealer on an ATS

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[251] *See* SCI Adopting Release, *supra* note 1, at 72270.

[252] *See id.* The Commission also acknowledged comments stating that lowering the 20% threshold in Rule 301(b)(6) could have the unintended effect of discouraging technology evolution in these markets. *Id.*

[253] *See* SCI Adopting Release, *supra* note 1, at 72409 (stating, ''[A]s the Commission monitors the evolution of automation in this market, the Commission may reconsider the benefits and costs of extending the requirements of Regulation SCI to fixed-income ATSs in the future.'').

[254] *See* Government Securities ATS Proposing Release, *supra* note 84, at 87152–54. *See also* Government Securities ATS Reproposal, *supra* note 84, at 15527–29. Specifically, in the Government Securities ATS Reproposal, the Commission discussed how advances in technology have resulted in the increased use of systems that use protocols and non-firm trading interest to bring together buyers and sellers of securities and how these systems functioned as market places similar to market places provided by registered exchanges and ATSs. *See* Government Securities ATS Reproposal, *supra* note 84, at 15497–98.

[255] *See* Government Securities ATS Reproposal, *supra* note 84, at 15526.

[256] *See* Government Securities ATS Reproposal, *supra* note 84, at 15528 at n. 389, 15606, and 15609. *See also SIFMA Insights: Electronic Trading Market Structure Primer, supra* note 3 (outlining and comparing electronification trends in different markets); SIFMA, *SIFMA Insights: US Fixed Income Market Structure Primer* (July 2018), *available at https://www.sifma.org/wp-content/uploads/2018/07/SIFMA-Insights-FIMS-Primer_FINAL.pdf* (discussing several different types of fixed-income markets, noting that the historically quote-driven voice broker market structure has moved to accommodate limit order book protocols in the intradealer markets and request-for-quote (''RFQ'') protocols in the dealer-to-client markets; and assessing that ''Current growth [in the dealer-to-client markets] is enabling the total growth in overall electronification percentages: UST 70%, Agency 50%, Repos 50%, IG Corporates 40% and HY Corporates 25%'').

[257] *See* Annabel Smith, *Pandemic sees electronic fixed income trading skyrocket in 2021,* the Trade (Mar. 3, 2021), *available at https://www.thetradenews.com/pandemic-sees-electronic-fixed-income-trading-skyrocket-in-2021/*; Municipal Securities Rulemaking Board, *Characteristics of Municipal Securities Trading on Alternative Trading Systems and Broker's Broker Platforms* (Aug. 2021), *available at https://msrb.org/MarketTopics/-/media/27E4F111D18246C6B9DA849082230CD0.ashx* (discussing volume on ATSs and broker's broker platforms from 2016–2021).

[258] *See* Government Securities ATS Reproposal, *supra* note 84, at 15606–07. Market observers also note increased use of electronic trading in the growth of all-to-all trading and portfolio trading. *See* Greenwich Associates, *All-to-All Trading Takes Hold in Corporate Bonds* (Q2 2021), *available at https://content.marketaxess.com/sites/default/files/2021-04/All-to-All-Trading-Takes-Hold-in-Corporate-Bonds.pdf#:~:text=In%20all-%20to-all%20markets%2C%20where%20asset%20managers%20provide,of%20the%20corporate%20bond%20market%E2%80%99s%20growth%20and%20evolution* (stating that all-to-all trading, which allows asset managers to provide liquidity to dealers and each other and for dealers to trade with one another electronically, has increased from 8% of investment grade volume in 2019 to 12% of investment grade volume in 2020); *see also Li Renn Tsai, Understanding Portfolio Trading,* Tradeweb (Sept. 6, 2022), *available at https://www.tradeweb.com/newsroom/media-center/in-the-news/understanding-portfolio-trading/#:~:text=Portfolio%20Trading%20is%20a%20solution%20that%20gives%20asset,savings%2C%20mitigate%20operational%20risk%2C%20and%20reduce%20market%20slippage* (discussing that portfolio trading, a process similar to program trading for equities which allows asset managers to buy/sell a basket of bonds to trade together as a single package, increased from 2% of total corporate bond trades in Jan. 2020 to 5% in Sept. 2021); Kate Marino, *Algorithms have arrived in the bond market,* Axios (Sept. 3, 2021), *available at https://www.axios.com/2021/09/03/bond-market-trading-algorithms* (discussing the increase in portfolio trading in the bond market).

[259] *See Jack Pitcher, Record E-Trading Brings More Liquidity to Corporate Bond Market,* Bloomberg (Oct. 31, 2022), *available at https://www.bloomberg.com/news/articles/2022-10-31/electronic-credit-trading-surges-to-record-boosting-liquidity* (citing a Sept. 2022 Coalition Greenwich report stating that ''Investment-grade electronic trading accounted for 42% of volume in September, up 9 percentage points from the same month last year, and high yield was 34%, up 10 percentage points'' and about one third of trading volume on junk bonds was through online trading in Sept. 2022, up from about a quarter of trading volume in the same period last year); *but see* Maureen O'Hara and Xing Alex Zhou, *The electronic evolution of corporate bond dealers,* Journal of Financial Economics (Jan. 5, 2021), *available at https://www.sciencedirect.com/science/article/pii/S0304405X21000015* (discussing that any eventual domination of electronic bond trading may *ultimately* be limited because of the particular nature of bond trading, which includes bond illiquidity, the inability for larger trades to be broken into smaller trade sizes that can trade electronically, dealer unwillingness to trade more information-sensitive high-yield bonds electronically, and the lack of new dealers in bond market structure).

[260] *See* Simon Z. Wu, Characteristics of Municipal Securities Trading on Alternative Trading Systems and Broker's Broker Platforms, Municipal Securities Rulemaking Board (Aug. 2021), available at *https://www.msrb.org/sites/default/files/MSRB-Trading-on-Alternative-Trading-Systems.pdf. See also* Government Securities ATS Reproposal, *supra* note 84, at 15609 (discussing use of electronic trading protocols in the municipal securities markets, and noting that ''one MSRB report found that technological advancements in this market and the movement away from voice trading and towards electronic trading have helped reduce transaction costs for dealer-customer trades by 51 percent between 2005 and 2018'').

more than tripled from 2015 to 2021; the average daily number of municipal securities trades increased more than 550% from 2015 to 2022 and also increased more than 75% in 2022; and the average daily par amount traded increased more than 400% since 2015 and more than doubled in 2022 compared to 2021.[261]

While technological developments provide many benefits to the U.S. securities markets and investors, they also increase the risk of operational problems that have the potential to cause a widespread impact on the securities markets and market participants. The trend in electronic trading in these markets and recent data on the volume of Fixed Income ATSs suggest that there is likely to be one or more Fixed Income ATSs (or broker-dealers) that both rely on electronic trading technology and represent or generate significant sources of liquidity in these asset classes. In light of these developments, the Commission believes that it is appropriate to request comment on whether ATSs and broker-dealers that trade significant volume in corporate debt securities or municipal securities should also be subject to some or all of the requirements of Regulation SCI, and if so, what an appropriate threshold would be.[262]

2. Request for Comment

The Commission is requesting comment on whether to apply Regulation SCI to Fixed Income ATSs on the basis of volume, or to broker-dealers that trade corporate debt or municipal securities on or above a trading activity threshold. Specifically:

44. Should significant volume ATSs and/or broker-dealers with significant transaction activity in corporate debt or municipal securities be subject, in whole or in part, to Regulation SCI? [263]

45. Do commenters agree that the corporate debt and municipal securities markets have become increasingly electronic in recent years? Why or why not? Please provide data to support your views. If electronic trading in the corporate debt and municipal securities markets has increased, are these markets sufficiently different or unique to warrant an approach to technology oversight that differs from the approach taken in Regulation SCI? Why or why not?

46. What are the risks associated with systems issues at Fixed Income ATSs or broker-dealers that trade corporate debt or municipal securities today? What impact would a systems issue at a Fixed Income ATS or such broker-dealer have on the trading of corporate debt or municipal securities and the maintenance of fair and orderly markets?

47. Do electronic systems used to trade corporate debt or municipal securities markets today have linkages to any trading venues, including to U.S. Treasury markets? Are these linkages developing or likely to develop? If not, are there interconnections with third-party or other types of systems? How do any interconnections impact the risk of an SCI event at a Fixed Income ATS or broker-dealer that trades corporate debt or municipal securities on the market and/or market participants?

48. If commenters believe that Regulation SCI should apply, in whole or in part, to Fixed Income ATSs or broker-dealers that trade corporate debt or municipal securities, should there be a volume threshold? For example, should the definition of SCI ATS include those ATSs which, during at least four of the preceding six calendar months had: (1) with respect to municipal securities, five percent or more of the average daily dollar volume traded in the United States, as provided by the self-regulatory organization to which such transactions are reported; or (2) with respect to corporate debt securities, five percent or more of the average daily dollar volume traded in the United States as provided by the self-regulatory organization to which such transactions are reported? Similarly, should the definition of SCI-broker-dealer include a similar threshold to that proposed for registered broker-dealers trading Treasury or Agency securities (during at least four of the preceding six calendar months reported to the self-regulatory organization(s) to which such transactions are reported, average daily dollar volume in an amount that equals ten percent (10%) or more of the total average daily dollar volume as made available by the self-regulatory organization to which such transactions are reported)?

49. Is basing a threshold on a percentage of average daily dollar volume appropriate? Should there be an alternative threshold based on average daily share volume? Or par value? Or transaction volume?

50. Would commenters have a different view on what an appropriate threshold would be for Fixed Income ATSs if additional entities become Fixed Income ATSs as a result of adoption of the amendments to Rule 3b–16(a) that the Commission has proposed in the Government Securities ATS Reproposal?

51. If the Commission proposes to apply Regulation SCI to Fixed Income ATSs, should it propose a similar approach for broker-dealers that trade corporate debt or municipal securities? Why or why not?

52. Would four out of the preceding six months be an appropriate period to measure the volume thresholds for corporate debt and municipal securities for purposes of Regulation SCI? Why or why not? Would Fixed Income ATSs or broker-dealers that trade corporate debt or municipal securities have available appropriate data with which to determine whether a proposed threshold has been met? If not, what data or information is missing? Does the answer depend on whether the Government Securities ATS Reproposal (proposing to expand the definition of exchange in Rule 3b–16(a)) is adopted as proposed?

53. Should any or all Fixed Income ATSs that meet a volume threshold be subject to Rule 301(b)(6) of Regulation ATS instead of Regulation SCI (*i.e.,* should Rule 301(b)(6) be retained)? Why or why not? Alternatively, should any or all Fixed Income ATSs or broker-dealers that trade corporate debt or municipal securities be subject to only certain provisions of Regulation SCI? Which ones and why? Please explain. Alternatively, should Rule 301(b)(6) of Regulation ATS be updated to be more similar to Regulation SCI in certain respects? If so, how?

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[261] *See* John Bagley and Marcelo Vieira, *Customer Trading with Alternative Trading Systems,* Municipal Securities Rulemaking Board (Aug. 2022), *available at https://www.msrb.org/sites/default/files/2022-08/MSRB-Customer-Trading-with-Alternative-Trading-Systems.pdf.*

[262] An ATS that trades NMS stocks is subject to Regulation SCI if its trading volume reaches: (i) 5% or more in any single NMS stock and 0.25% or more in all NMS stocks of the average daily dollar volume reported by applicable transaction reporting plans; or (ii) 1% or more in all NMS stocks of the average daily dollar volume reported by applicable transaction reporting plans. An ATS that trades equity securities that are not NMS stocks is subject to Regulation SCI if its trading volume is 5% or more of the average daily dollar volume (across all equity securities that are not NMS stocks) as calculated by the SRO to which such transactions are reported. As stated in the SCI Adopting Release, the higher threshold for equity securities that are not NMS stocks versus NMS stocks was selected taking into account the lower degree of automation, electronic trading, and interconnectedness in the market for equity securities that are not NMS stocks and assessment that those ATSs would present lower risk to the market in the event of a systems issue, but not necessarily no risk. *See* SCI Adopting Release, *supra* note 1, at 72269. As stated above, a 5% average daily dollar volume threshold is proposed for Government Securities ATSs (*i.e.,* ATSs that that trade Agency Securities and/or U.S. Treasury Securities), where electronic trading is prevalent.

[263] The Commission notes that ATSs may also trade crypto asset securities. *See* section II.A.3.b.v. (discussing obligations of ATSs trading crypto asset securities).

54. If commenters believe Rule 301(b)(6) should continue to apply to Fixed Income ATSs, is the 20 percent average daily volume threshold an appropriate threshold? Should it be amended to specify what the 20 percent average daily volume refers to (*e.g.,* share? dollar? par? transaction?)? Should the Commission amend Rule 301(b)(6) to subject all Fixed Income ATSs, or certain Fixed Income ATSs, to the requirements of the rule if the Fixed Income ATS reaches a 5 percent, 10 percent, 15 percent or another volume threshold? If so, please explain why such a threshold would be appropriate. Alternatively, should Rule 301(b)(6) be superseded and replaced by Regulation SCI?

55. Are there characteristics specific to the corporate debt and municipal securities markets that would make applying Regulation SCI broadly or any specific provision of Regulation SCI to Fixed Income ATSs or broker-dealers that trade corporate debt or municipal securities unduly burdensome or inappropriate? Please explain. For example, if an ATS that fits the description of a Communication Protocol System (as described in the Government Securities ATS Proposal) were to be become an SCI ATS, would there be certain features or functions of that system that would not meet the definition of SCI systems, but that should be subject to Regulation SCI as SCI systems? Would there be any features or functions of that system that would meet the definition of SCI systems, but that should not be subject to Regulation SCI? Commenters that recommend that the Commission propose that ATSs and/or broker-dealers with significant transaction activity in corporate debt or municipal securities be subject to Regulation SCI are requested to specifically address the expected benefits and costs of their recommendations, above the current baseline of Rule 301(b)(6) of Regulation ATS, and the expected effects of their recommendations on efficiency, competition, and capital formation.

### *C. Strengthening Obligations of SCI Entities*

In adopting Regulation SCI, the Commission recognized that technology, standards, and threats would continue to evolve and that the regulation would need to be flexible so as to develop alongside such changes. Thus, 17 CFR 242.1001(a)(1) (''Rule 1001(a)(1)'' of Regulation SCI) requires that each SCI entity have ''written policies and procedures reasonably designed to ensure that its SCI systems and, for purposes of security standards, indirect SCI systems, have levels of capacity, integrity, resiliency, availability, and security, adequate to maintain the SCI entity's operational capability and promote the maintenance of fair and orderly markets.'' [264] While Rule 1001(a)(2) itemizes certain minimum requirements such policies and procedures must include, they are generally broad areas that must be covered (*e.g.,* requiring capacity planning estimates, stress tests, systems development and testing programs, reviews and testing for threats, business continuity and disaster recovery plans, standards with respect to market data, and monitoring for potential SCI events), Rule 1001(a) does not prescribe in detail how they should be addressed.[265]

Since the adoption and implementation of Regulation SCI, technology and the ways SCI entities employ such technology have continued to evolve, as have the potential vulnerabilities of, and threats posed to, SCI entities. In addition, the Commission and its staff have gained valuable experience and insights with respect to technology issues surrounding SCI entities and their systems. Given the important role SCI entities play in our markets, it is appropriate to strengthen the requirements Regulation SCI imposes on SCI entities to help ensure that their SCI systems and indirect SCI systems continue to remain robust, resilient, and secure.

#### 1. Systems Classification and Lifecycle Management

##### a. Discussion

The terms ''SCI systems,'' ''indirect SCI systems,'' and ''critical SCI systems'' are foundational definitions within Regulation SCI. These terms map out the scope of Regulation SCI's applicability to an SCI entity. If an SCI entity does not classify its systems pursuant to these defined terms, it cannot fully understand how it should apply Regulation SCI's requirements and where its obligations under the regulation start and end. Specifically, ''SCI systems'' is defined to mean ''all computer, network, electronic, technical, automated, or similar systems of, or operated by or on behalf of, an SCI entity that, with respect to securities, directly support trading, clearance and settlement, order routing, market data, market regulation, or market surveillance.'' The definition of ''SCI systems'' does not scope in every system of an SCI entity; rather, it is limited to those functions the Commission believed were of particular significance for the purposes of Regulation SCI, namely systems that, with respect to securities, directly support trading, clearance and settlement, order routing, market data, market regulation, or market surveillance. ''Indirect SCI systems'' come into play with respect to security standards and systems intrusions and include ''any systems of, or operated by or on behalf of, an SCI entity that, if breached, would be reasonably likely to pose a security threat to SCI systems.'' Importantly, both definitions include systems operated by an SCI entity as well as systems operated by third parties on behalf of a given SCI entity.

Except as discussed above,[266] the proposed rule amendments would not change the definition of SCI systems, indirect SCI systems, or critical SCI systems. However, the Commission is proposing to modify certain existing, and add a number of additional, requirements to the policies and procedures required of SCI entities with respect to their SCI systems (and indirect SCI systems or critical SCI systems, as the case may be), under Rule 1001(a), as discussed in further detail below.

One of the first steps many SCI entities take to comply with Regulation SCI is developing a classification of their systems in accordance with these definitions; *i.e.,* a documented inventory of the specific systems of the SCI entity that fall within each type of systems (*i.e.,* SCI system, indirect SCI system, and critical SCI system). However, not all SCI entities maintain such a list. A foundational and essential step for an SCI entity to be able to meet its obligations under Regulation SCI is to be able to identify clearly the systems that are subject to obligations under Regulation SCI. Therefore, the Commission is proposing a new provision to ensure that SCI entities develop and maintain a written inventory of their systems and classification. Specifically, new paragraph (a)(2)(viii) in Rule 1001 would require each SCI entity to include in their policies and procedures the maintenance of a written inventory and classification of all of its SCI systems, critical SCI systems, and indirect SCI systems.

In addition, 17 CFR 242.1001(a)(2)(viii) (''proposed Rule 1001(a)(2)(viii)'') would require that the

[264] *See* 17 CFR 242.1001(a)(1).

[265] *Id.*

[266] *See supra* section III.A.2.b.iv (discussing the proposed limitation to the definition of SCI systems for certain SCI broker-dealers).

SCI entity's policies and procedures include a program with respect to the lifecycle management of such systems, including the acquisition, integration, support, refresh, and disposal of such systems, as applicable. This provision would require SCI entities to consider how a system subject to Regulation SCI moves through its lifecycle, from initial acquisition to eventual disposal. The purpose of this provision is to help ensure that an SCI entity is able to identify risks an SCI system may face during its various lifecycle phases. Importantly, SCI entities would need to address the refresh of such systems in their lifecycle management program. Generally, systems that are properly refreshed and updated include up-to-date software and security patches. In addition, the lifecycle management program required in their policies and procedures must address disposal of such systems. Disposal generally should include sanitization of end-of-life systems to help ensure that systems that are no longer intended as SCI systems or indirect SCI systems do not contain sensitive information (*e.g.,* relating to the operations or security of the SCI entity or its systems architecture) that might be unintentionally revealed if such end-of-life systems fall into the wrong hands.[267] Thus, this generally would require SCI entities to pinpoint precisely when a given system ''becomes'' an SCI system (or an indirect SCI system), as well as the point at which it is officially ''no longer'' an SCI system (or an indirect SCI system).

b. Request for Comment

56. Do commenters agree with the proposed requirement in proposed Rule 1001(a)(2)(viii) to require SCI entities to include in their policies and procedures the maintenance of a written inventory and classification of all of its SCI systems, critical SCI systems, and indirect SCI systems? Why or why not?

57. Do commenters believe that Regulation SCI should require that SCI entities have a program with respect to the lifecycle management of such systems, including the acquisition, integration, support, refresh, and disposal of such systems, as applicable? Why or why not? Do SCI entities currently maintain such lifecycle management programs? Are there other aspects of lifecycle management that commenters believe should be included in the proposed requirement? If so, please describe.

2. Third-Party Provider Management

a. Third-Party Provider Management Issues

When it adopted Regulation SCI, the Commission recognized that an SCI entity may choose to use third parties to assist it in running its SCI systems and indirect SCI systems. The Commission took into account such scenarios by including the phrase ''or operated by *or on behalf of*'' [268] in key definitions such as ''SCI systems,'' ''critical SCI systems,'' and ''indirect SCI systems.'' The inclusion of the phrase ''or on behalf of'' was intended to make clear that outsourced systems are not excluded and that any such systems were within the scope of Regulation SCI, even when operated not by the SCI entity itself but rather by a third party. In the SCI Adopting Release, the Commission made clear that it was the responsibility of the SCI entity to manage its relationships with such third parties through due diligence, contract terms, and monitoring of third-party performance.[269] In addition, as the Commission stated when adopting Regulation SCI, ''[i]f an SCI entity is uncertain of its ability to manage a third-party relationship . . . to satisfy the requirements of Regulation SCI, then it would need to reassess its decision to outsource the applicable system to such third party. (footnotes omitted)'' [270]

An SCI entity may decide to outsource certain functionality to, or utilize the support or services of, a third-party provider (which would include both affiliated providers as well as vendors unaffiliated with the SCI entity) for a variety of reasons. In selecting a third-party provider to operate an SCI system on its behalf, an SCI entity may be attracted to the potential benefits that it may believe the third-party provider would bring, which could range from cost efficiencies and increased automation to particular expertise the vendor may provide in areas such as security and data latency. Third-party providers may also provide services that an SCI entity may not currently have in-house, such as a particular type of software required to run or monitor a given SCI system, or a data or pricing feed.

The Commission believes that the use of third-party providers by SCI entities can be appropriate and even advantageous and preferable in certain instances, given the benefits they may provide when employed appropriately. However, as the Commission discussed in the SCI Adopting Release, when utilizing a third-party provider, an SCI entity is ''responsible for having in place processes and requirements to ensure that it is able to satisfy the requirements of Regulation SCI for systems operated on behalf the SCI entity by a third party.'' [271] Thus, an SCI entity generally should be aware of the potential costs and risks posed by this choice including, for example: cybersecurity risks (*e.g.,* a compromise in a third-party provider's systems impacting the systems of the SCI entity); operational risks (*e.g.,* a disruption or shutdown of a third-party provider's service, or a bankruptcy or cessation of operation of a third-party provider, negatively impacting or disrupting the operation of an SCI system); reputational risks (*e.g.,* a faulty or incorrect input from a third-party provider causing an SCI entity's output to be incorrect); and legal and regulatory risks (*e.g.,* a third-party provider's lack of responsiveness or unwillingness to provide the SCI entity necessary information or detail results in an SCI entity missing a reporting or compliance deadline, such as a deadline for reporting an SCI event or taking corrective action on an SCI event). With the continued and increasing use of third-party providers by SCI entities and, in some cases, with third-party providers playing increasingly important and even critical roles in ensuring the reliable, resilient, and secure operation of SCI systems and indirect SCI systems, the Commission believes that it is appropriate to strengthen Regulation SCI's requirements with respect to SCI entities' use of third-party providers and the management of such relationships, as described in detail below.[272]

In recent years, many types of businesses have turned to cloud service providers (''CSPs'') to take advantage of their services.[273] Today, CSPs can provide a range of support to a wide variety of businesses, with deployment models ranging from public cloud, private cloud, hybrid cloud, and multi-cloud, and service models including Infrastructure as a Service (''IaaS''), Platform as a Service (''PaaS''), and

[267] For example, such policies generally should not simply require mere disposal of end-of-life SCI systems but should ensure their effective disposal such that sensitive information (including software, configuration info, middleware, etc.) that could compromise the security of an SCI entity's data and network is not inadvertently revealed.

[268] Emphasis added.

[269] *See* SCI Adopting Release, *supra* note 1, at 72276.

[270] *Id.*

[271] *See* SCI Adopting Release, *supra* note 1, at 72276.

[272] *See infra* sections III.C.2.b. through d (discussing the proposed rule changes with respect to third-party management programs, third-party providers for critical SCI systems, and third-party provider participation in BC/DR testing).

[273] *See, e.g.,* Angus Loten, CIOs Accelerate Pre-Pandemic Cloud Push Wall St. J. (Apr. 26, 2021).

Software as a Service (''SaaS'').[274] SCI entities are also engaging with CSPs to assist in operating their SCI systems and some utilize, or have announced their intention to utilize, CSPs for all or nearly all of their applicable systems,[275] others have begun moving towards employing CSPs at a more deliberate pace,[276] and others continue to explore and consider whether or not to use such services. A decision to move their systems from an ''on-premises,'' [277] internally run data center to ''the cloud'' is a significant one, often with potential benefits that may include cost efficiencies, automation, increased security, and resiliency, and entities may also take advantage of such an opportunity to reengineer or otherwise update their systems and applications to run even more efficiently than before.

In deciding whether to utilize a CSP, an SCI entity generally should take into account the various factors it would as with any other third-party providers.[278] However, given the degree to which CSP services may be integral to the operation of SCI systems, SCI entities generally should examine closely any potential relationship and utilization of CSP services. Importantly, regardless of the CSP and service model an SCI entity may be considering, it is the SCI entity's responsibility to ensure that it can and does comply with Regulation SCI. For example, in describing the services they provide, CSP marketing materials typically describe their service models as ''shared responsibilities'' between the CSP and client. With respect to an SCI entity's obligations under Regulation SCI, however, the SCI entity bears responsibility for compliance with the requirements of Regulation SCI, including for SCI systems operated on its behalf by third-party providers. As with other third-party providers that operate SCI systems on behalf of an SCI entity, if an SCI entity is uncertain of its ability to manage a CSP relationship (whether through appropriate due diligence, contract terms, monitoring, or other methods) to satisfy the requirements of Regulation SCI, the SCI entity would need to reassess its decision to outsource the applicable system to such CSP. As with any third-party provider, the SCI entity generally should not rely solely on the reputation of or attestations from a given CSP. In addition, an SCI entity that utilizes a CSP should not view the usage of a CSP from the perspective of being able to turn over its Regulation SCI-related responsibilities to the CSP; instead, an SCI entity generally should ensure that its own personnel have the requisite skills to properly manage and oversee such a relationship, and understand the issues—including technical ones—that may arise from the utilization of a CSP and are relevant to ensure its compliance with Regulation SCI.[279]

Rule 1001(a)(2)(v) of Regulation SCI requires that an SCI entity's policies and procedures include business continuity and disaster recovery plans that include maintaining backup and recovery capabilities sufficiently resilient and geographically diverse and that are reasonably designed to achieve next business day resumption of trading and two-hour resumption of critical SCI systems following a wide-scale disruption.[280] When the Commission adopted this provision it did not specifically discuss its application to CSPs. Whereas ''on-premises'' systems are installed and run at a site under the control of an SCI entity, the systems of an SCI entity that reside ''in the public cloud'' may not be tied to any specific geographic location. However, SCI entities must ensure that their SCI systems, whether ''on-premises'' or ''in the public cloud,'' comply with the requirement in Regulation SCI to have backup and recovery capabilities sufficiently resilient and geographically diverse and that are reasonably designed to achieve next business day resumption of trading and two-hour resumption of critical SCI systems following a wide-scale disruption. These provisions of Regulation SCI exist to help limit the downtime caused by wide-scale disruptions. Thus, for example, in determining whether any SCI-related systems ''in the public cloud'' can meet this requirement, SCI entities generally should understand where its systems will reside (*i.e.,* the locations of the CSP data center site(s) that may be used), and should consider whether those sites provide sufficient geographical diversity and operational resiliency to achieve the resumption requirements of Rule 1001(a)(2)(v).[281]

As discussed in section III.C.2.b.2 below, the Commission's proposal includes a requirement that every SCI entity undertake a risk-based assessment of the criticality of each of its third-party providers, including analyses of third-party provider concentration, of key dependencies if the third-party provider's functionality, support, or service were to become unavailable or materially impaired, and of any potential security, including cybersecurity, risks posed. This third-party provider assessment may be particularly relevant with respect to CSPs utilized by SCI entities, and an SCI entity may want to take into consideration the degree to which it may be ''locked-in'' to any given CSP it is considering engaging. As with any third-party provider, it could consider its exit strategies with respect to any potential CSP it might choose and may consider architectural decisions that would enable a quick re-deployment to another CSP if needed. Even when tools,

[274] Additional information relating to the services provided by CSPs is widely available online from CSPs as well as firms that provide consulting services for potential clients of CSPs. FINRA, *Cloud Computing in the Securities Industry* 3–4 (Aug. 2021), *available at https://www.finra.org/sites/default/files/2021-08/2021-cloud-computing-in-the-securities-industry.pdf* (providing a summary description of these services). For a discussion of considerations and risks relevant to the use of cloud service providers by entities in the financial services sector, *see* the Financial Services Sector's Adoption of Cloud Services, U.S. Dept. of the Treasury (issued February 8, 2023), available at: *https://home.treasury.gov/system/files/136/Treasury-Cloud-Report.pdf*.

[275] *See, e.g.,* FINRA, *Podcast: How the Cloud has Revolutionized FINRA Technology* (July 30, 2018), *available at www.finra.org/media-center/finra-unscripted/how-cloud-has-revolutionized-finra-technology*; Securities Exchange Act Release No. 93433 (Oct. 27, 2021), 86 FR 60503 (Nov. 2, 2021) (SR–OCC–2021–802) (Notice of Filing and Extension of Review Period of Advance Notice Relating to OCC's Adoption of Cloud Infrastructure for New Clearing, Risk Management, and Data Management Applications). *See also,* Huw Jones, *Microsoft invests $2 billion in London Stock Exchange,* Reuters (Dec. 12, 2022).

[276] *See, e.g.,* Nasdaq, *Press Release: Nasdaq and AWS Partner to Transform Capital Markets* (Nov. 30, 2021), *available at www.nasdaq.com/press-release/nasdaq-and-aws-partner-to-transform-capital-markets-2021-12-01*; Nasdaq, *Press Release: Nasdaq Completes Migration of the First U.S. Options Market to AWS* (Dec. 5, 2022), *available at https://www.nasdaq.com/press-release/nasdaq-completes-migration-of-the-first-u.s.-options-market-to-aws-2022-12-05*.

[277] In using the term ''on-premises,'' the Commission means that the data center's hardware (*e.g.,* the servers, switches, and other physical machines) is generally under the control of and operated by the SCI entity, even if the data center is physically located in a facility operated by a third party and for which such third party provides or arranges for certain services including, but not limited to, power, water, and physical security.

[278] *See* SCI Adopting Release, *supra* note 1, at 72275–76. In this section, the Commission discusses many issues that may be relevant for SCI entities to consider in relation to their use of third-party vendors generally, and with respect to cloud service providers specifically. These issues include those that the Commission and its staff have encountered with respect to SCI entities since the adoption and implementation of Regulation SCI; however, this is not meant to be a comprehensive list of all potential issues and considerations, and the Commission welcomes comment on other applicable issues and considerations that commenters believe are relevant for SCI entities with respect to third-party providers.

[279] *See* SCI Adopting Release, *supra* note 1, at 72276.

[280] *See* SCI Adopting Release, *supra* note 1, at 72295. *See also infra* section III.C.2.c, including notes 292–294 and accompanying text (discussing the proposed modifications to Rule 1001(a)(2)(v)).

[281] While CSPs may use slightly different nomenclature, typically, a CSP's region contains multiple availability zones, and an availability zone contains multiple data centers.

such as containerization,[282] exist that are designed to automate and simplify the deployment of systems to CSPs, and which appear at first glance to allow for greater portability among CSPs, SCI entities may want to consider any lock-in effects that utilizing CSP-specific tools might have. In addition, it may be useful for SCI entities to consider the relative benefits and costs of potential alternatives that could reduce dependence on any single CSP. In cases where the use of CSPs is being considered for both primary and backup systems, an SCI entity, taking into account the nature of its systems, may want to consider whether it is appropriate to utilize different CSPs, for such systems, as well as whether an ''on-premises'' backup may be appropriate. Similarly, SCI entities should generally engage their CSPs to ensure that they can meet the business continuity and disaster recovery requirements of Regulation SCI, which may not apply to the vast majority of a CSP's other clients.

More broadly, an SCI entity should ensure that it is able to meet its regulatory obligations under Regulation SCI, including the notice and dissemination requirements of Rule 1002. When there is a systems issue (including, for example, an outage or a cybersecurity event) at a CSP, a wide swath of CSP clients may be affected. SCI entities have regulatory requirements under Regulation SCI that other CSP clients may not have, and an SCI entity must have information regarding such issues within the time requirements of Regulation SCI to comply with its notice and dissemination requirements.[283]

An SCI entity should also be cognizant of its data security and recordkeeping obligations under Regulation SCI,[284] and generally should consider how the CSP and its employees or contractors would secure confidential information, how and where it would retain information (including all records required to be kept under Regulation SCI), how the information would be accessed by the personnel of the SCI entity, or others, such as those conducting SCI reviews and Commission staff, as well as ensure that such information access will be provided in a manner that provides for its compliance with the requirements of Regulation SCI.

While the discussion above is focused on CSPs, they are only one of many types of third-party providers an SCI entity may utilize. The discussion above is not an exhaustive list of issues SCI entities generally should consider with respect to utilizing CSPs; in addition, while the discussion provides some illustrative examples of areas of potential concern in an SCI entity's relationship with a CSP, similar issues may be applicable to the relationships between SCI entities and other types of third parties. In addition, some third-party providers may provide key functionality that may not have been widely utilized by SCI entities when Regulation SCI was adopted,[285] and the Commission anticipates that third-party providers will likely arise to provide other types of functionality, service, or support to SCI entities that are not contemplated yet today. All the same, the Commission believes that any third-party provider that an SCI entity uses with respect to its SCI systems and indirect SCI systems should be managed appropriately by the SCI entity to help ensure that such utilization of the third-party provider is consistent with the SCI entity's obligations under Regulation SCI.

As discussed above, when the Commission adopted Regulation SCI in 2014, it had accounted for the possibility that an SCI entity might utilize third-party providers to operate its SCI systems or indirect SCI systems by incorporating the phrase ''on behalf of'' in certain key definitions of Regulation SCI.[286] In addition, ''outsourcing'' is one of the ''domains'' identified by the Commission and its staff.[287] Based on the experience of Commission staff, all SCI entities that utilize third-party providers have some level of third-party provider oversight in place. However, given the growing role they are playing with respect to SCI systems and indirect SCI systems, and because the myriad of issues that may arise with respect to third-party providers (including, but not limited to oversight, access, speed of information flow, security and unauthorized access, loss of expertise internally, and lock-in) may become even more amplified when taking into account the regulatory obligations of SCI entities, the Commission believes that it is appropriate to delineate more clearly requirements with respect to the oversight and management of third-party providers, and thus is proposing to revise Regulation SCI to include additional requirements relating to third-party providers.[288]

b. Third-Party Provider Management Program

The Commission is proposing new 17 CFR 242.1001(a)(2)(ix) (''proposed Rule 1001(a)(2)(ix)'') regarding third-party provider management. While some SCI entities may already have a formal vendor management program, the Commission is proposing to require that SCI entities have a third-party provider management program that includes certain elements. Specifically, proposed Rule 1001(a)(2)(ix) would require each SCI entity to include in its policies and procedures required under Rule 1001(a)(1) a program to manage and

[282] Containerization allows developers to deploy applications more quickly by bundling an application with its required frameworks, configuration files, and libraries such that it may be run in different computing environments. Container orchestrators allow for automated deployment of identical applications across different environments, and simplify the process for management, scaling, and networking of containers.

[283] *See, e.g.,* Rule 1002 (relating to an SCI entity's obligations with respect to SCI events). *See also* Rule 1001(c) (which include requirements that an SCI entity's policies and procedures include escalation procedures to quickly inform responsible SCI personnel of potential SCI events).

[284] *See* 17 CFR 242.1001(a)(2)(iv) (''Rule 1001(a)(2)(iv)'') (relating to, among other things, vulnerabilities pertaining to internal threats) and Rule 1005 (relating to recordkeeping requirements related to compliance with Regulation SCI). *See also infra* section III.C.3.a (discussing newly proposed 17 CFR 242.1001(a)(2)(x) (''proposed Rule 1001(a)(2)(x)''), relating to unauthorized access to systems and information).

[285] One example of this are the services of shadow infrastructure providers, such as edge cloud computing, content delivery networks, and DNS providers.

[286] *See supra* notes 268–270 and accompanying text (discussing ''on behalf of'').

[287] *See* SCI Adopting Release, *supra* note 1, at 72302. *See also Staff Guidance on Current SCI Industry Standards* 5, 8 (Nov. 19, 2014), *available at https://www.sec.gov/rules/final/2014/staff-guidance-current-sci-industry-standards.pdf.*

[288] The Commission proposed the Clearing Agency Governance rules in Aug. 2022, which contains, among other proposed requirements, proposed new 17 CFR 240.17Ad–25(i) (''Rule 17Ad–25(i)''). *See Clearing Agency Governance and Conflicts of Interest,* Securities Exchange Act Release No. 95431 (Aug. 8, 2022), 87 FR 51812 (Aug. 23, 2022) (proposing policy and procedure requirements for clearing agency board of directors to oversee relationships with service providers for critical services to, among other things, confirm and document that risks related to relationships with service providers for critical services are managed in a manner consistent with its risk management framework, and review senior management's monitoring of relationships with service providers for critical services, and to review and approve plans for entering into third-party relationships where the engagement entails being a service provider for critical services to the registered clearing agency). Registered clearing agencies that would be subject to proposed Rule 17Ad–25(i), if adopted, would also be subject to Regulation SCI, as proposed to be amended. However, the scope of proposed Rule 17Ad–25(i) is meant to address not only service providers providing technology or systems-based services, but also service providers that would include the clearing agency's parent company under contract to staff the registered clearing agency, as well as service providers that are investment advisers under contract to help facilitate the closing out of a defaulting participant's portfolio. *See id.* at 51836. Commenters are encouraged to review the Clearing Agency Governance proposed rules to determine whether they might affect their comments on this proposal.

oversee third-party providers that provide functionality, support or service, directly or indirectly, for its SCI systems and, for purposes of security standards, indirect SCI systems. The Commission is proposing this new provision to help ensure that an SCI entity that elects to utilize a third-party provider will be able to meet its obligations under Regulation SCI.

i. Third-Party Provider Contract Review

First, the program would be required to include initial and periodic review of contracts with such third-party providers for consistency with the SCI entity's obligations under Regulation SCI. The Commission believes that it is critical that each SCI entity carefully analyze and understand the impact any third-party providers it chooses to utilize may have on its ability to satisfy its obligations under Regulation SCI. As discussed above,[289] the Commission recognizes that many SCI entities may seek to and, in practice, do outsource certain of its SCI-related functionality, support, or service to third parties. As key entities in our securities markets, SCI entities have regulatory obligations that are not placed upon non-SCI entities, and third-party providers SCI entities may utilize may not be familiar with the requirements of Regulation SCI. As the Commission stated in adopting Regulation SCI, if an SCI entity determines to utilize a third party for an applicable system, ''it is responsible for having in place processes and requirements to ensure that it is able to satisfy the applicable requirements of Regulation SCI for such system.'' [290] And, if an SCI entity is uncertain of its ability to manage a third-party relationship (including through contract terms, among other methods) to satisfy the requirements of Regulation SCI, ''then it would need to reassess its decision to outsource the applicable system to such third party.'' [291] Thus, it is incumbent on SCI entities to review their relationships with such third-party providers to ensure that the SCI entities are able to satisfy their obligations under Regulation SCI. In addition, consistent with the current requirement that an SCI entity periodically review the effectiveness of its policies and procedures, this provision would require an SCI entity to review contracts with such third-party providers periodically for consistency with the SCI entity's obligations under Regulation SCI.

A foundational part of this review is to ensure that any contracts that the SCI entity has with such third-party providers are consistent with the requirements of Regulation SCI. These documents govern the obligations and expectations as between an SCI entity and a third-party provider it utilizes, and the SCI entity is responsible for assessing if these agreements allow it to comply with the requirements of Regulation SCI. For example, an SCI entity generally should consider whether or not it is appropriate to rely on a third-party provider's standard contract or standard service level agreement (''SLA''), particularly if such contract or SLA has not been drafted with Regulation SCI's requirements in mind. For example, regardless of whether an SCI entity is negotiating with the dominant provider in the field, has made its best efforts in negotiating contract or SLA terms, or has extracted what it believes to be ''the best terms'' it (or any client of the third party) could get, if the SCI entity determines that any term in such agreements are inconsistent with such SCI entity's obligations under Regulation SCI, the SCI entity should reassess whether such outsourcing arrangement is appropriate and will allow it to meet its obligations under Regulation SCI. In addition, in some cases, particularly where the third-party provider would play a significant role in the operation of an SCI entity's SCI systems or indirect SCI systems, or provide functionality, support, or service to such systems without which there would be a meaningful impact, an SCI entity and its third-party provider may find it useful to negotiate an addendum to any standard contract to separate and highlight the contractual understanding of the parties with respect to SCI-related obligations.

While each contract's specific terms and circumstances will likely differ, there are several considerations that SCI entities generally should take into consideration when entering into such a contract. For example, SCI entities generally should consider whether a contract raises doubt on its consistency with the SCI entity's obligations under Regulation SCI (*e.g.,* the contract terms are vague regarding the third-party provider's obligations to the SCI entity to enable the SCI entity to meets its SCI obligations). Generally, contractual terms should not be silent or lack substance on key aspects of Regulation SCI that would need the third-party provider's cooperation (*e.g.,* SCI event notifications and information dissemination, and business continuity and disaster recovery for an SCI entity seeking to move its SCI systems to a cloud service provider). Nor should they undermine the ability of the SCI entity to oversee and manage the third party (*e.g.,* by limiting the SCI entity's personnel ability to assess whether systems operated by a third-party provider on behalf of the SCI entity satisfy the requirements of Regulation SCI). The SCI entity may want to consider and, if appropriate, negotiate provisions that provide priority to the SCI entity's systems, such as for failover and/or business continuity and disaster recovery (''BC/DR'') scenarios, if needed to meet the SCI entity's obligations under Regulation SCI. In addition, an SCI entity generally should review the contract for provisions that, by their terms, are inconsistent with Regulation SCI or would otherwise fail to satisfy the requirements of Regulation SCI (*e.g.,* restricting information flow to the SCI entity and/or Commission and its staff pursuant to a non-disclosure agreement in a manner inconsistent with the requirements of Regulation SCI; specifying response times that are inconsistent with (*i.e.,* slower than) those required by Regulation SCI with respect to notifications regarding SCI events under Rule 1002). The Commission also believes that, to the extent possible, SCI entities may want to avoid defining terms in a contract with a third-party provider differently from how they are used in Regulation SCI, as this may introduce confusion as to the scope and applicability of Regulation SCI. In addition, although it is a term that may be common in many commercial contracts, provisions that provide the third-party provider with the contractual right to be able to make decisions that would negatively impact an SCI entity's obligations in its ''commercially reasonable discretion'' should be carefully considered, as what may be considered ''commercially reasonable'' for many entities that are not subject to Regulation SCI may not be appropriate for an SCI entity and its SCI systems and indirect SCI systems when taking into consideration the regulatory obligations of Regulation SCI.

ii. Risk-Based Assessment of Third-Party Providers

The Commission is also proposing in proposed Rule 1001(a)(2)(ix) to require each SCI entity to undertake a risk-based assessment of each third-party provider's criticality to the SCI entity, including analyses of third-party provider concentration, of key dependencies if the third-party provider's functionality, support, or

[289] *See supra* section III.C.2.a.

[290] *See* SCI Adopting Release, *supra* note 1, at 72276.

[291] *See id.*

service were to become unavailable or materially impaired, and of any potential security, including cybersecurity, risks posed. The Commission believes that specifically requiring each SCI entity to undertake a risk-based assessment of each of its third-party providers' criticality to the SCI entity will help them more fully understand the risks and vulnerabilities of utilizing each third-party provider, and provide the opportunity for the SCI entity to better prepare in advance for contingencies should the provider's functionality, support, or service become unavailable or materially impaired. In performing this risk-based assessment, SCI entities would be required to consider third-party provider concentration, which would help ensure that they properly account and prepare contingencies or alternatives for an overreliance on a given third-party provider by the SCI entity or by its industry. In addition, each SCI entity would be required to assess any potential security, including cybersecurity, risks posed by its third-party provider, to help ensure that the SCI entity does not only take into consideration the benefits it believes a third-party provider can provide it, but the security risks involved in utilizing a given provider as well.

c. Third-Party Providers for Critical SCI Systems

The newly proposed provisions of proposed Rule 1001(a)(2)(ix) discussed above would apply to all SCI entities for all of their SCI systems. However, given the essential nature of critical SCI systems,[292] the Commission believes that it is appropriate to require SCI entities to have even more robust policies and procedures with respect to any third-party provider that supports such systems. In adopting Regulation SCI, the Commission stated that critical SCI systems are those SCI systems ''whose functions are critical to the operation of the markets, including those systems that represent potential single points of failure in the securities markets [and] . . . are those that, if they were to experience systems issues, the Commission believes would be most likely to have a widespread and significant impact on the securities market.'' [293] Therefore, the Commission is proposing to revise Rule 1001(a)(2)(v), which relates to the business continuity and disaster recovery plans of SCI entities. Currently, Rule 1001(a)(2)(v) requires their policies and procedures to include business continuity and disaster recovery plans that include maintaining backup and recovery capabilities sufficiently resilient and geographically diverse and that are reasonably designed to achieve next business day resumption of trading and two-hour resumption of critical SCI systems following a wide-scale disruption. To help ensure that SCI entities are appropriately prepared for any contingency relating to a third-party provider with respect to critical SCI systems, the Commission is proposing to revise Rule 1001(a)(2)(v) to also require the BC/DR plans of SCI entities to be reasonably designed to address the unavailability of any third-party provider that provides functionality, support, or service to the SCI entity without which there would be a material impact on any of its critical SCI systems.

As discussed above, the Commission is proposing under proposed Rule 1001(a)(2)(ix) to require each SCI entity to conduct a risk-based assessment of the criticality of each of its third-party providers to the SCI entity. With respect to an SCI entity's critical SCI systems, the Commission believes the revised provisions of Rule 1001(a)(2)(v) are appropriate to ensure that an SCI entity has considered and addressed in its BC/DR plans how it would deal with a situation in which a third-party provider that provides any functionality, support, or service for any of its critical SCI systems has an issue that would materially impact any such system. For example, such BC/DR plans generally should not only take into account and address temporary losses of functionality, support, or service—such as a momentary outage that causes a feed to be interrupted or extended cybersecurity event on the third-party provider—but also consider more extended outage scenarios, including if the third-party provider goes into bankruptcy or dissolves, or if it breaches its contract and decides to suddenly, unilaterally, and/or permanently cease to provide the SCI entity's critical SCI systems with functionality, support, or service.[294] In determining how to satisfy the requirement that policies and procedures be reasonably designed to address the unavailability of any third-party provider that provides functionality, support, or service to the SCI entity without which there would be a material impact on any of its critical SCI systems, an SCI entity could consider if use of a CSP for its critical SCI systems also warrants maintaining an ''on-premises'' backup data center or other contingency plan which could be employed in the event of the scenarios noted above.

d. Third-Party Provider Participation in BC/DR Testing

With respect to an SCI entity's business continuity and disaster recovery plans, including its backup systems, Rule 1004 of Regulation SCI requires SCI entities to: (a) establish standards for the designation of those members or participants that the SCI entity reasonably determines are, taken as a whole, the minimum necessary for the maintenance of fair and orderly markets in the event of the activation of such plans; (b) designate members or participants pursuant to such standards and require participation by such designated members or participants in scheduled functional and performance testing of the operation of such plans, in the manner and frequency specified by the SCI entity, provided that such frequency shall not be less than once every 12 months; and (c) coordinate the testing of such plans on an industry- or sector-wide basis with other SCI entities.[295]

Because the Commission believes that some third-party providers may be of such importance to the operations of an SCI entity, the Commission is proposing to include certain third-party providers in the BC/DR testing requirements of Rule 1004. In the same way SCI entities currently are required to establish standards for and require participation by their members or participants in the annual industry-wide testing required of all SCI entities, the Commission is adding third-party providers as another category of entities. Thus, pursuant to revised paragraph (a) of Rule 1004, an SCI entity would be required also to establish standards for the designation of third-party providers (in addition to members or participants) that it determines are, taken as a whole, the minimum necessary for the

[292] Critical SCI systems include systems that directly support functionality relating to: (i) clearance and settlement systems of clearing agencies; (ii) openings, reopenings, and closings on the primary listing market; (iii) trading halts; (iv) initial public offerings; (v) the provision of market data by a plan processor; or (vi) exclusively listed securities. In addition, the definition of critical SCI systems includes a catchall provision for systems that provide functionality to the securities markets for which the availability of alternatives is significantly limited or nonexistent and without which there would be a material impact on fair and orderly markets.

[293] *See* SCI Adopting Release, *supra* note 1, at 72277.

[294] While such scenarios may appear to be improbable, given the criticality of the critical SCI systems to the SCI entity and U.S. securities markets, SCI entities should have plans in place to account for such scenarios, however remote.

[295] *See* 17 CFR 242.1004. *See also* SCI Adopting Release, *supra* note 1, at 72347–55 (providing a more detailed discussion of the BC/DR testing requirements under Rule 1004).

maintenance of fair and orderly markets in the event of the activation of the SCI entity's BC/DR plans. In addition, paragraph (b) of Rule 1004 would require each SCI entity to designate such third-party providers (in addition to members or participants) pursuant to such standards and require their participation in the scheduled functional and performance testing of the operation of such BC/DR plans, which would occur not less than once every 12 months and which would be coordinated with other SCI entities on an industry- or sector-wide basis.

As discussed above, SCI entities often employ a wide array of third-party providers which perform a multitude of different functions, support, or services for them. While many of these third-party providers may provide relatively minor functions, support, or services for an SCI entity, there may be one or more third-party providers of such significance to the operations of an SCI entity that, without the functions, support, or services of such provider(s), the maintenance of fair and orderly markets in the event of the activation of the SCI entity's BC/DR plans would not be possible. For example, the Commission believes it likely that, for an SCI entity that utilizes a cloud service provider for all, or nearly all, of its operations, such CSP would be of such importance to the operations of the SCI entity and the maintenance of fair and orderly markets in the event of the activation of the SCI entity's BC/DR plans that it would be required to participate in the BC/DR testing required by Rule 1004.[296]

e. Third-Party Providers of Certain Registered Clearing Agencies

The Commission may examine the provision of services by third-party providers of certain registered clearing agencies. The Financial Stability Oversight Council (''FSOC'') has designated certain financial market utilities (''FMUs'') [297] as systemically important or likely to become systemically important financial market utilities (''SIFMUs'').[298] The Payment, Clearing, and Settlement Supervision Act of 2010 (''Clearing Supervision Act''), enacted in Title VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (''Dodd-Frank Act''), provides for the enhanced regulation of certain FMUs.[299] FMUs include clearing agencies that manage or operate a multilateral system for the purpose of transferring, clearing, or settling payments, securities, or other financial transactions among financial institutions or between financial institutions and the FMU.[300] For SIFMUs, the Clearing Supervision Act provides for enhanced coordination between the Commission and Federal Reserve Board by allowing for regular on-site examinations and information sharing,[301] and further provides that the Commission and CFTC shall coordinate with the Federal Reserve Board to develop risk management supervision programs for SIFMUs jointly.[302] In addition, section 807 of the Clearing Supervision Act provides that ''[w]henever a service integral to the operation of a designated financial market utility is performed for the designated financial market utility by another entity, whether an affiliate or non-affiliate and whether on or off the premises of the designated financial market utility, the Supervisory Agency may examine whether the provision of that service is in compliance with applicable law, rules, orders, and standards to the same extent as if the designated financial market utility were performing the service on its own premises.'' [303] Given the importance of the provision of services by SIFMUs to the U.S. financial system and global financial stability, SIFMU third-party providers may be integral to the operation of the SIFMU and thus be examined by the Commission.

f. Request for Comment

58. Do SCI entities employ third-party providers to operate SCI systems or indirect SCI systems on their behalf? If so, what types of systems are most frequently operated by third parties?

59. Please describe SCI entities' use of third-party providers generally, even if they do not operate SCI systems or indirect SCI systems on behalf of an SCI entity. What types of functionality, support, or service do such entities provide to SCI entities? Please describe.

60. The Commission requests commenters' views on significant issues that they believe SCI entities should take into account with respect to their use of third-party providers and the requirements of Regulation SCI. Are there common or important issues that commenters believe the Commission should focus on in addition to those discussed above? If so, please describe.

61. Do commenters believe it is appropriate to require, as in proposed Rule 1001(a)(2)(ix), that each SCI entity have a program to manage and oversee third-party providers that provide functionality, support or service, directly or indirectly, for its SCI systems and, for purposes of security standards, indirect SCI systems? Do commenters believe that such a program should require an initial and periodic review of contracts with such providers for consistency with the SCI entity's obligations under Regulation SCI? Why or why not?

62. Do commenters believe that it is appropriate to require each SCI entity to

[296] Contractual arrangements with applicable third-party providers that require such providers to engage in BC/DR testing could help ensure implementation of this requirement. *See also* SCI Adopting Release, *supra* note 1, at 72350 (discussing how contractual arrangements by SCI entities that are not SROs would enable such SCI entities to implement the BC/DR testing requirement for their members or participants).

[297] *See* 12 U.S.C. 5462(6). The definition of ''financial market utility'' in section 803(6) of the Clearing Supervision Act contains a number of exclusions that include, but are not limited to, certain designated contract markets, registered futures associations, swap data repositories, swap execution facilities, national securities exchanges, national securities associations, alternative trading systems, security-based swap data repositories, security-based swap execution facilities, brokers, dealers, transfer agents, investment companies, and futures commission merchants. *See* 12 U.S.C. 5462(6)(B).

[298] *See* 12 U.S.C. 5463. An FMU is systemically important if the failure of or a disruption to the functioning of such FMU could create or increase the risk of significant liquidity or credit problems spreading among financial institutions or markets and thereby threaten the stability of the U.S. financial system. *See* 12 U.S.C. 5462(9). On July 18, 2012, the FSOC designated as systemically important the following then-registered clearing agencies: CME Group (''CME''), DTC, FICC, ICC, NSCC, and OCC. The Commission is the supervisory agency for DTC, FICC, NSCC, and OCC, and the CFTC is the supervisory agency for CME and ICE. The Commission jointly regulates ICC and OCC with the CFTC. The Commission also jointly regulates ICE Clear Europe (''ICEEU''), which has not been designated as systemically important by FSOC, with the CFTC and Bank of England. The Commission also jointly regulated CME with the CFTC until 2015, when the Commission published an order approving CME's request to withdraw from registration as a clearing agency. *See* Securities Exchange Act Release No. 76678 (Dec. 17, 2015), 80 FR 79983 (Dec. 23, 2015).

[299] The objectives and principles for the risk management standards prescribed under the Clearing Supervision Act shall be to (i) promote robust risk management; (ii) promote safety and soundness; (iii) reduce systemic risks; and (iv) support the stability of the broader financial system. Further, the Clearing Supervision Act states that the standards may address areas such as risk management policies and procedures; margin and collateral requirements; participant or counterparty default policies and procedures; the ability to complete timely clearing and settlement of financial transactions; capital and financial resources requirements for designated FMUs; and other areas that are necessary to achieve the objectives and principles described above. *See* 12 U.S.C. 5464(b), (c).

[300] *See* 12 U.S.C. 5462(6).

[301] *See* 12 U.S.C. 5466.

[302] *See* 12 U.S.C. 5472; *see also* Federal Reserve Board, et al., *Risk Management Supervision of Designated Clearing Entities* (July 2011), *available at https://www.federalreserve.gov/publications/other-reports/files/risk-management-supervision-report-201107.pdf* (describing the joint supervisory framework of the Commission, CFTC, and Federal Reserve Board).

[303] 12 U.S.C. 5466.

include a risk-based assessment of each third-party provider's criticality to the SCI entity, including analyses of third-party provider concentration, of key dependencies if the third-party provider's functionality, support, or service were to become unavailable or materially impaired, and of any potential security, including cybersecurity, risks posed? Why or why not?

63. Are there any third-party providers, or types of third-party providers, that commenters believe an SCI entity or SCI entities rely on in a manner that creates, from the commenters' point of view, undue concentration risk? If so, please describe.

64. Are there other aspects of third-party provider management that commenters believe should be included in the proposed rule provision? If so, please describe.

65. Do commenters agree with the proposed revisions to Rule 1001(a)(2)(v) to require the BC/DR plans of SCI entities to be reasonably designed to address the unavailability of any third-party provider that provides functionality, support, or service to the SCI entity without which there would be a material impact on any of its critical SCI systems? Why or why not? Do commenters believe that any such providers exist today for the critical SCI systems of SCI entities? If so, please describe. Should the Commission require third-party provider diversity for critical systems of an SCI entity, for example, requiring an SCI entity that utilizes a third-party provider for its critical SCI systems to use a different party (*i.e.,* another third-party provider or operate the critical SCI system itself) for its backup for such systems? Why or why not?

66. Do commenters agree with the proposed revisions to Rule 1004 to require that SCI entities establish standards and designate third-party providers that must participate in BC/DR testing in the annual industry-wide BC/DR testing required by Rule 1004? Why or why not?

3. Security

The Commission recognized the importance of security for the technology systems of SCI entities and included various requirements and provisions in Regulation SCI relating to the security of an SCI entity's SCI systems. For example, the rules provide that minimum policies and procedures must provide for, among other things, regular reviews and testing of systems, including backup systems, to identify vulnerabilities from internal and external threats.[304] In addition, penetration testing is required as part of the SCI review.[305] Recognizing that SCI systems may be vulnerable if other types of systems are not physically or logically separated (or ''walled off''), Regulation SCI also specifies that ''indirect systems''—defined as systems that if breached, are reasonably likely to pose a security threat to SCI systems—are also subject to the provisions of Regulation SCI relating to security standards and systems intrusions.[306] Thus, the application of Regulation SCI to indirect SCI systems could encourage SCI entities to establish effective controls that result in the core SCI systems being logically or physically separated from other systems that could provide vulnerable entry points into SCI systems, thereby removing these non-SCI systems from the scope of indirect SCI systems.[307]

Regulation SCI also includes ''systems intrusions'' [308] as one of three types of SCI events for which SCI entities are required to take corrective action, provide notification to the Commission, and disseminate information to their members and participants.[309] Since the adoption of Regulation SCI in 2014, cybersecurity has continued to be a significant concern for SCI entities and non-SCI entities alike. Various studies and surveys have noted significant increases in cybersecurity events [310] across all types of companies in recent years.[311] Among these are targeted ransomware attacks that lock access to a victim's data unless a ransom is paid, and have included certain high-profile incidents involving the local government of a major U.S. city [312] as well as one of the largest oil pipelines in the United States.[313] Cybersecurity events have also included hacks that have had widespread impacts across many industries and types of entities.[314] Financial sector entities have been vulnerable to cybersecurity events as well, including the Society for Worldwide Interbank Financial Telecommunication (''SWIFT''), an international cooperative of financial institutions that provides safe and secure financial transactions for its members, which was the target of a series of cybersecurity events in 2015 and 2016, including one incident in which $81 million was stolen.[315]

Given the continued and increasing risks associated with cybersecurity for SCI entities, the Commission believes it is appropriate to enhance the cybersecurity provisions of Regulation SCI to help ensure that SCI systems and indirect SCI systems of the most important entities in our securities markets remain secure.

a. Unauthorized Access to Systems and Information

While Rule 1001(a)(1) already requires an SCI entity to have policies and procedures reasonably designed to ensure that its SCI systems and indirect SCI systems have levels of security adequate to maintain operational capabilities and promote the

[304] *See* 17 CFR 242.1001(a)(2)(iv).

[305] *See* 17 CFR 242.1003(b)(1)(i).

[306] *See* 17 CFR 242.1000.

[307] *See* SCI Adopting Release, *supra* note 1, at 72287–89 (discussing systems intrusions).

[308] A ''systems intrusion'' is defined as ''any unauthorized entry into the SCI systems or indirect SCI systems of an SCI entity.'' *See* 17 CFR 242.1000.

[309] *See* 17 CFR 242.1002.

[310] Cybersecurity events can span a wide variety of types of threats. For example, FINRA summarized common cybersecurity threats faced by broker-dealers to include phishing, imposter websites, malware, ransomware, distributed denial-of-service attacks, and vendor breaches, among others. *See* FINRA, *Common Cybersecurity Threats, available at www.finra.org/rules-guidance/guidance/common-cybersecurity-threats.*

[311] *See, e.g.,* Financial Services Information Sharing and Analysis Center, *Navigating Cyber 2022* (Mar. 2022), *available at www.fsisac.com/navigatingcyber2022-report* (detailing cyber threats that emerged in 2021 and predictions for 2022); Bree Fowler, *Number and cost of cyberattacks continue to grow, new survey says,* CNET (Jan. 21, 2022), *available at https://www.cnet.com/news/privacy/cyberattacks-continue-to-increase-new-survey-says* (citing, among other things, Anomali's poll of cybersecurity decision makers that 87% of their companies had experienced a cyberattack in the past three years that resulted in damage, disruption, or data breach); Accenture, *Triple digit increase in cyberattacks: What next?* (Aug. 4, 2021), *available at www.accenture.com/us-en/blogs/security/triple-digit-increase-cyberattacks*; Chris Morris, *Cyberattacks and ransomware hit a new record in 2021, says report,* Fast Company (Jan. 25, 2022), *available at https://www.fastcompany.com/90715622/cyberattacks-ransomware-data-breach-new-record-2021* (citing report by Identity Theft Resource Center stating that the number of security compromises was up more than 68% in 2021).

[312] *See, e.g.,* Stephen Deere, *Cost of City of Atlanta's cyber attack: $2.7 million—and rising,* The Atlanta Journal-Constitution (Apr. 12, 2018), *available at https://www.ajc.com/news/cost-city-atlanta-cyber-attack-million-and-rising/nABZ3K1AXQYvY0vxqfO1FI/* (describing the costs relating to a five-day ransomware attack on the City of Atlanta in Mar. 2018).

[313] *See, e.g.,* Clare Duffy, *Colonial Pipeline attack: A 'wake up call' about the threat of ransomware,* CNN Business (May 16, 2021), *available at https://www.cnn.com/2021/05/16/tech/colonial-ransomware-darkside-what-to-know/index.html* (describing the ransomware attack on a pipeline and concerns regarding the potential for similar attacks on critical US infrastructure).

[314] *See, e.g.,* David Uberti, et al., *The Log4j Vulnerability: Millions of Attempts Made Per Hour to Exploit Software Flaw,* Wall Street Journal (Dec. 21, 2021), *available at https://www.wsj.com/articles/what-is-the-log4j-vulnerability-11639446180* (discussing the Log4j hack).

[315] *See, e.g.,* Kim Zetter, *That Insane, $81M Bangladesh Bank Heist? Here's What We Know,* WIRED (May 17, 2016), *available at https://www.wired.com/2016/05/insane-81m-bangladesh-bank-heist-heres-know/.*

maintenance of fair and orderly markets, and Rule 1001(a)(4) specifies that policies and procedures will be deemed reasonable if consistent with current SCI industry standards, Rule 1001(a)(2) is not specific in terms of the need for an SCI entity to have access controls designed to protect both the security of the systems and the information residing therein. Limiting access to SCI systems and indirect SCI systems and the information residing therein to authorized purposes and users is particularly important given that these systems include the core technology of key U.S. securities markets entities, and would help ensure that such systems and information remain safeguarded and protected from unauthorized uses. Proposed Rule 1001(a)(2)(x) would specify that the Rule 1001(a)(1) policies and procedures of SCI entities include a program to prevent the unauthorized access to such systems and information residing therein. An SCI entity's policies and procedures generally should specify appropriate access controls to ensure that its applicable systems and information is protected. Such policies and controls generally should be designed to prevent both unauthorized external intruders as well as unauthorized internal personnel from access to these systems and information. For example, this would also include personnel that may be inappropriately accessing certain systems and/or information residing on such systems, though they may have authorized access to other systems, portions of systems, or certain information residing in such systems at the SCI entity. Thus, for example, the procedures and access controls at the SCI entity generally should provide for an appropriate patch management cycle for systems software, to ensure that known software vulnerabilities are identified and patches are deployed and validated in a timely manner. The procedures and access controls generally should also be calibrated sufficiently to account for such different levels of access for each person granted access to any part of the SCI entity's systems or information. In addition, this requirement would make clear that an SCI entity's policies and procedures are required to address not only protection of its technology systems, but also of the information residing on such systems.

In developing and implementing such policies and procedures, SCI entities generally should develop a clear understanding of the need for access to systems and data, including identifying which users should have access to sensitive systems or data. In general, such policies and procedures should include: requiring standards of behavior for individuals authorized to access SCI systems and indirect SCI systems and information residing therein, such as an acceptable use policy; identifying and authenticating individual users; establishing procedures for timing distribution, replacement, and revocation of passwords or methods of authentication; restricting access to specific SCI systems or components thereof or information residing therein only to individuals requiring access to such systems or information as is necessary for them to perform their responsibilities or functions for the SCI entity; and securing remote access technologies used to interface with SCI systems.[316] Access to systems and data can be controlled through a variety of means, including but not limited to the issuance of user credentials, digital rights management with respect to proprietary hardware and copyrighted software, authentication methods including multifactor authentication as appropriate, tiered access to sensitive information and network resources, and security and access measures that are regularly monitored not only to provide access to authorized users, but also to remove access for users that are no longer authorized (*e.g.,* due to termination of employment).[317] As with other policies and procedures required under Rule 1001, SCI entities may, if they choose, look to SCI industry standards in developing their policies and procedures to prevent unauthorized access to information and systems.[318]

b. Penetration Testing

Penetration tests can help entities understand how effective their security policies and controls are in the face of attempted and successful systems intrusions, and assist in revealing the potential threats and vulnerabilities to the entity's network and controls that might be exploited by malicious attackers to disrupt the operation of their systems, result in stolen confidential information, and damage their reputations. When the Commission adopted Regulation SCI in 2014, it required that SCI entities conduct penetration testing as part of its SCI review [319] but, because of the costs associated with penetration testing at the time, only required that such tests be conducted once every three years.[320] In the time since the adoption of Regulation SCI, cybersecurity has become an even greater and more pervasive concern for all types of businesses, including SCI entities. At the same time, best practices of businesses with respect to penetration testing have evolved such that such tests occur on a much more frequent basis, as businesses confront the threat of cybersecurity events on a wider scale.[321]

Given this, the Commission is proposing to increase the frequency of penetration testing by SCI entities such that they are conducted at least annually, rather than once every three years. The Commission believes that such tests are a critical component of ensuring the cybersecurity health of an SCI entity's technology systems and that such a frequency would help to ensure that robust measures are in place to protect an SCI entity's systems from cybersecurity events. In addition, the proposed annual frequency would only be a minimum frequency and SCI entities may choose to adopt even more frequent penetration tests if they feel it appropriate to do so.[322]

In addition, the Commission is proposing to require that the conduct of such penetration testing include testing by the SCI entity of any vulnerabilities of its SCI entity's SCI systems and indirect SCI systems identified pursuant to § 242.1001(a)(2)(iv). Currently, the requirement in Rule 1003 with respect to penetration testing does not include this phrase. However, Rule 1001(a)(2)(iv) requires an SCI entity's policies and procedures to include,

[316] *See* Exchange Act Cybersecurity Proposal, *supra* note 10.

[317] *See* Exchange Act Cybersecurity Proposal, *supra* note 10 (similarly discussing examples of access controls).

[318] *See* Rule 1001(a)(4) of Regulation SCI (defining current SCI industry standards), which is discussed further in *infra* section III.C.5.

[319] Specifically, paragraph (b)(1) of Rule 1003 currently requires that ''[p]enetration test reviews of the network, firewalls, and production systems shall be conducted at a frequency of not less than once every three years . . .''. Rule 1003(b)(1).

[320] *See* SCI Adopting Release, *supra* note 1, at 72344.

[321] *See, e.g.,* Fortra, *2022 Penetration Testing Report* 14 (July 7, 2022), *available at https://static.fortra.com/core-security/pdfs/guides/cs-2022-pen-testing-report.pdf* (stating that 42% of respondents conducted penetration testing one or two times a year, and 45% of respondents conducted penetration testing at a more frequent pace); PCI Security Standards Council, *Information Supplement: Penetration Testing Guidance* 6 (Sept. 2017), *available at https://listings.pcisecuritystandards.org/documents/Penetration-Testing-Guidance-v1_1.pdf* (''at least annually and upon significant changes'').

[322] As discussed further below, as part of the proposed revisions to the SCI review requirement, the Commission is also moving rule provisions relating to the substantive requirements of the SCI review to Rule 1000 under the definition of ''SCI review,'' while timing requirements relating to the SCI review and the report of the SCI review would be contained in Rule 1003(b). Thus, although currently the requirement relating to penetration test reviews is in Rule 1003, it is now proposed to be in Rule 1000.

among other things, ''regular reviews and testing . . . to identify vulnerabilities pertaining to internal and external threats . . .'' The new language with respect to penetration testing (which is proposed to be located in the definition of SCI review in Rule 1000) would require SCI entities to include testing of the vulnerabilities identified pursuant to its regular review and testing requirement in designing its penetration testing. Thus, rather than, for example, running a static annual test against a portion of its SCI systems, this proposed language would require an SCI entity's penetration testing program to include any identified relevant threats and then conduct penetration testing accordingly, which should help ensure the security and resiliency of SCI systems.

c. Systems Intrusions

Rule 1000 of Regulation SCI defines a ''systems intrusion'' as any unauthorized entry into the SCI systems or indirect SCI systems of an SCI entity. Systems intrusions are one of three types of SCI events that each SCI entity must monitor for and, when they occur, subject to certain exceptions, an SCI entity must: take corrective action; [323] immediately notify the Commission and maintain certain records with respect to the event; [324] and promptly disseminate information about the event to applicable members and participants of each SCI entity.[325] As discussed in the SCI Adopting Release,[326] the definition of systems intrusion has several important characteristics to it, two of which are relevant to the changes proposed. First, because the term ''entry'' is used in the current definition, the term systems intrusions only applies to ''successful'' intrusions, thus excluding attempted (*i.e.,* unsuccessful) intrusions. In addition, the term ''entry into'' implies that the intrusion is limited to events that result in an intruder entering into the SCI entity's SCI systems or indirect SCI systems, and thus does not include any types of attacks on systems outside of the SCI entity's SCI systems or indirect SCI systems that nonetheless impacts such systems.

As discussed above, cybersecurity has become ever more increasingly important for all types of entities, and the same is true for SCI entities. The Commission believes that it is appropriate to expand the definition of systems intrusion to include two additional types of cybersecurity events. The first additional type of systems intrusion would include certain types of incidents that are currently considered to be cybersecurity events that are not included in the current definition, as discussed below. In addition, the revised definition would ensure that the Commission and its staff are made aware when an SCI entity is the subject of a significant cybersecurity threat, including those that may be ultimately unsuccessful, which would provide important information regarding threats that may be posed to other entities in the securities markets, including other SCI entities. By requiring SCI entities to submit SCI filings for these new types of systems intrusions, the Commission believes that the revised definition of systems intrusion would provide the Commission and its staff more complete information to assess the security status of the SCI entity, and also assess the impact or potential impact that unauthorized activity could have on the security of the SCI entity's affected systems as well on other SCI entities and market participants.

The proposed definition would have three prongs, the first of which would contain the current requirement that defines any ''unauthorized entry into the SCI systems or indirect SCI systems of an SCI entity'' as a systems intrusion, and would continue to include a wide range of cybersecurity events. As stated in the SCI Adopting Release, the current definition describes ''any unauthorized'' entry or ''breach'' into SCI systems or indirect SCI systems, and includes unauthorized access, whether intentional or inadvertent, by employees or agents of the SCI entity that resulted from weaknesses in the SCI entity's access controls and/or procedures.[327] For example, data breaches are included under the first prong, as are instances in which an employee of an SCI entity accessed an SCI system without proper authorization. It also includes instances in which an employee, such as a systems administrator, was authorized to access a system, but where the employee improperly accessed confidential information within such system. Similarly, an instance in which members of an SCI entity were properly accessing a system but were inadvertently exposed to the confidential information of other members would also likewise fall within this prong.[328]

The new second prong would expand the definition of systems intrusion to include any cybersecurity event that disrupts, or significantly degrades, the normal operation of an SCI system. This prong is intended to include cybersecurity events on the SCI entity's SCI systems or indirect SCI systems that cause disruption to such systems, regardless of whether the event resulted in an entry into or access to them. For example, in distributed denial-of-service attacks, the attacker, often using malware-infected machines, typically seeks to overwhelm or drain the resources of the target with illegitimate requests to prevent the target's systems from providing services to those seeking to access or use them. Unlike cybersecurity events that would qualify under the current definition of systems intrusions (*i.e.,* the first prong of the proposed definition), the objective of these attacks is often simply to disrupt or disable the target's operations, rendering them unable to run efficiently, or run at all. For example, given the essential role hypervisors play in supporting cloud computing, an attack on a CSP's hypervisor, which enables the sharing of physical compute and memory resources across multiple virtual machines, could also significantly disrupt or even disable, albeit indirectly, the SCI systems of an SCI entity that is utilizing such CSP, and thus constitute a systems intrusion under the proposed second prong. Likewise, these systems intrusions could include certain command and control attacks where a malicious actor is able to infiltrate a system to install malware to enable it to send commands to infected devices remotely. Similarly, supply chain attacks that enter a SCI entity's systems through an apparently authorized means, such as through regular maintenance software updates that—unbeknownst to the software provider and the recipient—contain malicious code and could also be systems intrusions under this proposal.[329] Because such cybersecurity events can cause serious harm and disruption to an SCI entity's operations, the Commission believes that the definition of systems intrusion should be broadened to include cybersecurity events that may not entail actually entering or accessing the SCI entity's SCI systems or indirect SCI systems, but still cause disruption or significant

[323] *See* 17 CFR 242.1002(a).

[324] *See* 17 CFR 242.1002(b) (setting forth the notification and follow-up reporting that is required for a systems intrusion that is not de minimis).

[325] *See* 17 CFR 242.1002(c).

[326] *See* SCI Adopting Release, *supra* note 1, at 72288.

[327] *See* SCI Adopting Release, *supra* note 1, at 72887–89 (providing a more detailed discussion of the current definition of systems intrusions).

[328] *See id.* (providing a more detailed discussion of the current definition of systems intrusions).

[329] *See supra* note 314 and accompanying text (discussing the Log4j hack).

degradation. For this second prong, the Commission believes it is appropriate to utilize language similar to that used in the definition of systems disruption (*i.e.,* ''disrupts, or significantly degrades, the normal operation of an SCI system'').[330] Similar to a systems disruption that occurs within the SCI systems or indirect SCI systems, if a cybersecurity event disrupts, or significantly degrades, an SCI entity's normal operations,[331] it would constitute a systems intrusion under the proposed revised definition, and the obligations and reporting requirements of Rule 1002 would apply.[332]

The third prong would include any significant attempted unauthorized entry into the SCI systems or indirect SCI systems of an SCI entity, as determined by the SCI entity pursuant to established reasonable written criteria. In contrast to the types of systems intrusions that are part of the first prong of the proposed definition, the third prong is intended to capture unsuccessful, but significant, attempts to enter an SCI entity's SCI systems or indirect SCI systems. The Commission recognizes that it would be inefficient, inappropriate, and undesirable (for both SCI entities as well as the Commission and its staff) to require that all attempted entries be considered systems intrusions. Rather, the Commission is seeking to include only attempts that an SCI entity believes to be significant attempts to its systems, even if successfully prevented.

The term ''significant attempted unauthorized entry'' would not be defined in the rule. Rather, the proposed rule would require each SCI entity to establish reasonable written criteria for it to use to determine whether a significant attempted unauthorized entry has occurred, because the Commission believes that each SCI entity should be granted some degree of discretion and flexibility in determining what constitutes a significant attempted unauthorized entry for its purposes, given that SCI entities differ in nature, size, technology, business model, and other aspects of their businesses.[333] However, the Commission believes that certain characteristics of attempted unauthorized entries would generally weigh in favor of such attempted unauthorized entries being considered significant and constituting systems intrusions that should be considered SCI events subject to the requirements of Regulation SCI, including: when an SCI entity becomes aware of reconnaissance that may be leveraged by a threat actor; a targeted campaign that is customized to the SCI entity's system; [334] an attempted cybersecurity event that required the SCI entity's personnel to triage, even if it was ultimately determined to have no impact; an attempted attack from a known sophisticated advanced threat actor; the depth of the breach in terms of proximity to SCI systems and critical SCI systems; and a cybersecurity event that, if successful, had meaningful potential to result in widespread damage and/or loss of confidential data or information.

As with all SCI events, SCI entities would be required under 17 CFR 242.1002(a) (''Rule 1002(a)'') to take corrective action with respect to any events that were determined to be systems intrusions under the proposed revised definition. In addition, the Commission is proposing to make a revision to the Commission reporting requirements relating to systems intrusions under Rule 1002(b) such that all systems intrusions would be required to be immediately reported to the Commission pursuant to the requirements of Rule 1002(b). Currently, paragraph (b)(5) of Rule 1002 states that the Commission notification requirements under paragraphs (b)(1) through (4) do not apply to any SCI event that has had, or the SCI entity reasonably estimates would have, no or a de minimis impact on the SCI entity's operations or on market participants (''de minimis SCI events'').[335] Instead, SCI entities are currently required to make, keep and preserve records relating to all such SCI events, and provide a quarterly report of de minimis systems intrusions and systems disruptions pursuant to Rule 1002(b)(5).[336] The Commission is proposing to eliminate the de minimis exception's applicability to systems intrusions, thus requiring all systems intrusions, whether de minimis or non-de minimis, to be reported pursuant to the requirements of 17 CFR 242.1002(b)(1) through (4) (''Rule 1002(b)(1) through (4)'').[337] By their very nature, systems intrusions may be difficult to identify, and assessing the impact of any systems intrusion is often complex and could potentially require a lengthy investigation before any conclusions may be reached with any degree of certainty. Because of this, the Commission recognizes that it may be difficult for SCI entities to make a clear determination in a timely manner of whether a systems intrusion is de minimis. At the same time, the Commission believes that it is important for the Commission and its staff to receive notification of systems intrusions to be aware of potential and actual security threats to individual SCI entities, particularly given that such threats may extend to other market participants in the securities markets, including other SCI entities. Thus, the Commission believes it is appropriate to eliminate systems intrusions from the types of SCI events that may make use of the exception for de minimis SCI events and be quarterly reported, and instead require that each systems intrusion be reported under the

[330] The Commission believes that the term ''cybersecurity event,'' as used here, would generally be understood to mean ''an unauthorized activity that disrupts or significantly degrades the normal operation of an SCI system.''

[331] *See* SCI Adopting Release, *supra* note 1, at 72284 (''SCI entities would likely find it helpful to establish parameters that can aid them and their staff in determining what constitutes the 'normal operation' of each of its SCI systems and when such 'normal operation' has been disrupted or significantly degraded because those parameters have been exceeded.'' (footnotes omitted)).

[332] Such events may, in some cases, first appear to an SCI entity to be a ''systems disruption'' but, upon further investigation and understanding of the true cause of the SCI event, may turn out to be both a ''systems intrusion'' as well as a ''systems disruption.'' In such cases, the applicable SCI entity should mark the SCI event as both types on its submissions to the Commission on Form SCI.

[333] Under 17 CFR 242.1003(a)(1) (''Rule 1003(a)(1)''), each SCI entity is similarly required to establish reasonable written criteria for identifying a material change to its SCI systems for quarterly reporting to the Commission. *See also* SCI Adopting Release, *supra* note 1, at 72341–42 (discussing the definition of material systems change).

[334] A wide variety of entities engage in web scanning, which may be in a targeted manner (*e.g.,* looking at certain IP address ranges) or broadly across the internet. Often, such scanning may be for non-malicious purposes such as, for example, indexing website content (for search engines) or mapping networks. Others may engage in such scanning to identify vulnerable systems or websites, which could be to inform vulnerability management identification and remediation efforts or identify opportunities for exploitation. Because of the wide range of possible uses of scanning and the nature of scanning tools' interactions with systems, such scanning activity alone is not necessarily indicative of malicious intent or even a vulnerable system capable of being exploited. However, evidence of further, follow-on activity indicative of a precursor to unauthorized entry may be a factor that an SCI entity should consider in weighing whether a significant attempted unauthorized entry has occurred.

[335] Rule 1002(b)(5).

[336] *Id.*

[337] To conform to the proposed elimination of de minimis systems intrusions from the quarterly report, Rule 1002(b)(5)(i) would be amended by replacing the phrase ''all such SCI events'' with the phrase ''all such systems disruptions or systems compliance issues,'' and Rule 1002(b)(5)(ii) would be amended to no longer include references to systems intrusions and instead read: ''Submit to the Commission a report, within 30 calendar days after the end of each calendar quarter, containing a summary description of such systems disruptions, including the SCI systems affected by such systems disruptions during the applicable calendar quarter.''

framework in Rule 1002(b)(1) through (4).[338]

Rule 1002(c) sets forth the requirements with respect to disseminating information regarding SCI events to applicable members or participants of SCI entities, and the Commission believes that it would be appropriate that information about systems intrusions under the proposed second prong of the systems intrusion definition (a ''cybersecurity event that disrupts, or significantly degrades, the normal operation of an SCI system'') be disseminated pursuant to Rule 1002(c)'s requirements. However, importantly, in contrast to the more detailed information dissemination requirements for SCI entities in paragraph (c)(1) of Rule 1002 for systems disruptions and systems compliance issues, in recognition of the more sensitive nature of systems intrusions (disclosure of which may alert threat actors of an existing or potential weakness in an SCI entity's systems, or alert them of an ongoing investigation of a systems intrusion), the Commission's information dissemination requirements for systems intrusions contained in paragraph (c)(2) of Rule 1002 only requires SCI entities to provide a ''summary description'' for such events.[339] In addition, paragraph (c)(2) also permits an SCI entity to delay disclosure of a systems intrusion in cases where the SCI entity ''determines that dissemination of such information would likely compromise the security of the SCI entity's SCI systems or indirect SCI systems, or an investigation of the systems intrusion, and documents the reasons for such determination.'' [340]

With respect to information dissemination to an SCI entity's members or participants, however, the Commission believes that information regarding significant attempted unauthorized entries should not be required to be disseminated to an SCI entity's members or participants, as any benefits associated with disseminating information about unsuccessful attempted unauthorized entries to members or participants of an SCI entity would likely not be justified due to distractions that such information would bring, particularly since the SCI entity's security controls were able, in fact, to repel the cybersecurity event. In addition, disseminating information regarding unsuccessful intrusions could result in the threat actors being unnecessarily alerted that they have been detected, which could make it more difficult to identify the attackers and halt their efforts on an ongoing, more permanent basis. Thus, the Commission is proposing to new 17 CFR 242.1002(c)(4)(iii) (''proposed Rule 1002(c)(4)(iii)'') which would exclude systems intrusions that are significant attempted unauthorized entries into the SCI systems or indirect SCI systems of an SCI entity from the information dissemination requirements of 17 CFR 242.1002(c)(1) through (3) (''Rule 1002(c)(1) through (3)'').

d. Request for Comment

67. Do commenters agree that cybersecurity is an area that the Commission should enhance as part of Regulation SCI? Is it necessary to help ensure that SCI entities maintain a robust technology infrastructure for the SCI systems and indirect SCI systems? Why or why not?

68. Do commenters agree with the proposed addition of Rule 1001(a)(2)(x), to enumerate that the policies and procedures of SCI entities shall include a program to prevent the unauthorized access to SCI systems and, for purposes of security standards, indirect SCI systems, and information residing therein? Why or why not?

69. Do commenters agree that SCI entities should be required to have an increased frequency of penetration test reviews? Why or why not? Do commenters feel that the requirement to have such tests at least annually is appropriate? How frequently do SCI entities conduct penetration testing today? Do commenters agree with the proposed requirement that the penetration testing include testing of any identified vulnerabilities? Why or why not?

70. Do commenters believe that it is appropriate to modify the definition of systems intrusion as proposed in Rule 1000? Do commenters believe that it would be useful (for example, for SCI entities and the Commission and its staff) to include other types of scenarios in the definition of systems intrusion? If so, which scenarios should be included and why? If not, why not?

71. Do commenters agree with the proposed revisions to the definition of systems intrusions to include the second prong, (*i.e.,* for any cybersecurity event that disrupts, or significantly degrades, the normal operation of an SCI system)? Why or why not? Could such events put the security or operational capability of an SCI system at risk? How frequently do commenters believe systems intrusions, as defined by the proposed second prong, occur at SCI entities? The Commission does not define the term ''cybersecurity event'' in the proposed rule text but, as noted, believes it would generally be understood to mean ''an unauthorized activity that disrupts or significantly degrades the normal operation of an SCI system.'' Do commenters agree? Do commenters believe it is necessary to provide a definition of the term ''cybersecurity event'' in the proposed rule text? If so, do commenters agree with the meaning above? If not, how should it be defined? Please be specific.

72. Do commenters believe that significant attempted unauthorized entries into the SCI systems or indirect SCI systems of an SCI entity should be included in the definition of systems intrusions, as under the proposed third prong? Why or why not? Do commenters believe that the Commission should define the term ''significant attempted unauthorized entry,'' or do commenters believe it is appropriate to require an SCI entity to establish reasonable written criteria to make such determinations to provide SCI entities some degree of discretion and flexibility in determining what constitutes a significant attempted unauthorized entry for its purposes, given differences as between SCI? What types of criteria or scenarios do commenters believe should constitute a significant attempted unauthorized entry? Please describe and be specific. How frequently do commenters believe systems intrusions, as defined by the proposed third prong, occur at SCI entities?

73. Do commenters agree with the proposed removal of systems intrusions from the types of de minimis SCI events permitted to be reported quarterly under Rule 1002(b)(5)? Why or why not? Should there be a requirement that SCI events that are systems intrusions, as proposed to be defined, be reported to senior management of an SCI entity? Why or why not?

74. Do commenters agree with proposed addition of Rule

[338] The Commission notes that systems intrusions, as currently defined in Rule 1000 of Regulation SCI, have been relatively infrequent as compared to other types of SCI events, and thus the burden of this proposed change in reporting for systems intrusions under the current definition (which is the first prong of the proposed revised definition of systems intrusions) should be relatively low for SCI entities. For example, in the three-year period from 2019 to 2021, systems intrusions only accounted for 27 of the 10,501 SCI events in total (including both de minimis and non-de minimis SCI events). The Commission requests comment below regarding the frequency of systems intrusions as defined by the second and third prongs of the proposed revised definition of systems intrusion.

[339] The information dissemination requirements described here for systems intrusions differ from the analogous requirements for the other two types of SCI events (systems disruptions and systems compliance issues), which require SCI entities to also, among other things, further provide a more detailed description of such SCI events when known. *See* 17 CFR 242.1002(c)(1).

[340] *See* 17 CFR 242.1002(c)(2) (''Rule 1002(c)(2)'').

1002(c)(4)(iii), which would exclude systems intrusions that are significant attempted unauthorized entries from the information dissemination requirements of Rule 1002(c)(1) through (3)? Why or why not?

4. SCI Review

a. Discussion

Rule 1000 currently defines the SCI review to be a review, following established procedures and standards, that is performed by objective personnel having appropriate experience to conduct reviews of SCI systems and indirect SCI systems, and which review contains: (a) a risk assessment with respect to such systems of an SCI entity; and (b) an assessment of internal control design and effectiveness of its SCI systems and indirect SCI systems to include logical and physical security controls, development processes, and information technology governance, consistent with industry standards. Paragraph (b)(1) of Rule 1003 requires each SCI entity to conduct an SCI review of the SCI entity's compliance with Regulation SCI not less than once each calendar year; however, penetration test reviews of the network, firewalls, and production systems may be conducted at a frequency of not less than once every three years, and assessments of SCI systems directly supporting market regulation or market surveillance may be conducted at a frequency based upon the risk assessment conducted as part of the SCI review, but in no case less than once every three years. Paragraph (b)(2) of Rule 1003 requires SCI entities to submit a report of the SCI review to senior management of the SCI entity for review no more than 30 calendar days after completion of such SCI review, and paragraph (b)(3) requires SCI entities to submit to the Commission, and to the board of directors of the SCI entity or the equivalent of such board, a report of the SCI review, together with any response by senior management, within 60 calendar days after its submission to senior management of the SCI entity.

The SCI review is an important part of Regulation SCI because it is a periodic evaluation by objective personnel of an SCI entity's compliance with SCI and helps the SCI entity to identify weaknesses and vulnerabilities in its systems and controls. In addition, because of Rule 1003(b)'s reporting requirements, the SCI review and the report of the SCI review helps to ensure that the senior management and board of the SCI entity are involved in and aware of the SCI entity's compliance with the regulation. Finally, the report provides the Commission and its staff insight into the SCI entity's compliance with Regulation SCI as well and assists the staff in determining how to follow up with the SCI entity in reviewing and addressing any identified weaknesses and vulnerabilities.

The SCI review is currently required to be conducted by ''objective personnel,'' and the Commission believes that this requirement continues to be appropriate. Thus, as the Commission discussed in the SCI Adopting Release, SCI reviews may be performed by personnel of the SCI entity (such as internal audit function) or an external firm, provided that such personnel are, in fact, objective and, as required by rule, have the appropriate experience to conduct reviews of SCI systems and indirect SCI systems.[341]

As described below, the Commission is proposing a number of revisions to the requirements relating to SCI reviews and for the reports SCI entities submit (both to their board of directors as well as to the Commission).[342] The definition of SCI review in Rule 1000 is proposed to be amended to contain the substantive requirements for an SCI review, which would be required to be ''a review, following established and documented procedures and standards, that is performed by objective personnel having appropriate experience to conduct reviews of SCI systems and indirect SCI systems . . .'' The revised definition of SCI review in Rule 1000 would go on to detail what an SCI review would be required to include and would require the use of appropriate risk management methodology. Specifically, paragraph (1) of the definition would require, with respect to each SCI system and indirect SCI system of the SCI entity, three assessments to be performed by objective personnel conducting the SCI review. The first required assessment would be of the risks related to the capacity, integrity, resiliency, availability, and security. The second assessment would be of internal control design and operating effectiveness to include logical and physical security controls, development processes, systems capacity and availability, information technology service continuity, and information technology governance, consistent with industry standards. The third assessment would be of third-party provider management risks and controls. As discussed above, the Commission is also proposing to update the requirement for penetration testing, from the current requirement of at least once every three years to at least annually.[343] Finally, the definition of SCI review in Rule 1000 would provide that assessments of SCI systems directly supporting market regulation or market surveillance would be required to be conducted at a frequency based upon the risk assessment conducted as part of the SCI review, but in no case less than once every three years.

It has been the experience of the Commission and its staff that the SCI reviews and their reports of such SCI reviews vary among SCI entities in content and detail. To help ensure that every SCI review and report of such reviews contain the assessments and related information the Commission and its staff believes is necessary for an SCI entity to be able to assess its compliance with Regulation SCI, the Commission proposes adding certain additional requirements and details with respect to each SCI review and the report of the SCI review that are submitted to the SCI entity's board and to the Commission. In the lead-in provision for the definition, the words ''and documented'' are proposed to be added to ensure that SCI entities and the objective personnel conducting SCI reviews document the work that is done during the SCI review. Documentation is necessary as evidence that the requirements relating to the SCI review are being complied with, and would help ensure that policies and procedures are followed. Documentation is also critical to any follow-on reviews of the work that may be required, such as follow-up on the work of the SCI review by SCI entity personnel (including by its senior management or board of directors) or by the Commission or its staff. In addition,

[341] *See* SCI Adopting Release, *supra* note 1, at 72343. The Commission continues to believe that persons who were not involved in the process for development, testing, and implementation of the systems being reviewed would generally be in a better position to identify weaknesses and deficiencies that were not identified in the development, testing, and implementation stages. Thus, any personnel with conflicts of interest that have not been adequately mitigated to allow for objectivity should be excluded from serving in this role, and a person or persons conducting an SCI review should not have a conflict of interest that interferes with their ability to exercise judgment, express opinions, and present recommendations with impartiality. *See id.*

[342] Rule 1000 (definition of SCI review) and Rule 1003(b) both currently contain requirements relating to SCI reviews. As described in this section, the Commission is proposing to focus the definition of SCI review in Rule 1000 on requirements relating to the SCI review itself, whereas Rule 1003(b)'s proposed language would be focused on the required contents of the report of the SCI review, as well as the timelines for when the SCI review is required to be conducted and when the report of the SCI review is required to be provided to senior management and the Commission.

[343] *See supra* section III.C.3.b (discussing the frequency of required penetration test reviews).

such documentation would facilitate follow-up required to address deficiencies and weaknesses that may be identified during the SCI review, such as through mitigation and remediation plans.

The proposed definition of SCI review would also require that the SCI review use ''appropriate risk management methodology.'' The objective personnel conducting the SCI review would be required to establish, document, and utilize a given risk methodology in conducting the SCI review that is appropriate for the SCI entity being reviewed. The Commission is not specifying a particular methodology that a given SCI entity and its objective personnel must use, but rather is providing the flexibility to such objective personnel to determine the risk management methodology that should be utilized, so long as it is appropriate given the SCI entity's characteristics and risks.

The requirements of the SCI review would apply to each individual SCI system and indirect SCI system, and would require that the SCI review include three specific assessments to be performed by objective personnel. This language is intended to require that each of these assessments be performed by objective personnel—either by those conducting the SCI review or others that those conducting the SCI review engage for such purposes—rather than utilizing, for example, enterprise or IT risk assessments as the basis for the SCI review after deeming them ''reasonable.'' The proposed requirement would not specify a particular control framework to be applied for such assessments, but rather would provide flexibility to those conducting the SCI review to choose the methodology they believe to be most appropriate given the particular characteristics and risks of the SCI entity's systems being assessed, and undertake the assessments themselves, or oversee and direct other objective personnel on how the assessments should be performed. The Commission considers the SCI reviews to be an important window into the strength of the technological infrastructure of SCI entities, and whether the controls implemented by the SCI entity are appropriate and employed properly. In addition, the Commission requires that objective personnel be used to help ensure the impartiality of the review and that the reviewers examine what they believe to be most appropriate for such a review.[344] The Commission believes that, by requiring that these assessments be performed by objective personnel, these assessments and tests will be able to provide the SCI entity, its senior management, its board of directors, and the Commission, an appropriately impartial and accurate assessment of the risks associated with the SCI entity's SCI systems and indirect SCI systems.

In the definition of SCI review in Rule 1000, the phrase ''a risk assessment with respect to such systems of an SCI entity'' would be replaced with an assessment of ''the risks related to the capacity, integrity, resiliency, availability, and security'' of each such system. The Commission believes that the additional detail in the proposed language would tie the required risk assessment more closely with the key principles of Regulation SCI (found in Rule 1001(a)(1)) relating to the ''capacity, integrity, resiliency, availability and security'' of each SCI entity's systems, while maintaining the focus of the assessment on the overall risks associated with such systems.

Further, in the definition of SCI review he phrase ''internal control design and effectiveness'' would be revised to read ''internal control design and operating effectiveness'' to clarify that the associated assessment must examine how well the internal controls performed in actual operations, *i.e.,* in practice. Thus, this assessment would look not only at how the controls worked in theory (*i.e.,* as designed), but also in practice (*i.e.,* in operations).[345] In addition, the definition of SCI review in Rule 1000 would expand on the list of controls to be assessed, adding ''systems capacity and availability'' and ''information technology service continuity'' to the current list of ''logical and physical security controls, development processes, and information technology governance.'' The Commission believes that systems capacity and availability and information technology service continuity are important areas for SCI entities to consider when conducting their SCI reviews, and is proposing to include them on the list of controls reviewed by objective personnel performing the SCI reviews to ensure that these additional areas of controls are assessed during each SCI review. As stated above, the foundational principles of Regulation SCI are set forth in Rule 1001 and require in part that each SCI entity establish, maintain, and enforce written policies and procedures reasonably designed to ensure that their SCI systems and, for purposes of security standards, indirect SCI systems, have levels of capacity, integrity, resiliency, availability, and security adequate to maintain their operational capability and promote the maintenance of fair and orderly markets.[346] The proposed addition of ''systems capacity and availability'' relates to this requirement with respect to ''capacity'' and ''availability,'' and ''information technology service continuity'' relates to this requirement with respect to ''resiliency'' and ''availability,'' and would require that objective personnel consider whether an SCI entity's internal controls have been designed and implemented in a manner to achieve these objectives of Regulation SCI, rather than only those currently enumerated regarding security, development processes, and governance.

New paragraph (1)(C) of the definition of SCI review in Rule 1000 would require an assessment of third-party provider management risks and controls with respect to each of its SCI systems and indirect SCI systems. As discussed in detail above,[347] third-party provider management is an important part of managing the risks posed when an SCI entity uses a third-party for functionality, support, or services.

Importantly, the proposed amended definition of SCI review under Rule 1000 uses the phrase ''with respect to each'' when referencing SCI systems and indirect SCI systems. This wording clarifies that the associated assessments are required to be made for each applicable system for each SCI review (*i.e.,* every year). Thus, the Commission believes it to be appropriate to conduct these assessments for each and every SCI system or, as applicable, indirect SCI system annually, rather than, for example, rotating control testing across several years such that not all systems and/or relevant controls are tested each year. However, in adopting Regulation SCI, the Commission determined to allow assessments of SCI systems directly supporting market regulation or market surveillance to be conducted, based upon a risk-assessment, at least

[344] *See supra* note 341 and accompanying text (discussing ''objective personnel'').

[345] *See, e.g.,* Sunil Bakshi, *Tips for Effective Control Design,* ISACA (Feb. 9, 2022), *available at https://www.isaca.org/resources/news-and-trends/newsletters/atisaca/2022/volume-6/tips-for-effective-control-design;* PCAOB, *AS2201: An Audit of Internal Controls Over Financial Reporting That is Integrated with An Audit of Financial Statements, available at https://pcaobus.org/oversight/standards/auditing-standards/details/AS2201*; and AICPA, AU–C Section 94), *An Audit of Internal Controls Over Financial Reporting That is Integrated With an Audit of Financial Statements, available at https://us.aicpa.org/content/dam/aicpa/research/standards/auditattest/downloadabledocuments/au-c-00940.pdf.*

[346] *See supra* note 39 and accompanying text.

[347] *See supra* section III.C.2.

once every three years, rather than annually, and the Commission is not amending this provision.[348]

Proposed paragraph (2) would contain the requirement that penetration test reviews be performed by objective personnel, conducted at least once each year. As discussed above, the revised requirements relating to SCI reviews would change the frequency of required penetration testing provision (currently located in Rule 1003(b)(1) but proposed to be relocated to the definition of ''SCI review'' in Rule 1000) from ''not less than once every three years'' to at least annually with each SCI review, and require that they include testing of any identified vulnerabilities of its SCI systems and indirect SCI systems.[349] In addition, the language relating to the frequency of assessments of SCI systems directly supporting market regulation or market surveillance, proposed to be in paragraph (3), would remain unchanged.[350]

Proposed Rule 1003(b) would continue to include requirements relating to the timeframes for conducting the SCI review (unchanged at ''not less than once each calendar year'') [351] and submitting reports of the SCI review to senior management (unchanged at ''no more than 30 calendar days after completion of such SCI review'') [352] and the Commission (unchanged at ''within 60 calendar days after its submission to senior management'').[353] However, proposed Rule 1003(b)(1) would add the phrase ''for each calendar year during which it was an SCI entity for any part of such calendar year'' to clarify that, if an SCI entity is an SCI entity for any part of the calendar year, it must conduct the SCI review and submit the associated report of the SCI review to the SCI entity's senior management and board, as well as to the Commission. Thus, an SCI review would be required for a new SCI entity, even in its first year as an SCI entity and even if its starting date as an SCI entity were not until late in the year. Similarly, if an SCI entity ceased to be an SCI entity during the middle of a calendar year (*e.g.,* an SCI ATS that falls out of the SCI ATS thresholds in July of a given year), it would still be required to submit an SCI review for that portion of the calendar year during which it was an SCI entity. The Commission believes this is appropriate, as the SCI review and the report of the SCI review contain, among other things, assessments of the SCI entity's compliance with the requirements of Regulation SCI which help to confirm, through objective personnel, that the capacity, integrity, resiliency, availability and security requirements of Regulation SCI have been met by the entity for the period during which it was an SCI entity.

Rule 1003(b) would also add additional detail on what the report of the SCI review is required to contain. Currently, the rule does not provide any specific requirements with respect to the contents of the report of the SCI review. In the experience of Commission staff, this has resulted in a wide range in the types and quality of SCI reports the Commission receives from SCI entities. In reviewing the reports, the Commission staff has found certain information particularly important in assessing the SCI review, and as a result the Commission is now revising the rule to require this information to be included in all reports on SCI reviews. Rule 1003(b)(2) would be revised to require the report of the SCI review to include: (i) the dates the SCI review was conducted and the date of completion; (ii) the entity or business unit of the SCI entity performing the review; (iii) a list of the controls reviewed and a description of each such control; (iv) the findings of the SCI review with respect to each SCI system and indirect SCI system, which must include, at a minimum, assessments of: the risks related to the capacity, integrity, resiliency, availability, and security; internal control design and operating effectiveness; and vendor management risks and controls; (v) a summary, including the scope of testing and resulting action plan, of each penetration test review conducted as part of the SCI review; and (vi) a description of each deficiency and weakness identified by the SCI review.

Items (i) and (ii) contain basic administrative information (relating to dates and the entity/unit conducting the SCI review) about the SCI review to identify the period over which the SCI review was conducted and the entity/unit responsible for such review that Commission staff may contact for any questions regarding the SCI review or the report of the SCI review. Item (iii), relating to controls reviewed as part of the SCI review, would assist Commission staff in understanding the scope of the review and, if applicable, also allow staff to identify and request additional information regarding any of the controls listed or any controls it believed to be missing. Item (iv) would contain the substantive findings of the SCI review and relate to the three assessments that are required to be part of the SCI review under paragraph (1) of the definition of SCI review in Rule 1000. Similarly, item (v) relates to paragraph (2) of the definition of SCI review relating to penetration test reviews and would require an SCI entity to provide a summary of each penetration test review conducted as part of the SCI review.[354] Item (v) also would require that the summary include the scope of testing and the resulting action plan. Item (vi) would require a description of each deficiency and weakness identified during the SCI review, including through the assessments and any testing conducted as part of the SCI review. This information is proposed to be included in the report of the SCI review to provide the senior management and board of the SCI entity, as well as the Commission and its staff, with information on the SCI review, including any deficiencies and weaknesses identified by the objective personnel that conducted the SCI review.

The Commission believes that requiring this minimum set of requirements for the report of the SCI review, as described above, would help ensure that SCI entities and the objective personnel that conduct the SCI review include in the report of the SCI review the key pieces of information relating to the SCI review (*i.e.,* information relating to the controls reviewed; substantive findings from the assessments conducted as part of the SCI review; summaries of penetration test reviews; and descriptions of each deficiency and weakness identified) that go towards ensuring that the SCI

[348] *See* 17 CFR 242.1003(b)(1)(ii).

[349] *See supra* section III.C.3.b. and proposed paragraph (2) of the definition of SCI review in Rule 1000, (relating to cybersecurity revisions, including penetration testing). Of course, while SCI entities would be required to conduct penetration test reviews at least annually as part of the SCI review, nothing in the proposed rule would prevent them from conducting penetration testing more frequently if warranted.

[350] As noted above, while the substance of the provision relating to the frequency of assessments of SCI systems directly supporting market regulation or market surveillance would remain unchanged, the provision would be moved from current Rule 1003(b)(1)(ii) to proposed paragraph (3) of the definition of SCI review in Rule 1000.

[351] *See* proposed Rule 1003(b)(1).

[352] *See* proposed Rule 1003(b)(2).

[353] *See* proposed Rule 1003(b)(3).

[354] The Commission notes that the proposed requirement under item (vi) would specify that a summary of each penetration test review be included but does not call for the penetration test review itself be included. The Commission believes that a summary that includes the scope of testing and action plan of the penetration test would provide Commission staff with sufficient initial information to obtain a broad understanding of what was tested and any vulnerabilities it identified and that Commission staff could, in any case, if it believed it appropriate, request that the SCI entity provide it with a copy of the penetration test review.

systems of SCI entities remain robust with respect to their capacity, integrity, resiliency, availability, and security, and are in compliance with the requirements of Regulation SCI.

Finally, the Commission is proposing several revisions to paragraph (b)(3) of Rule 1003, which relates to submission of the report of the SCI review to the Commission and to the board of directors (or its equivalent) of the SCI entity. First, because Rule 1003(b)(2) now contains details relating to the required contents of the report of the SCI review, the Commission is proposing to update the internal cross-reference in paragraph (b)(3) from ''paragraph (b)(1)'' to ''paragraph (b)(2).'' The proposed revisions would also require that, when the report is submitted to the board of directors of the SCI entity and the Commission, it must also include the date the report was submitted to senior management. In addition, the revisions would make mandatory that a response from senior management to the report is included when it is submitted to the Commission and board, whereas previously the language appeared permissive. The Commission believes that mandating a response from senior management will help ensure that both the SCI entity's senior management and board are informed of the findings in the report of the SCI review and that the SCI entity's policies and procedures are reasonably designed, as required by the rule, and as informed by the issues identified in the report.

b. Request for Comment

75. Do commenters agree with the proposed revisions to the definition of ''SCI review'' in Rule 1000? Why or why not? Do commenters agree with the proposed addition of ''and documented'' to require that the work relating to the SCI review be documented? Why or why not? Do commenters agree with the proposed addition that the objective personnel conducting the SCI review use ''appropriate risk management methodology?'' Why or why not? What risk management methodologies do commenters believe would be appropriate for use by SCI entities? Please describe. Does the requirement that SCI reviews be performed by ''objective personnel'' remain appropriate? For example, should the term ''objective personnel'' be defined? Why or why not? Should there be a requirement that the SCI review be performed by an independent third party? Why or why not? Should there be a requirement that senior management certify that the SCI review was performed by objective personnel? Why or why not?

76. What are commenters' views on not specifying a particular control framework to be applied for the internal control assessments? What are the costs and benefits to SCI entities if the Commission required the application of, for example, a suitable, recognized control framework that is established by a body or group that has followed due-process procedures, including the broad distribution of the framework for public comment?

77. With respect to the three assessments proposed to be required by paragraph (1) of the definition of SCI review, do commenters agree that these assessments should be overseen by the objective personnel responsible for the SCI review, rather than utilizing, for example, enterprise or IT risk assessments as the basis for the SCI review after deeming them ''reasonable''? Why or why not? What is the current practice among objective personnel conducting assessments for SCI reviews? Please describe. What do commenters believe would be the advantages and disadvantages for this proposed requirement?

78. Do commenters believe that it is appropriate that the SCI review include an assessment of ''the risks related to the capacity, integrity, resiliency, availability, and security,'' as proposed to be required in paragraph (1)(A) of the definition of SCI review under Rule 1000? Why or why not?

79. Do commenters believe that the revisions to the second assessment proposed to be required in paragraph (1)(A) of the definition of SCI review in Rule 1000 (replacing the phrase ''internal control design and effectiveness'' with ''internal control design and operating effectiveness,'' and adding ''systems capacity and availability'' and ''information technology service continuity'' to the current list of controls to be assessed) are appropriate as part of the SCI review?'' Why or why not?

80. Do commenters agree that the third assessment proposed to be required as part of the SCI review, relating to third-party provider management risks and controls, is appropriate? Why or why not?

81. Do commenters agree with the revision that the three assessments in paragraph (1) of the definition of SCI review be made ''with respect to each'' SCI system and indirect SCI system, thereby requiring that these assessments be made for each applicable system for each SCI review every year? Why or why not?

82. Do commenters agree that the SCI review and report of the SCI review should be conducted by an SCI entity ''for each calendar year during which it was an SCI entity for any part of such calendar year,'' as proposed to be added to Rule 1003(b)(1)? Why or why not?

83. Do commenters believe that the requirements in proposed Rule 1003(b)(2) are appropriate for the report of the SCI review? Why or why not? Do commenters believe additional requirements should be added or that any proposed requirements should be modified or not included? Why or why not? Please describe.

5. Current SCI Industry Standards

a. Overview of Current Rule 1001(a)(4)

Rule 1001(a)(4) of Regulation SCI states that, for purposes of paragraph (a) of Rule 1001, an SCI entity's policies and procedures will be deemed to be reasonably designed if they are consistent with ''current SCI industry standards.'' The provision defines ''current SCI industry standards'' to be ''comprised of information technology practices that are widely available to information technology professionals in the financial sector and issued by an authoritative body that is a U.S. governmental entity or agency, association of U.S. governmental entities or agencies, or widely recognized organization.'' In addition, Rule 1001(a)(4) also states that compliance with such current SCI industry standards shall not be the exclusive means to comply with the requirements of paragraph (a). Thus, Rule 1001(a)(4) provides a safe harbor for SCI entities to comply with Rule 1001(a) (*i.e.,* they will be deemed to comply if they have policies and procedures that are consistent with current SCI industry standards), while at the same time stating that following such current SCI industry standards is not the sole means of achieving compliance with the rule.

b. Rule 1001(a)(4) Safe Harbor

The Commission believes that utilizing current SCI industry standards is an appropriate way for SCI entities to develop their Rule 1001(a) policies and procedures. It has been the experience of the Commission and its staff that some SCI entities look to publications issued by the federal government's National Institute of Standards and Technology (''NIST'') *Framework for Improving Critical Infrastructure Cybersecurity* (''NIST Framework''),[355] or frameworks issued by non-

[355] The NIST Framework is *available at https://www.nist.gov/cyberframework/framework.*

governmental bodies such as the International Organization for Standardization (''ISO'') [356] or the Control Objectives for Information and Related Technologies (''COBIT''),[357] and some SCI entities may not point to any specific industry standards at all. In addition, among those SCI entities that utilize industry standards, some may look to a single industry standard for most or all of their policies and procedures, while others may ''mix and match'' standards for different policies and procedures. And, in some cases, an SCI entity may utilize multiple industry standards for a single set of their policies and procedures.

The Commission believes that use of industry standards continues to be an appropriate framework for SCI entities to model their policies and procedures.[358] To make clear that Rule 1001(a)(4)'s reference to and definition of ''current SCI industry standards'' provides a safe harbor for SCI entities with respect to their Rule 1001(a) policies and procedures, the Commission proposes to add the words ''safe harbor'' in Rule 1001(a)(4).[359]

c. Identification of Current SCI Industry Standards Used

In the experience of Commission staff, many SCI entities align their Rule 1001(a) policies and procedures, in part or whole, with current SCI industry standards, often referencing such standards in communications with Commission staff during inspections or examinations. However, some SCI entities do not reference any industry standard(s) for their Rule 1001(a) policies and procedures.

In conjunction with the proposed revision to Rule 1001(a)(4), the Commission is proposing to add a new requirement in Rule 1001(a)(2), which lays out certain minimum requirements for an SCI entity's Rule 1001(a) policies and procedures. Specifically, proposed new 17 CFR 242.1001(a)(2)(xi) (''proposed Rule 1001(a)(2)(xi)'') would require that an SCI entity's policies and procedures include ''[a]n identification of the current SCI industry standard(s) with which each such policy and procedure is consistent, if any.'' SCI entities are not required to avail themselves of the safe harbor of Rule 1001(a)(4) by aligning their policies and procedures required by Rule 1001(a) with current SCI industry standards,[360] but for SCI entities that choose to do so, this proposed provision would require SCI entities to provide a list of the specific current SCI industry standard(s) with which each of its policies and procedures is consistent. Thus, for example, such SCI entities would be required to identify the standard(s) used for their business continuity and disaster recovery policies and procedures, and separately identify the standard(s) used for its vendor management policies and procedures.

In addition, the Commission recognizes that there may be cases in which an SCI entity may draw from multiple current SCI industry standards in developing a given policy and procedure, and proposed Rule 1001(a)(2)(xi) recognizes this may be the case (''. . . the current SCI industry *standard (s).* . .''). In such cases, an SCI entity may simply list multiple standards with which the given policy and procedure is consistent.

d. Request for Comment

84. Do commenters agree with the proposed revisions to Rule 1001(a)(4) relating to current SCI industry standards? Why or why not?

85. Do SCI entities seek to make use of the safe harbor contained in Rule 1001(a)(4) for compliance with Rule 1001(a) of Regulation SCI? Why or why not? With what current SCI industry standard(s) do SCI entities seek to make their policies and procedures consistent?

86. For an SCI entity that seeks to avail itself of the safe harbor, do commenters agree that an SCI entity should identify the current SCI industry standard(s) with which each of its policies and procedures is consistent? Why or why not?

6. Other Changes

Rule 1002(c) of Regulation SCI requires that SCI entities disseminate information to their members or participants regarding SCI events.[361] These information dissemination requirements are scaled based on the nature and severity of an event, with SCI entities required to disseminate certain information about the event to members or participants that the SCI entity reasonably estimated to have been affected by the SCI event, and, in the case of a major SCI event, to all members or participants.[362] In connection with the proposal to include SCI broker-dealers as SCI entities, the Commission proposes that an SCI broker-dealer be required to disseminate information about an SCI event it is experiencing, in accordance with the requirements of Rule 1002(c), to its ''customers.'' As discussed above, the Commission proposes to include SCI broker-dealers as SCI entities because it believes that a systems issue at an SCI broker-dealer could, for example, impede the ability of other market participants to trade securities in a fair and orderly manner. As explained in the SCI Adopting Release, information about an SCI event is likely to be of greatest value to those market participants affected by it, who can use such information to evaluate the event's impact on their trading and other activities and develop an appropriate response.[363] To the extent that an SCI event at a broker-dealer affects its customers (*i.e.,* those with whom it trades or for whom it facilitates trades as an agent), the Commission believes that the SCI broker-dealer should inform them, and do so in the same manner and as required for other SCI entities, pursuant to Rule 1002(c). Similarly, and consistent with the current requirement of Rule 1002(b)(4)(ii)(B), an SCI broker-dealer would be required to include in its notices to the Commission a copy of any information it disseminated to its

[356] ISO is an independent, non-governmental international organization whose members include national standards bodies that develops and publishes international standards. *See* International Organization for Standardization, *available at https://www.iso.org*.

[357] COBIT is a leading framework for the enterprise governance of information and technology and is issued by ISACA, an international professional associated focused on information technology governance. *See* ISACA, *available at https://www.isaca.org*.

[358] We note that concurrent with the Commission's adoption of Regulation SCI in 2014, Commission staff stated its views regarding ''current SCI industry standards,'' including a listing of examples of publications describing processes, guidelines, frameworks, or standards for each inspection area, or domain, an SCI entity could look to in developing its reasonably designed policies and procedures. *See* Commission, *Staff Guidance on Current SCI Industry Standards* (Nov. 19, 2014), *available at https://www.sec.gov/rules/final/2014/staff-guidance-current-sci-industry-standards.pdf*. Commission staff is reviewing staff statements with respect to Regulation SCI to determine whether any such statements, or portion thereof, should be revised or withdrawn in connection with any adoption of this proposal. These statements include the Staff Guidance on Current SCI Industry Standards, as well as the Responses to Frequently Asked Questions Concerning Regulation SCI, Sept. 2, 2015 (Updated Aug. 21, 2019), *available at https://www.sec.gov/divisions/marketreg/regulation-sci-faq.shtml*.

[359] Specifically, the second sentence of Rule 1001(a)(4) would be revised to read: ''Compliance with such current SCI industry standards as a safe harbor, however, shall not be the exclusive means to comply with the requirements of paragraph (a) of this section.''

[360] For SCI entities that do not seek to avail themselves of the safe harbor of Rule 1001(a)(4), the requirements of proposed Rule 1001(a)(2)(xi) would not apply.

[361] *See* 17 CFR 242.1002(c).

[362] *Id. See also supra* section II.B.3 (discussing current Rule 1002(c)).

[363] *See* SCI Adopting Release, *supra* note 1 at 72334.

customers.[364] The Commission requests comment on the proposed amendments to Rule 1002(b)(4)(ii)(B) and Rule 1002(c) in section III.A.2.b above, which discusses the proposed definition of an SCI broker-dealer.[365]

Rule 1005 of Regulation SCI requires SCI entities to make, keep, and preserve certain records related to their compliance with Regulation SCI.[366] Rule 1005(c) specifies that the recordkeeping period survives even if an SCI entity ceases to do business or ceases to be registered under the Exchange Act. The Commission proposes to add that this survival provision applies to an SCI entity ''otherwise ceasing to be an SCI entity.'' This addition accounts for circumstances not expressly covered; specifically, those in which an SCI entity continues to do business or remains a registered entity, but may cease to qualify as an SCI entity, such as an SCI ATS that no longer satisfies a volume threshold. Such entities would not be excepted from complying with the recordkeeping provisions of Rule 1005 and would be required to make, keep, and preserve their records related to their compliance with Regulation SCI related to the period during which they were an SCI entity.

In addition, Form SCI is proposed to be modified to conform the text of the General Instructions and description of the attached Exhibits to the other changes proposed herein. Specifically, the operational aspects of Form SCI filing are unchanged, except to reflect that quarterly reports of SCI events with no or a de minimis impact would pertain only to systems disruptions, and not to systems intrusions.[367] Furthermore, the instructions to Exhibit 5 of Form SCI is proposed to be modified to reflect the requirement that an SCI entity's senior management respond to the report of the SCI review.[368] In addition, the Commission proposes to update section I of the General Instructions for Form SCI: Explanation of Terms to reflect the proposed changes in the definitions in Rule 1000, by revising the definitions of SCI entity, SCI review, SCI systems, and Systems Intrusion.

[364] *Id. See also supra* section II.B.3 (discussing current Rule 1002(b)(4).

[365] *See supra* section III.A.2.b.

[366] *See* 17 CFR 242.1005. Rule 1005(a) of Regulation SCI relates to recordkeeping provisions for SCI SROs, whereas Rule 1005(b) relates to the recordkeeping provision for SCI entities other than SCI SROs.

[367] *See supra* section III.C.3.c (discussing proposed changes to Rule 1002(b)(5)(ii)).

[368] *See supra* section III.C.4 (discussing proposed changes to Rule 1003(b)(3)).

*D. SCI Entities Subject to the Exchange Act Cybersecurity Proposal and/or Regulation S–P*

1. Discussion

a. Introduction

The Commission separately is proposing the Exchange Act Cybersecurity Proposal,[369] and separately is also proposing to amend Regulation S–P.[370] As discussed in more detail below, certain types of SCI entities also are or would be subject to the Exchange Act Cybersecurity Proposal and/or Regulation S–P (currently and as it would be amended).[371] The Exchange Act Cybersecurity Proposal and Regulation S–P (currently and as it would be amended) have or would have provisions requiring policies and procedures that address certain types of cybersecurity risks.[372] The Exchange Act Cybersecurity Proposal also requires certain reporting to the Commission on Form SCIR of certain types of cybersecurity incidents.[373] These notification and subsequent reporting requirements of the Exchange Act Cybersecurity Proposal are triggered by a ''significant cybersecurity incident,'' [374] which could also be an SCI event such as a ''systems intrusion'' as that term would be defined in current and proposed Rule 1000 of Regulation SCI.[375] Finally, the Exchange Act Cybersecurity Proposal and Regulation S–P (currently and as it would be amended) have or would have provisions requiring disclosures of certain cybersecurity incidents.[376] Consequently, if the proposed amendments to Regulation SCI and the other proposals are all adopted as proposed, SCI entities could be subject to requirements of that rule that relate to certain proposed requirements of the Exchange Act Cybersecurity Proposal and certain existing and proposed requirements of Regulation S–P. In the Commission's view, this would be appropriate because, while the current and proposed cybersecurity requirements of Regulation SCI may impose some broadly similar obligations, it has a different scope and purpose than the Exchange Act Cybersecurity Proposal and Regulation S–P. Moreover, in many instances, compliance with the current and proposed cybersecurity requirements of Regulation SCI that relate to the proposed requirements of the Exchange Act Cybersecurity Proposal and the existing or proposed requirements Regulation S–P can be accomplished through similar efforts.

The specific instances in which the cybersecurity requirements of current and proposed Regulation SCI would relate to the proposed requirements of the Exchange Act Cybersecurity Proposal and the existing or proposed requirements of Regulation S–P are discussed briefly below. The Commission encourages interested persons to provide comments on the discussion below, as well as on the potential application of Regulation SCI, the Exchange Act Cybersecurity Proposal, and Regulation S–P. More specifically, the Commission encourages commenters: (1) to identify any areas where they believe the relation between requirements of the existing or proposed requirements of Regulation SCI and the proposed requirements of the Exchange Act Cybersecurity Proposal and the existing or proposed requirements of Regulation S–P would be particularly costly or create practical implementation difficulties; (2) to provide details on why these instances would be particularly costly or create practical implementation difficulties; and (3) to make recommendations on

[369] *See* Exchange Act Cybersecurity Proposal, *supra* note 10.

[370] *See* Regulation S–P 2023 Proposing Release *supra* note 10.

[371] *See* proposed 17 CFR 242.10 of the Exchange Act Cybersecurity Proposal Rule (''Rule 10''); 17 CFR 248.1 through 248.30 (Regulation S–P). *See also* section III.D.1.b. of this release (discussing the types of SCI Entities that are or would be subject to the Exchange Act Cybersecurity Proposal and/or Regulation S–P).

[372] *See infra* section III.D.1.c (discussing the proposed requirements of the Exchange Act Cybersecurity Proposal and the existing and proposed requirements of Regulation S–P to have policies and procedures that address certain cybersecurity risks).

[373] *See infra* section III.D.1.d (discussing the proposed Commission notification requirements of the Exchange Act Cybersecurity Proposal).

[374] The Exchange Act Cybersecurity Proposal defines a ''significant cybersecurity incident'' to be a cybersecurity incident, or a group of related cybersecurity incidents, that: (i) Significantly disrupts or degrades the ability of the market entity to maintain critical operations; or (ii) Leads to the unauthorized access or use of the information or information systems of the market entity, where the unauthorized access or use of such information or information systems results in or is reasonably likely to result in: (A) Substantial harm to the market entity; or (B) Substantial harm to a customer, counterparty, member, registrant, or user of the market entity, or to any other market participant that interacts with the market entity. *See* proposed § 242.10(a) of the Exchange Act Cybersecurity Proposal.

[375] *See* current and proposed Rule 1000 of Regulation SCI (defining the term ''systems intrusion'').

[376] *See infra* section III.D.1.e (discussing the proposed disclosure requirements of the Exchange Act Cybersecurity Proposal and the existing and proposed disclosure requirements of Regulation S–P).

how to minimize these potential impacts, while also achieving the goal of this proposal to address, among other things, the cybersecurity risks faced by SCI entities. To assist this effort, the Commission is seeking specific comment below on these topics.[377]

b. SCI Entities That Are or Would Be Subject to the Exchange Act Cybersecurity Proposal and/or Regulation S–P

Various SCI entities under this proposal are or would be subject to the Exchange Act Cybersecurity Proposal and/or Regulation S–P (currently and as it would be amended). In particular, most SCI entities under Regulation SCI (currently and as it would be amended) would be subject to the requirements of Exchange Act Cybersecurity Proposal. Specifically, all SCI entities other than plan processors and SCI competing consolidators that are or would be subject to Regulation SCI also would be subject to the Exchange Act Cybersecurity Proposal as ''covered entities'' [378] of that proposal. Therefore, if the proposed amendments to Regulation SCI and the Exchange Act Cybersecurity Proposal are all adopted as proposed, these SCI entities would be subject to the requirements of Regulation SCI in addition to the requirements of the Exchange Act Cybersecurity Proposal.

In addition, broker-dealers that would be subject to Regulation SCI and those that operate certain ATSs currently subject to Regulation ATS (*i.e.,* as SCI ATSs or SCI broker-dealers) also are or would be subject to Regulation S–P (currently and as it would be amended).[379] Therefore, if the proposed amendments to Regulation SCI and Regulation S–P are all adopted as proposed, broker-dealers could be subject to Regulation SCI in addition to the requirements of Regulation S–P (currently and as it would be amended).

c. Policies and Procedures To Address Cybersecurity Risks

As discussed below, Regulation S–P currently has certain cybersecurity-related provisions. The Exchange Act Cybersecurity Proposal and the proposed amendments to Regulation S–P would add to these requirements. These existing and proposed requirements would relate to certain of the requirements of Regulation SCI (currently and as it would be amended). The Commission believes this result would be appropriate because the policies and procedures requirements of Regulation SCI (currently and as it would be amended) differ in scope and purpose from those of the Exchange Act Cybersecurity Proposal and Regulation S–P, and because the policies and procedures required under Regulation SCI that relate to cybersecurity (currently and as it would be amended) are generally consistent with the proposed requirements of the Exchange Act Cybersecurity Proposal and the existing and proposed requirements of Regulation S–P that pertain to cybersecurity.

i. Different Scope of the Policies and Procedures Requirements

As discussed above in sections II.B and III.C, Regulation SCI (currently and as it would be amended) limits its requirements to *SCI systems,* which are certain systems of the SCI entity that support specified securities market related functions,[380] and *indirect SCI systems.*[381] Therefore, the policies and procedures requirements of Regulation SCI (currently and as it would be amended) that pertain to cybersecurity apply to SCI systems and indirect SCI systems. They do not and would not apply to other systems maintained by an SCI entity.

Regulation S–P's safeguards provisions currently apply to *customer records and information.*[382] Regulation S–P defines ''customer'' to mean a consumer who has a customer relationship with the broker-dealer.[383] Regulation S–P further defines the term ''consumer'' to mean an individual who obtains or has obtained a financial product or service from the broker-dealer that is to be used primarily for personal, family, or household purposes, or that individual's legal representative.[384] Regulation S–P's disposal provisions apply to *consumer report information* maintained for a business purpose.[385] Regulation S–P currently defines ''consumer report information'' to mean any record about an individual, whether in paper, electronic or other form, that is a consumer report or is derived from a consumer report and also a compilation of such records.[386] The Commission is separately proposing to amend the scope of information covered under both the Regulation S–P safeguards provisions and the Regulation S–P disposal provisions.[387] The amendments, however, would not fundamentally broaden the scope of these provisions. Therefore, the existing and proposed policies and procedures requirements of the Regulation S–P safeguards and disposal provisions that pertain to cybersecurity would apply to customer and consumer-related information. They do not and would not apply to other types of information stored on the information systems of the broker-dealer.[388]

Regulation SCI (currently and as it would be amended), the Exchange Act Cybersecurity Proposal, and Regulation S–P (currently and as it would be amended) would, therefore, differ in scope. The Exchange Act Cybersecurity

[377] *See infra* section III.D.2.

[378] The requirements of the Exchange Act Cybersecurity Proposal would apply to broker-dealers, clearing agencies, major security-based swap participants, the MSRB, national securities associations, national securities exchanges, security-based swap data repositories, security-based swap dealers, and transfer agents. *See* proposed 17 CFR 240.10(a). The Commission believes that a broker-dealer that exceeds one or more of the transaction activity thresholds under the proposed amendments to Regulation SCI (*i.e.,* an SCI broker-dealer) likely would meet one of the broker-dealer definitions of ''covered entity'' in proposed Rule 10 of the Exchange Act Cybersecurity Proposal given their size and activities. For example, it would either be a carrying broker-dealer, have regulatory capital equal to or exceeding $50 million, have total assets equal to or exceeding $1 billion, or operate as a market maker. *See* paragraphs (a)(1)(i)(A), (C), (D), and (E) of proposed Rule 10. The Commission is seeking comment in the Exchange Act Cybersecurity Proposal as to whether a broker-dealer that is an SCI entity should be defined specifically as a ''covered entity'' under proposed Rule 10. *See* section II.A.10 of the Exchange Act Cybersecurity Proposal. In addition, the Commission requests comment in the Exchange Act Cybersecurity Proposal as to whether plan processors and SCI competing consolidators should be subject to its requirements. *See id.* The discussion in this section III.D focuses on the requirements of the Exchange Act Cybersecurity Proposal only as they would apply to current and proposed SCI entities.

[379] Regulation S–P applies to additional types of market participants that are not or would not be subject to Regulation SCI. *See* 17 CFR 248.3. For example, with regard to the proposed inclusion of broker-dealers, Regulation SCI would only be applicable to an estimated 17 broker-dealers under the proposed definition of SCI broker-dealer. The discussion in this section III.D focuses on the current and proposed requirements of Regulation S–P only as they would apply to current and proposed SCI entities.

[380] *See* 17 CFR 242.1000 (defining ''SCI systems''). *See also supra* section II.B.1.

[381] *See* 17 CFR 242.1000 (defining ''indirect SCI systems''). *See also supra* section II.B.1.

[382] *See* 17 CFR 248.30(a).

[383] *See* 17 CFR 248.3(j).

[384] *See* 17 CFR 248.3(g)(1).

[385] *See* 17 CFR 248.30(b)(2).

[386] *See* 17 CFR 248.30(b)(1)(ii).

[387] *See* Regulation S–P 2023 Proposing Release.

[388] Additionally, Regulation S–P (currently and as it would be amended) implicates cybersecurity to the extent that customer records or information or consumer report information is stored on an information system (*e.g.,* on a computer). If this information is stored in paper form (*e.g.,* in a file cabinet), the requirements of Regulation S–P apply but the policies and procedures required under the rule would need to address risks that are different than cybersecurity risks—for example, the *physical security risk* that individuals could gain unauthorized access to the room or file cabinet where the paper records are stored as compared to the *cybersecurity risk* that individuals could gain unauthorized access to the information system on which the records are stored electronically.

Proposal would require covered entities to establish, maintain, and enforce written policies and procedures that are reasonably designed to address their cybersecurity risks.[389] Therefore, the Exchange Act Cybersecurity Proposal does not limit its application to certain systems or information residing on those systems based on the functions and operations performed by the covered entity through the system or the use of the information residing on the system unlike Regulation SCI (currently and as it would be amended). In addition, the Exchange Act Cybersecurity Proposal does not limit its application to a specific type of information residing on an information system unlike Regulation S–P (currently and as it would be amended).

ii. Consistency of the Policies and Procedures Requirements

The Commission also believes that it would be appropriate to apply Regulation SCI to SCI entities even if they also are subject to the requirements of the Exchange Act Cybersecurity Proposal and/or Regulation S–P (currently and as it would be amended) because an SCI entity could use one comprehensive set of policies and procedures to satisfy the requirements of the current and proposed cybersecurity-related policies and procedures requirements of Regulation SCI, the Exchange Act Cybersecurity Proposal, and Regulation S–P. As explained below, the more focused current and proposed policies and procedures requirements of Regulation SCI and Regulation S–P addressing certain cybersecurity risks would logically fit within and be consistent with the broader policies and procedures required under the Exchange Act Cybersecurity Proposal to address all cybersecurity risks (including those outside of SCI systems and indirect SCI systems).

SCI entities that would be covered entities under the proposed requirements of the Exchange Act Cybersecurity Proposal would be subject the proposed policies and procedures requirements of the Exchange Act Cybersecurity Proposal. In addition, broker-dealers that would be subject to Regulation SCI and those that operate certain ATSs currently subject to Regulation ATS (*i.e.,* as SCI ATSs or SCI broker-dealers) are subject to the requirements of Regulation S–P (currently and as it would be amended).

*General Cybersecurity Policies and Procedures Requirements.* Regulation SCI, Regulation S–P, and the Exchange Act Cybersecurity Proposal all include requirements that address certain cybersecurity-related risks. Regulation SCI requires an SCI entity to have reasonably designed policies and procedures to ensure that its SCI systems and, for purposes of security standards, indirect SCI systems, have levels of capacity, integrity, resiliency, availability, and security, adequate to maintain the SCI entity's operational capability and promote the maintenance of fair and orderly markets.[390]

Regulation S–P's safeguards provisions require broker-dealers to adopt written policies and procedures that address administrative, technical, and physical safeguards for the protection of customer records and information.[391] Additionally, Regulation S–P's disposal provisions require broker-dealers that maintain or otherwise possess consumer report information for a business purpose to properly dispose of the information by taking reasonable measures to protect against unauthorized access to or use of the information in connection with its disposal.[392]

Rule 10 of the Exchange Act Cybersecurity Proposal would require a covered entity to establish, maintain, and enforce written policies and procedures that are reasonably designed to address the covered entity's cybersecurity risks. These requirements are designed to position covered entities to be better prepared to protect themselves against cybersecurity risks, to mitigate cybersecurity threats and vulnerabilities, and to recover from cybersecurity incidents. They are also designed to help ensure that covered entities focus their efforts and resources on the cybersecurity risks associated with their operations and business practices.

A covered entity that implements reasonably designed policies and procedures in compliance with the requirements of the Exchange Act Cybersecurity Proposal that cover its SCI systems and indirect SCI systems should generally satisfy the current and proposed general policies and procedures requirements of Regulation SCI that pertain to cybersecurity.[393] Similarly, policies and procedures implemented by a broker-dealer that is an SCI entity that are reasonably designed in compliance with the current and proposed cybersecurity requirements of Regulation SCI should generally satisfy the existing general policies and procedures requirements of Regulation S–P safeguards and disposal provisions discussed above that pertain to cybersecurity.

*Requirements to Oversee Service Providers.* Under the amendments to Regulation SCI, the policies and procedures required of SCI entities would need to include a program to manage and oversee third-party providers that provide functionality, support or service, directly or indirectly, for SCI systems and indirect SCI systems, and are discussed above in more detail in section III.C.2. In addition, proposed amendments to Regulation S–P's safeguards provisions would require broker-dealers to include written policies and procedures within their response programs that require their service providers, pursuant to a written contract, to take appropriate measures that are designed to protect against unauthorized access to or use of customer information, including notification to the broker-dealer in the event of any breach in security resulting in unauthorized access to a customer information maintained by the service provider to enable the broker-dealer to implement its response program.[394]

Proposed Rule 10 of the Exchange Act Cybersecurity Proposal would have several policies and procedures requirements that are designed to address similar cybersecurity-related

[389] *See* paragraphs (b) and (e) of proposed Rule 10 (setting forth the requirements of covered entities, among others, to have policies and procedures to address their cybersecurity risks).

[390] *See* 17 CFR 242.1001(a)(1).

[391] *See* 17 CFR 248.30(a).

[392] *See* 17 CFR 248.30(b)(2). Regulation S–P currently defines the term ''disposal'' to mean: (1) the discarding or abandonment of consumer report information; or (2) the sale, donation, or transfer of any medium, including computer equipment, on which consumer report information is stored. *See* 17 CFR 248.30(b)(1)(iii).

[393] The CAT System is a facility of each of the Participants and an SCI system. *See also Joint Industry Plan; Order Approving the National Market System Plan Governing the Consolidated Audit Trail,* Securities Exchange Act Release No. 79318 (Nov. 15, 2016), 81 FR 84696, 84758 (Nov. 23, 2016) (''CAT NMS Plan Approval Order''). It would also qualify as an ''information system'' of each national securities exchange and each national securities association under the Exchange Act Cybersecurity Proposal. The CAT NMS Plan requires the CAT's Plan Processor to follow certain security protocols and industry standards, including the NIST Cyber Security Framework, subject to Participant oversight. *See, e.g.,* CAT NMS Plan at Appendix D, Section 4.2. For the reasons discussed above and below with respect to SCI systems, the policies and procedures requirements of Regulation SCI are not intended to be inconsistent with the security protocols set forth in the CAT NMS Plan. Moreover, to the extent the CAT NMS Plan requires security protocols beyond those that would be required under Regulation SCI, those additional security protocols should generally fit within and be consistent with the policies and procedures required under the Exchange Act Cybersecurity Proposal to address all cybersecurity risks.

[394] *See* Regulation S–P 2023 Proposing Release.

risks to these proposed amendments to Regulation SCI and Regulation S–P. First, a covered entity's policies and procedures under proposed Rule 10 would need to require periodic assessments of cybersecurity risks associated with the covered entity's information systems and information residing on those systems.[395] This element of the policies and procedures would need to include requirements that the covered entity identify its service providers that receive, maintain, or process information, or are otherwise permitted to access its information systems and any of its information residing on those systems, and assess the cybersecurity risks associated with its use of these service providers.[396] Second, under proposed Rule 10, a covered entity's policies and procedures would need to require oversight of service providers that receive, maintain, or process its information, or are otherwise permitted to access its information systems and the information residing on those systems, pursuant to a written contract between the covered entity and the service provider, and through that written contract the service providers would need to be required to implement and maintain appropriate measures that are designed to protect the covered entity's information systems and information residing on those systems.[397]

A covered entity that implements these requirements of proposed Rule 10 of the Exchange Act Cybersecurity Proposal with respect to its SCI systems and indirect SCI systems should generally satisfy the proposed requirements of Regulation SCI that the SCI entity's policies and procedures include a program to manage and oversee third-party providers that provide functionality, support or service, directly or indirectly, for SCI systems and indirect SCI systems. Similarly, a broker-dealer that is an SCI entity that implements these requirements of Regulation SCI should generally comply with the proposed requirements of Regulation S–P's safeguards provisions relating to the oversight of service providers.

*Unauthorized Access Requirements.* Under the proposed amendments to Regulation SCI, SCI entities would be required to have a program to prevent the unauthorized access to their SCI systems and indirect SCI systems, and information residing therein, and are discussed above in more detail in section III.C.3.a. The proposed amendments to Regulation S–P's disposal provisions would require broker-dealers that maintain or otherwise possess consumer information or customer information for a business purpose to properly dispose of this information by taking reasonable measures to protect against unauthorized access to or use of the information in connection with its disposal.[398] The broker-dealer would be required to adopt and implement written policies and procedures that address the proper disposal of consumer information and customer information in accordance with this standard.[399]

Proposed Rule 10 of the Exchange Act Cybersecurity Proposal would have several policies and procedures requirements that are designed to address similar cybersecurity-related risks to these proposed requirements of Regulation SCI and the proposed disposal provisions of Regulation S–P. First, a covered entity's policies and procedures under proposed Rule 10 would need controls: (1) requiring standards of behavior for individuals authorized to access the covered entity's information systems and the information residing on those systems, such as an acceptable use policy; (2) identifying and authenticating individual users, including but not limited to implementing authentication measures that require users to present a combination of two or more credentials for access verification; (3) establishing procedures for the timely distribution, replacement, and revocation of passwords or methods of authentication; (4) restricting access to specific information systems of the covered entity or components thereof and the information residing on those systems solely to individuals requiring access to the systems and information as is necessary for them to perform their responsibilities and functions on behalf of the covered entity; and (5) securing remote access technologies.[400]

Second, under proposed Rule 10, a covered entity's policies and procedures would need to include measures designed to protect the covered entity's information systems and protect the information residing on those systems from unauthorized access or use, based on a periodic assessment of the covered entity's information systems and the information that resides on the systems.[401] The periodic assessment would need to take into account: (1) the sensitivity level and importance of the information to the covered entity's business operations; (2) whether any of the information is personal information; (3) where and how the information is accessed, stored and transmitted, including the monitoring of information in transmission; (4) the information systems' access controls and malware protection; and (5) the potential effect a cybersecurity incident involving the information could have on the covered entity and its customers, counterparties, members, registrants, or users, including the potential to cause a significant cybersecurity incident.[402]

A covered entity that implements these requirements of proposed Rule 10 of the Exchange Act Cybersecurity Proposal with respect to its SCI systems and indirect SCI systems should generally satisfy the proposed requirements of Regulation SCI that the SCI entity's policies and procedures include a program to prevent the unauthorized access to their SCI systems and indirect SCI systems, and information residing therein. Similarly, a broker-dealer that is an SCI entity that implements these proposed requirements of Regulation SCI should generally satisfy the proposed requirements of Regulation S–P's disposal provisions to adopt and implement written policies and procedures that address the proper disposal of consumer information and customer information.

*Review Requirements.* The current and proposed provisions of Regulation SCI prescribe certain elements that must be included in each SCI entity's policies and procedures relating to regular reviews and testing, penetration testing, and the SCI review, and are discussed above in more detail in sections II.B.2, II.B.4, III.C.3.b, and III.C.4.

Proposed Rule 10 of the Exchange Act Cybersecurity Proposal would have several policies and procedures requirements that are designed to

[395] *See* paragraph (b)(1)(i)(A) of proposed Rule 10; *see also* section II.B.1.a of the Exchange Act Cybersecurity Proposal (discussing this requirement in more detail).

[396] *See* paragraph (b)(1)(i)(A)(*2*) of proposed Rule 10.

[397] *See* paragraphs (b)(1)(iii)(B) of proposed Rule 10; *see also* section II.B.1.c. of this release (discussing this requirement in more detail).

[398] *See* Regulation S–P 2023 Proposing Release. As discussed above, the general policies and procedures requirements of Regulation S–P's safeguards provisions require the policies and procedures—among other things—to protect against unauthorized access to or use of customer records or information that could result in substantial harm or inconvenience to any customer. *See* 17 CFR 248.30(a)(3).

[399] *See* Regulation S–P 2023 Proposing Release.

[400] *See* paragraphs (b)(1)(ii)(A) through (E) of proposed Rule 10; *see also* section II.B.1.b of the Exchange Act Cybersecurity Proposal (discussing these requirements in more detail).

[401] *See* paragraph (b)(1)(iii)(A) of proposed Rule 10; *see also* section II.B.1.c. of the Exchange Act Cybersecurity Proposal (discussing these requirements in more detail).

[402] *See* paragraphs (b)(1)(iii)(A)(*1*) through (*5*) of proposed Rule 10.

address similar cybersecurity-related risks to these existing and proposed requirements of Regulation SCI. First, a covered entity's policies and procedures under proposed Rule 10 would need to require periodic assessments of cybersecurity risks associated with the covered entity's information systems and information residing on those systems.[403] Moreover, this element of the policies and procedures would need to include requirements that the covered entity categorize and prioritize cybersecurity risks based on an inventory of the components of the covered entity's information systems and information residing on those systems and the potential effect of a cybersecurity incident on the covered entity.[404] Second, under proposed Rule 10, a covered entity's policies and procedures would need to require measures designed to detect, mitigate, and remediate any cybersecurity threats and vulnerabilities with respect to the covered entity's information systems and the information residing on those systems.[405]

A covered entity that implements these requirements of proposed Rule 10 with respect to its SCI systems and indirect SCI systems should generally satisfy the current requirements of Regulation SCI that the SCI entity's policies and procedures require regular reviews and testing of SCI systems and indirect SCI systems, including backup systems, to identify vulnerabilities from internal and external threats. Further, while proposed Rule 10 does not require penetration testing, the proposed rule requires measures designed to protect the covered entity's information systems and protect the information residing on those systems from unauthorized access or use, based on a periodic assessment of the covered entity's information systems and the information that resides on the systems [406] and penetration testing could be part of these measures.[407] Therefore, the existing and proposed requirements of Regulation SCI requiring penetration testing could be incorporated into and should logically fit within a covered entity's policies and procedures to address cybersecurity risks under proposed Rule 10 of the Exchange Act Cybersecurity Proposal.

*Response Program.* Regulation SCI requires SCI entities to have policies and procedures to monitor its SCI systems and indirect SCI systems for SCI events, which include systems intrusions for unauthorized access, and also requires them to have policies and procedures that include escalation procedures to quickly inform responsible SCI personnel of potential SCI events, which are discussed above in more detail in section II.B.2.[408] The amendments to Regulation S–P's safeguards provisions would require the policies and procedures to include a response program for unauthorized access to or use of customer information. Further, the response program would need to be reasonably designed to detect, respond to, and recover from unauthorized access to or use of customer information, including procedures, among others: (1) to assess the nature and scope of any incident involving unauthorized access to or use of customer information and identify the customer information systems and types of customer information that may have been accessed or used without authorization; and (2) to take appropriate steps to contain and control the incident to prevent further unauthorized access to or use of customer information.[409]

Proposed Rule 10 of the Exchange Act Cybersecurity Proposal would have several policies and procedures requirements that are designed to address similar cybersecurity-related risks to these proposed requirements of Regulation SCI and the proposed requirements of the safeguards provisions of Regulation S–P. First, under proposed Rule 10, a covered entity's policies and procedures would need to have measures designed to detect, mitigate, and remediate any cybersecurity threats and vulnerabilities with respect to the covered entity's information systems and the information residing on those systems.[410] Second, under proposed Rule 10, a covered entity's policies and procedures would need to have measures designed to detect, respond to, and recover from a cybersecurity incident, including policies and procedures that are reasonably designed to ensure (among other things): (1) the continued operations of the covered entity; (2) the protection of the covered entity's information systems and the information residing on those systems; and (3) external and internal cybersecurity incident information sharing and communications.[411]

A covered entity that implements reasonably designed policies and procedures in compliance with these requirements of proposed Rule 10 of the Exchange Act Cybersecurity Proposal should generally satisfy the current and proposed requirements of Regulation SCI and Regulation S–P's safeguards provisions relating to response programs for unauthorized access.

d. Commission Notification

As discussed above in sections II.B.3 and III.C.3.c, Regulation SCI (currently and as it would be amended) provides the framework for notifying the Commission of SCI events including, among other things, requirements to: notify the Commission of the event immediately; provide a written notification on Form SCI within 24 hours that includes a description of the SCI event and the system(s) affected, with other information required to the extent available at the time; provide regular updates regarding the SCI event until the event is resolved; and submit a final detailed written report regarding the SCI event.[412] If proposed Rule 10 of the Exchange Act Cybersecurity Proposal is adopted as proposed, it would establish a framework for covered entities to provide the Commission (and other regulators, if applicable) with immediate written electronic notice of a significant cybersecurity incident affecting the covered entity and, thereafter, report and update information about the

[403] *See* paragraph (b)(1)(i)(A) of proposed Rule 10; *see also* section II.B.1.a of the Exchange Act Cybersecurity Proposal (discussing this requirement in more detail).

[404] *See* paragraph (b)(1)(i)(A)(*1*) of proposed Rule 10.

[405] *See* paragraph (b)(1)(iv) of proposed Rule 10; *see also* section II.B.1.d of the Exchange Act Cybersecurity Proposal (discussing this requirement in more detail).

[406] *See* paragraph (b)(1)(iii)(A) of proposed Rule 10.

[407] *See also* section II.B.1.c of the Exchange Act Cybersecurity Proposal.

[408] *See* paragraphs (a)(2)(vii) and (c)(1) of Rule 1001 of Regulation SCI, respectively. *See also* Rule 1002(a) of Regulation SCI and *supra* sections II.B.3 and III.C.3.c (discussing Regulation SCI's current and proposed requirements with respect to taking corrective action for SCI events, including systems intrusions).

[409] *See* Regulation S–P 2023 Proposing Release. The response program also would need to have procedures to notify each affected individual whose sensitive customer information was, or is reasonably likely to have been, accessed or used without authorization unless the covered institution determines, after a reasonable investigation of the facts and circumstances of the incident of unauthorized access to or use of sensitive customer information, the sensitive customer information has not been, and is not reasonably likely to be, used in a manner that would result in substantial harm or inconvenience. *See id.*

[410] *See* paragraph (b)(1)(iv) of proposed Rule 10; *see also* section II.B.1.d of the Exchange Act Cybersecurity Proposal (discussing this requirement in more detail).

[411] *See* paragraph (b)(1)(v) of proposed Rule 10; *see also* section II.B.1.e of the Exchange Act Cybersecurity Proposal (discussing this requirement in more detail).

[412] *See* 17 CFR 242.1002(b); *supra* sections II.B.2 and III.C.3.c (discussing Regulation SCI's current and proposed requirements relating to SCI events, which include systems intrusions, and Commission notification for SCI events).

significant cybersecurity incident by filing Part I of proposed Form SCIR with the Commission (and other regulators, if applicable).[413] Part I of proposed of Form SCIR would elicit information about the significant cybersecurity incident and the covered entity's efforts to respond to, and recover from, the incident.

Consequently, an SCI entity that is also a covered entity under the Exchange Act Cybersecurity Proposal that experiences a systems intrusion under Regulation SCI that also is a significant cybersecurity incident under proposed Rule 10 would be required to make two filings for the single incident: one on Form SCI and the other on Part I of proposed Form SCIR. The SCI entity also would be required to make additional filings on Forms SCI and SCIR pertaining to the systems intrusion (*i.e.,* to provide updates and final reports). The Commission believes the approach of having two separate notification and reporting programs—one under Regulation SCI and the other under proposed Rule 10 of the Exchange Act Cybersecurity Proposal—would be appropriate for the following reasons.

As discussed earlier, most broker-dealers would not be SCI entities under the current and proposed requirements of Regulation SCI.[414] Certain of the broker-dealers that are not SCI entities (currently and as it would be amended) would be covered entities under the Exchange Act Cybersecurity Proposal, as would other types of entities.[415] In addition, the current and proposed reporting requirements of Regulation SCI are or would be triggered by events impacting *SCI systems* and *indirect SCI systems.* In addition to SCI systems and indirect SCI systems, covered entities that are or would be SCI entities use and rely on information systems that are not SCI systems or indirect SCI systems under the current and proposed amendments to Regulation SCI. For these reasons, covered entities under the Exchange Act Cybersecurity Proposal could be impacted by significant cybersecurity incidents that do not trigger the current and proposed notification requirements of Regulation SCI either because they do not meet the current or proposed definitions of ''SCI entity'' or because the significant cybersecurity incident does not meet the current or proposed definitions of ''SCI event.''

The objective of notification and reporting requirements of proposed Rule 10 of the Exchange Act Cybersecurity Proposal is to improve the Commission's ability to monitor and respond to significant cybersecurity incidents and use the information reported about them to better understand how they can be avoided or mitigated.[416] For this reason, Part I of proposed Form SCIR is tailored to elicit information relating specifically to cybersecurity, such as information relating to the threat actor, and the impact of the incident on any data or personal information that may have been accessed.[417] The Commission and its staff could use the information reported on Part I of Form SCIR to monitor the U.S. securities markets and the covered entities that support those markets broadly from a cybersecurity perspective, including identifying cybersecurity threats and trends from a market-wide view. By requiring all covered entities to report information about a significant cybersecurity incident on a common form, the information obtained from these filings over time would create a comprehensive set of data of all significant cybersecurity incidents impacting covered entities that is based on these entities responding to the same check boxes and questions on the form. This would facilitate analysis of the data, including analysis across different covered entities and significant cybersecurity incidents. Eventually, this set of data and the ability to analyze it by searching and sorting how different covered entities responded to the same questions on the form could be used to spot common trending risks and vulnerabilities as well as best practices employed by covered entities to respond to and recover from significant cybersecurity incidents.[418]

The current and proposed definitions of ''SCI event'' include not only cybersecurity events, but also events that are not related to significant cybersecurity incidents under the Exchange Act Cybersecurity Proposal.[419] For example, under the current and proposed requirements of Regulation SCI, the definition of ''SCI event'' includes ''systems disruptions,'' which are events in an SCI entity's SCI systems that disrupts, or significantly degrades, the normal operation of an SCI system.[420] Therefore, the definitions are not limited to events in an SCI entity's SCI systems that disrupt, or significantly degrade, the normal operation of an SCI system *caused by a significant cybersecurity incident.* The information elicited in Form SCI reflects the broader scope of the reporting requirements of Regulation SCI (as compared to the narrower focus of proposed Rule 10 on reporting about significant cybersecurity incidents). For example, Form SCI requires the SCI entity to identify the type of SCI event: systems compliance issue, systems disruption, and/or systems intrusion. In addition, Form SCI is tailored to elicit information specifically about SCI systems. For example, the form requires the SCI entity to indicate whether the type of SCI system impacted by the SCI event directly supports: (1) trading; (2) clearance and settlement; (3) order routing; (4) market data; (5) market regulation; and/or (6) market surveillance. If the impacted system is a critical SCI system, the SCI entity must indicate whether it directly supports functionality relating to: (1) clearance and settlement systems of clearing agencies; (2) openings, reopenings, and closings on the primary listing market; (3) trading halts; (4) initial public offerings; (5) the provision of consolidated market data; and/or (6) exclusively listed securities. The form also requires the SCI entity to indicate if the systems that provide functionality to the securities markets for which the availability of alternatives is significantly limited or nonexistent and without which there would be a material impact on fair and orderly markets.

e. Information Dissemination and Disclosure

As discussed above in sections II.B.3 and III.C.3.c, Regulation SCI (currently and as it would be amended) would require that SCI entities disseminate information to their members,

[413] *See* paragraphs (c)(1) and (2) of proposed Rule 10 (requiring covered entities to provide immediate written notice and subsequent reporting on Part I of proposed Form SCIR of significant cybersecurity incidents); and sections II.B.2. and II.B.4. of the Exchange Act Cybersecurity Proposal (discussing the requirements of paragraphs (c)(1) and (2) of proposed Rule 10 and Part I of Form SCIR in more detail).

[414] *See* section II.F.1.b of the Exchange Act Cybersecurity Proposal.

[415] *See* paragraphs (a)(1)(i)(A) and (F) of proposed Rule 10 (defining the categories of broker-dealers that would be covered entities); *see also supra* note 378.

[416] *See* section II.B.2.a of the Exchange Act Cybersecurity Proposal.

[417] *See* section II.B.2.b of the Exchange Act Cybersecurity Proposal.

[418] FSOC has found that ''[s]haring timely and actionable cybersecurity information can reduce the risk that cybersecurity incidents occur and can mitigate the impacts of those that do occur.'' FSOC, *Annual Report (2021), available at https://home.treasury.gov/system/files/261/FSOC2021AnnualReport.pdf* (''FSOC 2021 Annual Report'').

[419] *See* 17 CFR 242.1000 (defining the term ''SCI event''); *see also supra* sections II.B.3 and III.C.3.c (discussion the current and proposed requirements relating to SCI events, including systems intrusions).

[420] *See* 17 CFR 242.1000 (defining the term ''system disruption'' and including that term in the definition of ''SCI event'').

participants, or customers (as applicable) regarding SCI events, including systems intrusions.[421] The proposed amendments to Regulation S–P would require broker-dealers to notify affected individuals whose sensitive customer information was, or is reasonably likely to have been, accessed or used without authorization.[422] Proposed Rule 10 of the Exchange Act Cybersecurity Proposal would require a covered entity to make two types of public disclosures relating to cybersecurity on Part II of proposed Form SCIR.[423] Covered entities would be required to make the disclosures by filing Part II of proposed Form SCIR on the Electronic Data Gathering, Analysis, and Retrieval (EDGAR) system and posting a copy of the filing on their business websites.[424] In addition, a covered entity that is either a carrying or introducing broker-dealer would be required to provide a copy of the most recently filed Part II of Form SCIR to a customer as part of the account opening process. Thereafter, the carrying or introducing broker-dealer would need to provide the customer with the most recently filed form annually. The copies of the form would need to be provided to the customer using the same means that the customer elects to receive account statements (*e.g.,* by email or through the postal service). Finally, a covered entity would be required to make updated disclosures promptly through each of the methods described above (as applicable) if the information required to be disclosed about cybersecurity risk or significant cybersecurity incidents materially changes, including, in the case of the disclosure about significant cybersecurity incidents, after the occurrence of a new significant cybersecurity incident or when information about a previously disclosed significant cybersecurity incident materially changes.

Consequently, a covered entity would, if it experiences a ''significant cybersecurity incident,'' be required to make updated disclosures under proposed Rule 10 by filing Part II of proposed Form SCIR on EDGAR, posting a copy of the form on its business website, and, in the case of a carrying or introducing broker-dealer, by sending the disclosure to its customers using the same means that the customer elects to receive account statements. Thus, if an SCI entity is a covered entity under the Exchange Act Cybersecurity Proposal and if the SCI event would be a significant cybersecurity incident under the Exchange Act Cybersecurity Proposal, the SCI entity also could be required to disseminate certain information about the SCI event to certain of its members, participants, or customers (as applicable). Further, if the SCI entity is a broker-dealer and, therefore, subject to Regulation S–P (as it is proposed to be amended), the broker-dealer also could be required to notify individuals whose sensitive customer information was, or is reasonably likely to have been, accessed or used without authorization.

However, the Commission believes that this result would be appropriate. First, as discussed above, Regulation SCI (currently and as it would be amended), proposed Rule 10, and Regulation S–P (as proposed to be amended) require different types of information to be disclosed. Second, as discussed above, the disclosures, for the most part, would be made to different persons: (1) affected members,[425] participants, or customers (as applicable) of the SCI entity in the case of Regulation SCI; (2) the public at large in the case of proposed Rule 10 of the Exchange Act Cybersecurity Proposal; [426] and (3) affected individuals whose sensitive customer information was, or is reasonably likely to have been, accessed or used without authorization or, in some cases, all individuals whose information resides in the customer information system that was accessed or used without authorization in the case of Regulation S–P (as proposed to be amended).[427] For these reasons, the Commission believes it would be appropriate to apply these current and proposed requirements of Regulation SCI to SCI entities even if they would be subject to the disclosure requirements of proposed Rule 10 of the Exchange Act Cybersecurity Proposal and/or Regulation S–P (as proposed to be amended).

2. Request for Comment

The Commission requests comment on the relation between the requirements of Regulation SCI (as it currently exists and as it is proposed to be amended), proposed Rule 10, and Regulation S–P (as it currently exists and as it is proposed to be amended). In addition, the Commission is requesting comment on the following matters:

87. Should the policies and procedures requirements of current and proposed Regulation SCI regarding cybersecurity be modified to address SCI entities that also would be subject to proposed Rule 10 of the Exchange Act Cybersecurity Proposal and/or the existing and proposed requirements of Regulation S–P? For example, would it be particularly costly or create practical implementation difficulties to apply the requirements of current and proposed Regulation SCI to have policies and procedures to address cybersecurity risks to SCI entities even if they also would be subject to requirements to have policies and procedures under proposed Rule 10 (if it is adopted) and/or Regulation S–P that address certain cybersecurity risks (currently and it they would be amended)? If so, explain why. If not, explain why not. Are there ways the policies and procedures requirements of current or proposed Regulation SCI regarding could be modified to minimize these potential impacts while achieving the separate goals of this proposal? If so, explain how and suggest specific modifications.

88. Should the Commission notification and reporting requirements of current and proposed Regulation SCI be modified to address SCI entities that also would be subject to the proposed requirements of Rule 10 of the Exchange Act Cybersecurity Proposal? For example, would it be particularly costly or create practical implementation difficulties to apply the Commission notification and reporting requirements

[421] *See* 17 CFR 242.1002(c).

[422] However, disclosure under proposed Regulation S–P would not be required if ''a covered institution has determined, after a reasonable investigation of the facts and circumstances of the incident of unauthorized access to or use of sensitive customer information, that sensitive customer information has not been, and is not reasonably likely to be, used in a manner that would result in substantial harm or inconvenience.'' *See* Regulation S–P 2023 Proposing Release. The proposed amendments to Regulation S–P would define ''sensitive customer information'' to mean any component of customer information alone or in conjunction with any other information, the compromise of which could create a reasonably likely risk of substantial harm or inconvenience to an individual identified with the information. *Id.* The proposed amendments would provide example of sensitive customer information. *Id.*

[423] *See* paragraph (d)(1) of proposed Rule 10.

[424] *See* section II.B.3.b (discussing these proposed requirements in more detail).

[425] Information regarding major SCI events would be required to be disseminated by an SCI entity to all of its members, participants, or customers (as applicable). *See* current and proposed Rule 1002(c)(3) of Regulation SCI.

[426] A carrying broker-dealer would be required to make the disclosures to its customers as well through the means by which they receive account statements.

[427] Under the Regulation SCI and Regulation S–P proposals, there could be circumstances in which a compromise involving sensitive customer information at a broker-dealer that is an SCI entity could result in two forms of notification being provided to customers for the same incident. In addition, under the Exchange Act Cybersecurity Proposal, the broker-dealer also may need to publicly disclose a summary description of the incident via EDGAR and the entity's business internet website, and, in the case of an introducing or carrying broker-dealer, send a copy of the disclosure to its customers.

of current and proposed Regulation SCI and Form SCI to SCI entities even if they also would be subject to immediate notification and subsequent reporting requirements under proposed Rule 10 of the Exchange Act Cybersecurity Proposal and Part I of proposed Form SCIR (if they are adopted)? If so, explain why. If not, explain why not. Are there ways the Commission notification and reporting requirements of current or proposed Regulation SCI and Form SCI could be modified to minimize these potential impacts while achieving the separate goals of this proposal? If so, explain how and suggest specific modifications. For example, should Form SCI be modified to include a section that incorporates the check boxes and questions of Part I of Form SCIR so that a single form could be filed to meet the reporting requirements of Regulation SCI and proposed Rule 10? If so, explain why. If not, explain why not. Should the Commission modify the proposed Commission notification framework for systems intrusions that are also significant cybersecurity incidents under Rule 10? For example, should such systems intrusions be initially reported (*i.e.,* immediately and for the 24-hour notification) on Form SCI, with subsequent reports exempted from Rule 1002(b)'s requirements if they are reported to the Commission on Form SCIR pursuant to the proposed requirements of Rule 10? Why or why not? Are there other ways Form SCI could be modified to combine the elements of Part I of Form SCIR? If so, explain how.

89. Should the disclosure requirements of proposed and current Regulation SCI be modified to address SCI entities that also would be subject to the proposed requirements of the Exchange Act Cybersecurity Proposal and the existing and proposed requirements of Regulation S–P? For example, would it be particularly costly or create practical implementation difficulties to apply the disclosure requirements of current and proposed Regulation SCI to SCI entities even if they also would be subject to the proposed Rule 10 and Part II of proposed form SCIR (if they are adopted) the current and proposed requirements of Regulation S–P? If so, explain why. If not, explain why not. Are there ways the disclosure requirements of Regulation SCI could be modified to minimize these potential impacts while achieving the separate goals of this proposal? If so, explain how and suggest specific modifications.

90. Would the addition of the requirements in the Exchange Act Cybersecurity Proposal—together with the current broker-dealer regulatory regime, including the Market Access Rule and other Commission and FINRA rules—be sufficient to reasonably ensure the operational capability of the technological systems of the proposed SCI broker-dealers? Why or why not? For example, are there any provisions of Regulation SCI that, if added to the Exchange Act Cybersecurity Proposal as it applies to broker-dealers, would help ensure the operational capability of the technological systems of the proposed SCI broker-dealers? Which provisions?

## IV. Paperwork Reduction Act

Certain provisions of the proposal would contain a new ''collection of information'' within the meaning of the Paperwork Reduction Act of 1995 (''PRA'').[428] The Commission is submitting the proposed rule amendments to the Office of Management and Budget (''OMB'') for review and approval in accordance with the PRA and its implementing regulations.[429] 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.[430] The Commission is proposing to alter the 31 existing collections of information and apply such collections of information to new categories of respondents. The title for the collections of information is: Regulation Systems Compliance and Integrity (OMB control number 3235–0703). The burden estimates contained in this section do not include any other possible costs or economic effects beyond the burdens required to be calculated for PRA purposes.

### *A. Summary of Collections of Information*

The proposed amendments to Regulation SCI create paperwork burdens under the PRA by (1) adding new categories of respondents to the 31 existing collections of information (across 7 rules) noted above and (2) modifying the requirements of 16 of those collections, as noted below. For entities that are already required to comply with Regulation SCI (''Current SCI Entities''), the proposed amendments would result in the modification of certain collections of information. Entities that would become subject to Regulation SCI as a result of the proposed amendments (''New SCI Entities'') would be newly subject to the 31 existing collections of information, including the modifications.[431] The collections of information and applicable categories of new respondents are summarized (by rule) in the following table.[432]

| Collection of information | Rule | Burden description | Respondent categories |
|---|---|---|---|
| Rule 1001 of Regulation SCI | Rule 1001(a) ..... | *Rule Description:* Requirement to establish, maintain, and enforce written policies and procedures related to capacity, integrity, resiliency, availability, and security.<br>*Revised burden:* ensure policies and procedures include a program to manage and oversee third-party providers that provide functionality, support or service for the SCI entity's SCI systems; inventory all SCI systems, include a program to prevent unauthorized access to SCI system access and the information residing therein, identify the SCI industry standard with which such policy and procedure is consistent, if any. | Current SCI Entities and New SCI Entities. |

[428] *See* 44 U.S.C. 3501 *et seq.*

[429] *See* 44 U.S.C. 3507; 5 CFR 1320.11.

[430] *See* 5 CFR 1320.11(l).

[431] *See infra* section IV.C (Respondents) for more information on Current SCI Entities and New SCI Entities.

[432] Unless otherwise described, none of the existing information collections are being revised with new requirements.

| Collection of information | Rule | Burden description | Respondent categories |
|---|---|---|---|
| | Rule 1001(b) | *Rule Description:* Requirement to establish, maintain, and enforce policies and procedures reasonably designed to ensure that its SCI systems operate in a manner that complies with the Exchange Act, rules and regulations thereunder, and the entity's rules and governing documents. | New SCI Entities. |
| | Rule 1001(c) | *Rule Description:* Establish, maintain, and enforce reasonably designed written policies and procedures that include the criteria for identifying responsible SCI personnel, the designation and documentation of responsible SCI personnel, and escalation procedures to inform responsible SCI personnel of potential SCI events. | New SCI Entities. |
| Rule 1002 of Regulation SCI | Rule 1002(a) | *Rule Description:* Each SCI entity is required to take appropriate corrective action upon any responsible SCI personnel having a reasonable basis to conclude that an SCI event has occurred. | New SCI Entities. |
| | Rule 1002(b) | *Rule Description:* Rules 1002(b)(1) through (4): Requirement that each SCI entity, upon any responsible SCI personnel having a reasonable basis to conclude that an SCI event has occurred, notify the Commission immediately of such SCI event and submit a written notification within 24 hours of responsible SCI personnel having a reasonable basis to conclude there was an SCI event. Periodic updates are required pertaining to the SCI event on either a regular basis or at such frequency requested by representatives of the Commission. An interim written notification is required if the SCI event is not closed within 30 days of its occurrence. A final notification is required to be submitted within five days of the resolution and closure of the SCI event.<br>*Rule 1002(b)(5):* For events that the SCI entity reasonably estimates would have no, or a de minimis impact on the SCI entity's operations or on market participants, submit a report within 30 days after the end of each calendar quarter containing a summary description of such systems disruptions and systems intrusions.<br>*Revised burden:* add (1) cybersecurity events that disrupt, or significantly degrade the normal operation of an SCI system, and (2) significant attempted unauthorized entries into SCI systems or indirect SCI systems, as determined by the SCI entity pursuant to established reasonable written criteria, to the definition of systems intrusions in Rule 1000, thus requiring that SCI entities provide notifications under Rule 1002(b)(1) through (4); eliminate the de minimis exception's applicability to systems intrusions, thus requiring all systems intrusions to be reported pursuant to Rule 1002(b)(1) through (4); require interim written notification to the Commission to include a copy of any information disseminated pursuant to Rule 1002(c) regarding the SCI event by SCI broker-dealers to their customers. | Current SCI Entities and New SCI Entities. |
| | Rule 1002(c) | *Rule Description:* Requirements to disseminate certain information to members and participants concerning SCI events promptly after any responsible SCI personnel has a reasonable basis to conclude that an SCI event has occurred. For major SCI events, information must be disseminated to all members and participants, and for SCI events that are not major, the information must be disseminated to members or participants that any responsible SCI personnel has reasonably estimated may have been affected by the SCI event. | Current SCI Entities and New SCI Entities. |

| Collection of information | Rule | Burden description | Respondent categories |
|---|---|---|---|
| | | *Revised burden:* add cybersecurity events to the definition of systems intrusions in Rule 1000, thus making them SCI events and requiring that SCI entities provide notifications under Rule 1002(c)(2) for those additional SCI events; exclude systems intrusions that are significant attempted unauthorized entries into the SCI systems or indirect SCI systems of an SCI entity from information dissemination requirements; add that SCI broker-dealers would notify their customers (rather than members or participants). | |
| Rule 1003 of Regulation SCI | Rule 1003(a) | *Rule Description:* Submit quarterly report describing completed, ongoing, and planned material changes to SCI systems and the security of indirect SCI systems; establish reasonable written criteria to identify changes to SCI systems and the security of indirect SCI systems as material and report such changes in accordance with such criteria. Promptly submit a supplemental report notifying the Commission of a material error in or material omission from a previously submitted report. | New SCI Entities. |
| | Rule 1003(b) | *Rule Description:* Requirement to conduct an SCI review of the SCI entity's compliance with Regulation SCI not less than once each calendar year; conduct penetration test reviews not less than once every three years.<br>*Revised burden:* include certain additional requirements and information in SCI reviews, require the SCI review to be performed annually, and require a response by senior management be reported to the Commission. | Current SCI Entities and New SCI Entities. |
| Rule 1004 of Regulation SCI | Rule 1004 | *Rule Description:* Establish standards to designate members and participants that are the minimum necessary for the maintenance of fair and orderly markets, designate members or participants and require their participation in testing of the BC/DR plans pursuant to such standards, and coordinate testing on an industry or sector-wide basis with other SCI entities.<br>*Revised burden:* require SCI entities to establish standards for designating certain third-party providers that are the minimum necessary for the maintenance of fair and orderly markets, and designate third-party providers for BC/DR testing pursuant to those standards. | Current SCI Entities and New SCI Entities. |
| Rule 1005 of Regulation SCI | Rule 1005 | *Rule Description:* Requirement to make, keep, and preserve all documents relating to compliance with Regulation SCI.<br>*Revised burden:* Entities that ''otherwise [cease] to be an SCI entity'' are required to comply with the recordkeeping requirements in this section. | Current SCI Entities and New SCI Entities. |
| Rule 1006 | Rule 1006 | *Rule Description:* Require submissions to the Commission pursuant to Regulation SCI to be made electronically on Form SCI. | New SCI Entities. |
| Rule 1007 | Rule 1007 | *Rule Description:* Requirement that SCI entities make available records required to be filed or kept under Regulation SCI that are prepared or maintained by a service bureau or other recordkeeping service on behalf of the SCI entity. | New SCI Entities. |

*B. Proposed Use of Information*

The existing information collections and the proposed amendments are used as described below:

1. Rule 1001 of Regulation SCI

Rule 1001(a)(1) of Regulation SCI requires each SCI entity to establish, maintain, and enforce written policies and procedures reasonably designed to ensure that their SCI systems and, for purposes of security standards, indirect SCI systems, have levels of capacity, integrity, resiliency, availability, and security adequate to maintain their operational capability and promote the maintenance of fair and orderly markets.[433] Rule 1001(a)(2) of Regulation SCI requires that, at a minimum, such policies and procedures include: current and future capacity planning; periodic stress testing; systems development and testing methodology; reviews and testing to identify vulnerabilities; business continuity and disaster recovery planning (inclusive of backup systems that are geographically diverse and designed to meet specified recovery

[433] *See* 17 CFR 242.1001(a)(1).

time objectives); standards for market data collection, processing, and dissemination; and monitoring to identify potential SCI events.[434] Rule 1001(a)(3) of Regulation SCI requires that SCI entities periodically review the effectiveness of these policies and procedures and take prompt action to remedy any deficiencies.[435] Rule 1001(a)(4) of Regulation SCI provides that an SCI entity's policies and procedures will be deemed to be reasonably designed if they are consistent with current SCI industry standards, which is defined to be comprised of information technology practices that are widely available to information technology professionals in the financial sector and issued by an authoritative body that is a U.S. governmental entity or agency, association of U.S. governmental entities or agencies, or widely recognized organization;[436] however, Rule 1001(a)(4) of Regulation SCI also makes clear that compliance with such ''current SCI industry standards'' is not the exclusive means to comply with these requirements.

Rule 1001(b) of Regulation SCI requires each SCI entity to establish, maintain, and enforce written policies and procedures reasonably designed to ensure that its SCI systems operate in a manner that complies with the Exchange Act and the rules and regulations thereunder and the entity's rules and governing documents, as applicable, and specifies certain minimum requirements for such policies and procedures.[437] Rule 1001(c) of Regulation SCI requires SCI entities to establish, maintain, and enforce reasonably designed written policies and procedures that include the criteria for identifying responsible SCI personnel, the designation and documentation of responsible SCI personnel, and escalation procedures to quickly inform responsible SCI personnel of potential SCI events.[438]

The Commission is proposing revisions to Rule 1001(a)(2) and (4) of Regulation SCI to include four additional elements in the policies and procedures: (1) the maintenance of a written inventory of all SCI systems, critical SCI systems, and indirect SCI systems, including a lifecycle management program with respect to such systems; (2) a program to manage and oversee third-party providers that includes an initial and periodic review of contracts with third-party providers and a risk-based assessment of each third-party provider's criticality to the SCI entity; (3) a program to prevent unauthorized SCI system access; and (4) identification of the SCI industry standard with which such policies and procedures are consistent, if any. The Commission also proposes to amend the existing requirements in Rule 1001(a)(2)(v) for the BC/DR plan to include the requirement to maintain backup and recovery capabilities that are reasonably designed to address the unavailability of any third-party provider without which there would be a material impact on any of its critical SCI systems.

The requirement to have a third-party provider management program would help ensure that any third-party provider an SCI entity selects is able to support the SCI entity's compliance with Regulation SCI's requirements.

Additionally, the proposed revisions would ensure SCI entities are creating an inventory of their SCI systems, critical SCI systems, and indirect SCI systems and have a lifecycle management program for such systems, which would ensure that SCI entities are able to identify when a system becomes an SCI system or indirect SCI system and when it ceases to be one. Next, the revisions would require SCI entities to have in place a program to prevent unauthorized SCI system access. The existing collections of information, which would be extended to new SCI entities would advance the goals of promoting the maintenance of fair an orderly markets and improving Commission review and oversight of U.S. securities market infrastructure. The proposed additional collections of information would advance these same goals.

2. Rule 1002 of Regulation SCI

Under Rule 1002 of Regulation SCI, SCI entities have certain obligations regarding SCI events. Rule 1002(a) requires an SCI entity to begin to take appropriate corrective action when any responsible SCI personnel has a reasonable basis to conclude that an SCI event has occurred. The corrective action must include, at a minimum, mitigating potential harm to investors and market integrity resulting from the SCI event and devoting adequate resources to remedy the SCI event as soon as reasonably practicable.[439] Rule 1002(b)(1) requires each SCI entity to immediately notify the Commission of an SCI event.[440] Under 17 CFR 242.1002(b)(2) (''Rule 1002(b)(2)''), each SCI entity is required, within 24 hours of any responsible SCI personnel having a reasonable basis to conclude that the SCI event has occurred, to submit a written notification to the Commission pertaining to the SCI event that includes a description of the SCI event and the system(s) affected, with other information required to the extent available at the time.[441] Under 17 CFR 242.1002(b)(3) (''Rule 1002(b)(3)''), each SCI entity is required to provide regular updates regarding the SCI event until the event is resolved.[442] Under 17 CFR 242.1002(b)(4)(i) (''Rule 1002(b)(4)(i)''), each SCI entity is required to submit written interim reports, as necessary, and a written final report regarding an SCI event to the Commission.[443] Under 17 CFR 242.1002(b)(4)(ii) (''Rule 1002(b)(4)(ii)''), the information that is required to be included in the interim and final written reports is set forth, including the SCI entity's assessment of the types and number of market participants affected by the SCI event and the impact of the SCI event on the market, and a copy of any information disseminated pursuant to Rule 1002(c) regarding the SCI event to the SCI entity's members or participants. For any SCI event that ''has had, or the SCI entity reasonably estimates would have, no or a de minimis impact on the SCI entity's operations or on market participants,'' Rule 1002(b)(5) provides an exception to the general Commission notification requirements under Rule 1002(b) Instead, an SCI entity must make, keep, and preserve records relating to all such SCI events, and submit a quarterly report to the Commission regarding any such events that are systems disruptions or systems intrusions. SCI events that are reported immediately and later determined to have a de minimis impact may be reclassified as de minimis.[444]

Rule 1002(c) of Regulation SCI requires that SCI entities disseminate information to their members or participants regarding SCI events.[445] Under 17 CFR 242.1002(c)(1)(i) (''Rule 1002(c)(1)(i)''), each SCI entity is required, promptly after any responsible SCI personnel has a reasonable basis to conclude that an SCI event (other than a systems intrusion) has occurred, to disseminate certain information to its members or participants. Under 17 CFR 242.1002(c)(1)(ii) (''Rule 1002(c)(1)(ii)''), each SCI entity is required, when

[434] *See* 17 CFR 242.1001(a)(2).
[435] *See* 17 CFR 242.1001(a)(3).
[436] *See* 17 CFR 242.1001(a)(4).
[437] *See* 17 CFR 242.1001(b).
[438] *See* 17 CFR 242.1001(c).
[439] *See* 17 CFR 242.1002(a).
[440] *See* 17 CFR 242.1002(b)(1).
[441] *See* 17 CFR 242.1002(b)(2).
[442] *See* 17 CFR 242.1002(b)(3).
[443] *See* 17 CFR 242.1002(b)(4).
[444] *See* 17 CFR 242.1002(b)(5).
[445] *See* 17 CFR 242.1002(c).

known, to disseminate additional information about an SCI event (other than a systems intrusion) to its members or participants promptly. Under 17 CFR 242.1002(c)(1)(iii) (''Rule 1002(c)(1)(iii)''), each SCI entity is required to provide to its members or participants regular updates of any information required to be disseminated under Rule 1002(c)(1)(i) and (ii) until the SCI event is resolved. Rule 1002(c)(2) requires each SCI entity to disseminate certain information regarding a systems intrusion to its members or participants. For ''major SCI events,'' these disseminations must be made to all of its members or participants. For SCI events that are not ''major SCI events,'' SCI entities must disseminate such information to those SCI entity members and participants reasonably estimated to have been affected by the event.[446] In addition, dissemination of information to members or participants is permitted to be delayed for systems intrusions if such dissemination would likely compromise the security of the SCI entity's systems or an investigation of the intrusion and documents the reasons for such determination.[447] Rule 1002(c)(4) of Regulation SCI provides exceptions to the dissemination requirements under Rule 1002(c) of Regulation SCI for SCI events to the extent they relate to market regulation or market surveillance systems and SCI events that have had, or the SCI entity reasonably estimates would have, no or a de minimis impact on the SCI entity's operations or on market participants.[448] Rule 1000 sets out the definition of systems intrusion, which means any unauthorized entry into the SCI systems or indirect SCI systems of an SCI entity.

The Commission proposes to amend the definition of systems intrusion in Rule 1000 to include cybersecurity events that disrupt, or significantly degrade, the normal operation of an SCI system and significant attempted unauthorized entries into the SCI systems or indirect SCI systems of an SCI entity, as determined by the SCI entity pursuant to established reasonable written criteria. SCI entities would be required to report information concerning these systems intrusions pursuant to Rule 1002(b). The Commission believes that it is appropriate to expand the definition of systems intrusion to include two additional types of cybersecurity events that are currently not part of the current definition as described above. The additional notifications that would result from the proposed revised definition of systems intrusion would provide the Commission and its staff more complete information to assess the security status of the SCI entity, and also assess the impact or potential impact that unauthorized activity could have on the security of the SCI entity's affected systems as well on other SCI entities and market participants.

The proposed revisions to Rule 1002(b) would eliminate the de minimis exception's applicability to systems intrusions, thus requiring all systems intrusions, whether de minimis or non-de minimis, to be reported pursuant to Rule 1002(b)(1) through (4). The Commission would also amend the information required under Rule 1002(b)(4)(ii) to be included in the interim and final written notifications to include a copy of any information disseminated pursuant to Rule 1002(c) by an SCI broker-dealer to its customers. The Commission would use this information to be aware of potential and actual security threats to SCI entities, including threats that may extend to other market participants in the securities markets, including other SCI entities.

As a result of the amendment to the definition of systems intrusions, SCI entities would be required to disseminate information to members and participants pursuant to Rule 1002(c)(2) concerning cybersecurity events not currently covered by the rule. This would have the effect of increasing the number of SCI events that would be required to be disseminated. Further, in connection with expansion of Regulation SCI to SCI broker-dealers, amended Rule 1002(c)(3) would require that SCI broker-dealers promptly disseminate information about major SCI events to all of its customers and, for SCI events that are not major SCI events, to customers that any responsible SCI personnel subsequently reasonably estimates may have been affected by the SCI event. Such information would be used by the SCI entity's members and participants, and in the case of an SCI broker-dealer, its customers, to understand better the threats faced by the SCI entity, evaluate the event's impact on their trading or other business with the SCI entity and formulate a response, thereby advance the Commission's goal of promoting fair and orderly markets and investor protection. The proposed revisions to Rule 1002(c), however, would exclude systems intrusions that are significant attempted unauthorized entries into the SCI systems or indirect SCI systems of an SCI entity from the information dissemination requirements of Rule 1002(c)(1) through (3).[449]

3. Rule 1003 of Regulation SCI

Rule 1003(a) establishes reporting burdens for all SCI entities. Rule 1003(a)(1) requires each SCI entity to submit to the Commission quarterly reports describing completed, ongoing, and planned material changes to its SCI systems and security of indirect SCI systems during the prior, current, and subsequent calendar quarters, including the dates or expected dates of commencement and completion.[450] Under 17 CFR 242.1003(a)(2) (''Rule 1003(a)(2)''), each SCI entity is required to promptly submit a supplemental report notifying the Commission of a material error in or material omission from a report previously submitted under Rule 1003(a)(1).

Rule 1003(b) of Regulation SCI also requires that an SCI entity conduct an ''SCI review'' not less than once each calendar year.[451] ''SCI review'' is defined in Rule 1000 of Regulation SCI to mean a review, following established procedures and standards, that is performed by objective personnel having appropriate experience to conduct reviews of SCI systems and indirect SCI systems, and which review contains: (1) a risk assessment with respect to such systems of an SCI entity; and (2) an assessment of internal control design and effectiveness of its SCI systems and indirect SCI systems to include logical and physical security controls, development processes, and information technology governance, consistent with industry standards Rule 1003(b)(2) requires each SCI entity to submit a report of the SCI review to senior management no more than 30 calendar days after completion of the review.[452] Rule 1003(b) requires that penetration test reviews of the network, firewalls, and production systems shall be conducted at a frequency of not less than once every three years and that assessments of SCI systems directly supporting market regulation or market surveillance shall be conducted at a frequency based upon the risk assessment conducted as part of the SCI review, but in no case less than once every three years.[453] Rule 1003(b)(2) requires that the submission of a report of the SCI review to senior management of the SCI entity for review no more than 30 calendar days after completion

[446] *See* 17 CFR 242.1002(c)(3).

[447] *See* 17 CFR 242.1002(c)(2).

[448] *See* 17 CFR 242.1002(c)(4).

[449] *See* proposed amended Rule 1002(c)(4).

[450] *See* 17 CFR 242.1003(a).

[451] *See* 17 CFR 242.1003(b).

[452] *See* 17 CFR 242.1003(b)(2).

[453] *See* 17 CFR 242.1003(b)(1)(i) and (ii).

of such SCI review.[454] Rule 1003(b)(3) requires each SCI entity to submit the report of the SCI review to the Commission and to its board of directors or the equivalent of such board, together with any response by senior management, within 60 calendar days after its submission to senior management.[455]

The Commission is proposing revisions to Rule 1003(b) and the definition of SCI review. The Commission is proposing to increase the frequency of penetration testing by SCI entities such that they are conducted at least annually, rather than once every three years, and that the penetration tests include any of the vulnerabilities of its SCI systems and indirect SCI systems identified pursuant to Rule 1001(a)(2)(iv).[456] The Commission would use this more frequent information to have more up-to-date information regarding an SCI entity's systems vulnerabilities and help the Commission with its oversight of U.S. securities market technology infrastructure.

In addition, the Commission is proposing a number of revisions to the requirements relating to SCI reviews and for the reports SCI entities submit (both to their board of directors as well as to the Commission). The definition of SCI review in Rule 1000 is proposed to contain the substantive requirements for an SCI review, which would be required to be ''a review, following established and documented procedures and standards, that is performed by objective personnel having appropriate experience to conduct reviews of SCI systems and indirect SCI systems . . .'' [457] The Commission proposes to amend the definition of SCI review in Rule 1000 to require that the SCI review: (1) use appropriate risk management methodology, (2) include third-party provider management risks and controls, (3) include the risks related to the capacity, integrity, resiliency, availability, and security, and (4) include systems capacity and availability and information technology service continuity within the review of internal control design and operating effectiveness.[458]

The Commission also proposes to amend Rule 1003(b)(2) to require that the SCI review be conducted in each calendar year during which the entity was an SCI entity for any part of that calendar year and that the SCI entity submit the associated report of the SCI review to the SCI entity's senior management and board, as well as to the Commission.[459] The Commission proposes amend Rule 1003(b)(2) to specify that certain elements be included in the report of the SCI review, namely: (1) the dates the SCI review was conducted and the date of completion; (2) the entity or business unit of the SCI entity performing the review; (3) a list of the controls reviewed and a description of each such control; (4) the findings of the SCI review with respect to each SCI system and indirect SCI system, which shall include, at a minimum, assessments of: the risks related to the capacity, integrity, resiliency, availability, and security; internal control design and operating effectiveness; and an assessment of third-party provider management risks and controls; (5) a summary, including the scope of testing and resulting action plan, of each penetration test review conducted as part of the SCI review; and (6) a description of each deficiency and weakness identified by the SCI review.[460] The Commission also proposes to amend Rule 1003(b)(3) to require a response to the report of the SCI review from senior management and to require that the date the report was submitted to senior management be submitted to the Commission and the board of directors, and that the response from senior management include a response for each deficiency and weakness identified by the SCI review, and the associated mitigation and remediation plan and associated dates for each.[461]

The additional requirements and details are designed to ensure SCI reviews contain certain baseline information and are based on the appropriate risk management methodology. The enhanced SCI review and corresponding report would provide the Commission and its staff greater insight into the SCI entity's compliance with Regulation SCI and would more thoroughly assist the staff in determining how to follow up with the SCI entity in reviewing and addressing any identified weaknesses and vulnerabilities. The Commission would use this additional reporting and information to improve the Commission's oversight of the technology infrastructure of SCI entities further.

4. Rule 1004 of Regulation SCI

Rule 1004 of Regulation SCI requires SCI entities to, with respect to an SCI entity's business continuity and disaster recovery plans, including its backup systems: (a) establish standards for the designation of those members or participants that the SCI entity reasonably determines are, taken as a whole, the minimum necessary for the maintenance of fair and orderly markets in the event of the activation of such plans; (b) designate members or participants pursuant to such standards and require participation by such designated members or participants in scheduled functional and performance testing of the operation of such plans, in the manner and frequency specified by the SCI entity, provided that such frequency shall not be less than once every 12 months; and (c) coordinate the testing of such plans on an industry- or sector-wide basis with other SCI entities.[462]

The Commission is proposing to include certain third-party providers in the BC/DR testing requirements of Rule 1004. Specifically, an SCI entity would be required to establish standards for the designation of third-party providers (in addition to members or participants) that it determines are, taken as a whole, the minimum necessary for the maintenance of fair and orderly markets in the event of the activation of the SCI entity's BC/DR plans. In addition, Rule 1004 would require each SCI entity to designate such third-party providers (in addition to members or participants) pursuant to such standards and require their participation in the scheduled functional and performance testing of the operation of such BC/DR plans.[463]

The Commission believes that the requirement that SCI entities establish standards that require designated third-party providers to participate in the testing of their business continuity and disaster recovery plans will help reduce the risks associated with an SCI entity's decision to activate its BC/DR plans and help to ensure that such plans operate as intended, if activated. The testing participation requirement should help an SCI entity to ensure that its efforts to develop effective BC/DR plans are not undermined by a lack of participation by third-party providers that the SCI entity believes are necessary to the successful activation of such plans. This requirement should also assist the Commission in maintaining fair and orderly markets in a BC/DR scenario following a wide-scale disruption.

[454] *See* 17 CFR 242.1003(b)(2).

[455] *See* 17 CFR 242.1003(b)(3).

[456] *See* 17 CFR 242.1000.

[457] *See id.*

[458] *See id.*

[459] *See* 17 CFR 242.1003(b)(2) and (3).

[460] *See* 17 CFR 242.1003(b)(2).

[461] *See* 17 CFR 242.1003(b)(3).

[462] *See* 17 CFR 242.1003(b)(4).

[463] *See id.*

5. Rule 1005 and 1007 of Regulation SCI

Rule 1005 of Regulation SCI requires SCI entities to make, keep, and preserve certain records related to their compliance with Regulation SCI.[464] Rule 1007 sets forth requirements for a SCI entity whose Regulation SCI records are prepared or maintained by a service bureau or other recordkeeping service on behalf of the SCI entity.[465]

Rule 1005(c) specifies that the requirement that records required to be made, kept, and preserved by Rule 1005 be accessible to the Commission and its representatives for the period required by Rule 1005, in cases where an SCI entity ceases to do business or ceases to be registered under the Exchange Act.[466] The Commission proposes to add that this survival provision similarly applies to an SCI entity that ''otherwise [ceases] to be an SCI entity.'' [467] This addition accounts for circumstances not expressly covered; specifically, the circumstance in which an SCI entity continues to do business or remains a registered entity, but may cease to qualify as an SCI entity (*e.g.,* an SCI ATS that no longer satisfies a volume threshold). Such entities would not be excepted from complying with the recordkeeping provisions of Rule 1005.

The Commission believes the records of entities that ceased being SCI entities are important for assisting the Commission and its staff in understanding whether such an SCI entity met its obligations under Regulation SCI, assessing whether such an SCI entity had appropriate policies and procedures with respect to its technology systems, helping to identify the causes and consequences of an SCI event, and understanding the types of material systems changes that occurred at such an SCI entity. The Commission expects this revision to facilitate the Commission's inspections and examinations of SCI entities that have ceased to be SCI entities and assist it in evaluating such SCI entity's previous compliance with Regulation SCI. Furthermore, having an SCI entity's records available even after it has ceased to be an SCI entity should provide an additional tool to help the Commission to reconstruct important market events and better understand the impact of such events. There are no amendments to Rule 1007, which sets forth requirements for a SCI entity whose Regulation SCI records are prepared or maintained by a service bureau or other recordkeeping service on behalf of the SCI entity.

6. Rule 1006 of Regulation SCI

Rule 1006 requires each SCI entity, with a few exceptions, to file any notification, review, description, analysis, or report to the Commission required under Regulation SCI electronically on Form SCI.[468] There are no amendments to this section. The Commission staff would use the collection of information in its examination and oversight program in identifying patterns and trends across registrants.

*C. Respondents*

The collection of information requirements contained in Regulation SCI apply to SCI entities. As of 2021, there were an estimated 47 Current SCI Entities (*i.e.,* entities that met the definition of SCI entity) [469] that were subject to the requirements of Regulation SCI.[470] The Commission preliminarily estimates that as a result of the proposed amendments to Rule 1000, there would be a total of 23 New SCI Entities (*i.e.,* meet the amended definition of SCI entity) that would become subject to the requirements of Regulation SCI. Thus, the Commission preliminarily estimates that a total of 70 entities would be subject to the requirements of Regulation SCI. The Commission preliminarily believes that the remaining amendments would not add any additional respondents but would result in additional reporting burdens, which are discussed in section IV.D (Total Initial and Annual Reporting Burdens).

The following table summarizes the estimated number of Current SCI Entities and New SCI Entities:

| Type of SCI entity | Number |
|---|---|
| Current SCI Entities | 47 |
| New SCI Entities: | |
| SBSDR [1] | 3 |
| SCI broker-dealers [2] | 17 |
| Exempt Clearing Agencies [3] | 3 |
| Total New SCI Entities | 23 |
| Total SCI Entities | 70 |

[1] *See supra* notes 118, 124 and accompanying text. As noted earlier, two SBSDRs are currently registered with the Commission. The Commission estimates for purposes of the PRA that one additional entity may seek to register as an SBSDR in the next three years, and so for purposes of this proposal the Commission has assumed three SBSDR respondents.

[2] *See supra* note 219 and accompanying text.

[3] *See supra* notes 240 and accompanying text. As noted earlier, the Commission proposes to expand the scope of ''SCI entity'' to cover two additional exempt clearing agencies that are not subject to ARP, which are Euroclear Bank SA/NV and Clearstream Banking, S.A. The Commission estimates for purposes of the PRA that one additional entity may receive an exemption from registration as a clearing agency in the next three years, and so for purposes of this proposal the Commission has assumed three exempt clearing agency respondents.

[464] *See* 17 CFR 242.1005. Rule 1005(a) of Regulation SCI relates to recordkeeping provisions for SCI SROs, whereas Rule 1005(b) relates to the recordkeeping provision for SCI entities other than SCI SROs.

[465] *See* 17 CFR 242.1007.

[466] *See* 17 CFR 242.1005(c).

[467] *See id.*

[468] *See* 17 CFR 242.1003(b)(6).

[469] In 2020, the Commission amended Regulation SCI to add as SCI entities SCI competing consolidators, defined as competing consolidators that exceed a five percent consolidated market data gross revenue threshold over a specified time period. *See* Market Data Infrastructure Adopting Release, *supra* note 24. The Commission estimated that seven persons would meet the definition of SCI competing consolidator and be subject to Regulation SCI, two of which would be Current SCI Entities (as plan processors) and five of which would be new SCI competing consolidators, if they registered as competing consolidators and exceeded the threshold. *See Extension Without Change of a Currently Approved Collection: Regulation SCI and Form SCI;* ICR Reference No. 202111–3235–005; OMB Control No. 3235–0703 (Mar. 3, 2022), *available at https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=202111-3235-005* (''2022 PRA Supporting Statement''). Currently, no competing consolidators have registered with the Commission. As a result, no competing consolidators (in addition to the two current plan processors that are Current SCI Entities) are included as Current SCI Entities. To the extent that a competing consolidator registers with the Commission and qualifies as an SCI competing consolidator it would be subject to the same additional burdens as Current SCI Entities as a result of the proposed amendments to Regulation SCI. The additional burdens for Current SCI Entities are set forth in section IV.D.

[470] Proposed Collection; Comment Request; Extension: Regulation SCI, Form SCI; SEC File No. 270–653, OMB Control No. 3235–0703, 87 FR 3132.

*D. Total Initial and Annual Reporting Burdens*

As stated above, each requirement to disclose information, offer to provide information, or adopt policies and procedures constitutes a collection of information requirement under the PRA. We discuss below the collection of information burdens associated with the proposed rules and rule amendments.

1. Rule 1001

The rules under Regulation SCI that would require an SCI entity to establish policies and procedures are discussed more fully in sections II.B, and the proposed amendments are discussed more fully in sections III.A and III.C above.

a. Rule 1001(a)

Current SCI Entities are already required to establish, maintain, and enforce policies and procedures pursuant to Rule 1001(a) and therefore already incur baseline initial [471] and ongoing burden [472] for complying with Rule 1001(a), so the amendments should only impose a burden required to comply with the additional requirements.[473] Presently, none of the New SCI Entities are required to comply with the policies and procedures requirement of Rule 1001(a), but the proposed amendments will newly impose the baseline burden to develop and draft written policies and procedures and review and update annually such policies and procedures, as well as the additional burden to include the proposed requirements in the policies and procedures. The Commission estimates an initial compliance burden of 386 additional hours [474] for Current SCI Entities and 890 hours [475] for New SCI Entities. The Commission estimates an annual compliance burden of 58 hours [476] for Current SCI Entities and 145 hours [477] for New SCI Entities.[478] The table below summarizes the initial and ongoing annual burden estimates for Current SCI Entities and New SCI Entities:

| Respondent type | Burden type | Estimated respondents (entities) | Burden hours per entity (hours) | Estimated burden hours for all entities (estimated respondents × burden hours per entity) |
|---|---|---|---|---|
| Current SCI Entities | Initial | 47 | 386 | 18,142 |
| | Annual | 47 | 58 | 2,726 |
| New SCI Entities | Initial | 23 | 890 | 20,470 |
| | Annual | 23 | 145 | 3,335 |

The table below summarizes the Commission's estimates for the average internal cost of compliance for Current SCI Entities and New SCI Entities:

| Respondent type | Burden type | Estimated respondents (entities) | Average internal cost of compliance per entity | Total internal cost of compliance (estimated respondents × average internal cost of compliance per entity) |
|---|---|---|---|---|
| Current SCI Entities | Initial | 47 | [1] $144,787 | $6,804,989 |
| | Annual | 47 | [2] 23,403 | 1,099,941 |
| New SCI Entities | Initial | 23 | [3] 333,371 | 7,667,533 |

[471] The Commission's currently approved baseline for average compliance burden per SCI entity to develop and draft the policies and procedures required by Rule 1001(a) (except for 17 CFR 242.1001(a)(2)(vi) (''Rule 1001(a)(2)(vi)'')) is 534 hours. *See Extension Without Change of a Currently Approved Collection: Regulation SCI and Form SCI;* ICR Reference No. 202111–3235–005; OMB Control No. 3235–0703 (Mar. 3, 2022), *available at https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=202111-3235-005* (''2022 PRA Supporting Statement''). Rule 1001(a)(2) currently requires six elements (excluding Rule 1001(a)(2)(vi)) to be included in the policies and procedures required by Rule 1001(a)(1). The burden hours for each element would be 89 hours per policy element (534 hours/6 policy elements).

[472] The Commission's currently approved baseline for average compliance burden per SCI entity to review and update the policies and procedures required by Rule 1001(a) (except for Rule 1001(a)(2)(vi)) is 87 hours. *See* 2022 PRA Supporting Statement, *supra* note 471. The burden hours for each element would be 14.5 hours per policy element (87 hours/6 policy elements).

[473] The Commission estimates that at the additional burden would be the result of the additions to Rule 1001(a)(2), specifically the proposed requirement in the BC/DR plan and the four proposed additional policy elements. The Commission does not anticipate that Current SCI Entities or New SCI Entities would incur any additional burden from the amendment to Rule 1001(a)(4) above and beyond the burden hours estimated for the policies and procedures in this release.

[474] 89 hours × 4 additional policy elements = 356 hours. The Commission estimates a one-time burden of 30 hours (one-third of 89 hours per policy element) for SCI entities to address the unavailability of third-party providers in their BC/DR plans. 356 hours + 30 hours = 386 hours. The burden hours include 139 Compliance Manager hours, 139 Attorney hours, 43 Senior System Analyst hours, 43 Operations Specialist hours, 15 Chief Compliance Officer hours, and 7 Director of Compliance hours.

[475] 534 baseline burden hours + 356 additional burden hours = 890 hours. The burden hours include 320 Compliance Manager hours, 320 Attorney hours, 100 Senior System Analyst hours, 100 Operations Specialist hours, 33 Chief Compliance Officer hours, and 17 Director of Compliance hours.

[476] 14.5 hours × 4 additional policy elements = 58 hours. The burden hours include 19 Compliance Manager hours, 19 Attorney hours, 5 Senior System Analyst hours, 5 Operations Specialist hours, 7 Chief Compliance Officer hours, and 3 Director of Compliance hours.

[477] 87 baseline burden hours + 58 additional burden hours = 145 hours. The burden hours include 47 Compliance Manager hours, 47 Attorney hours, 13 Senior System Analyst hours, 13 Operations Specialist hours, 17 Chief Compliance Officer hours, and 8 Director of Compliance hours.

[478] The Commission recognizes that the some of the Regulation SCI requirements and certain proposed requirements in the Exchange Act Cybersecurity Proposal rule may appear duplicative. The Commission believes that although the requirements are related, they are ultimately separate obligations. Thus, the Commission has not considered the requirements of the Exchange Act Cybersecurity Proposal rule in formulating its estimates.

| Respondent type | Burden type | Estimated respondents (entities) | Average internal cost of compliance per entity | Total internal cost of compliance (estimated respondents × average internal cost of compliance per entity) |
|---|---|---|---|---|
| | Annual | 23 | [4] 58,315 | 1,341,245 |

[1] (139 Compliance Manager hours × $344) + (139 Attorney hours × $462) + (43 Senior Systems Analyst hours × $316) + (43 Operations Specialist hours × $152) + (15 Chief Compliance Officer hours × $589) + (7 Director of Compliance hours × $542) = $144,787. The Commission derived this estimate based on per hour figures from SIFMA's Management & Professional Earnings in the Securities Industry 2013, modified by Commission staff to account for an 1,800-hour work-year and inflation, and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead.

[2] (19 Compliance Manager hours × $344) + (19 Attorney hours × $462) + (5 Senior Systems Analyst hours × $316) + (5 Operations Specialist hours × $152) + (7 Chief Compliance Officer hours × $589) + (3 Director of Compliance hours × $542) = $23,403.

[3] (320 Compliance Manager hours × $344) + (320 Attorney hours × $462) + (100 Senior Systems Analyst hours × $316) + (100 Operations Specialist hours × $152) + (33 Chief Compliance Officer hours × $589) + (17 Director of Compliance hours × $542) = $333,371.

[4] (47 Compliance Manager hours × $344) + (47 Attorney hours × $462) + (13 Senior Systems Analyst hours × $316) + (13 Operations Specialist hours × $152) + (17 Chief Compliance Officer hours × $589) + (8 Director of Compliance hours × $542) = $58,315.

The proposed amendments would newly impose a burden on New SCI Entities to comply with Rule 1001(a)(2)(vi), which requires the policies and procedures required by Rule 1001(a) to include standards that result in systems being designed, developed, tested, maintained, operated, and surveilled in a manner that facilitates the successful collection, processing, and dissemination of market data.[479] The Commission estimates that New SCI Entities would incur an initial burden of 160 hours and an ongoing burden of 145 hours to annually review and update the policies and procedures.[480] The table below summarizes the initial and ongoing annual burden estimates for New SCI Entities to comply with Rule 1001(a)(2)(vi):

| Respondent type | Burden type | Estimated respondents (entities) | Burden hours per entity | Estimated burden hours for all entities (estimated respondents × burden hours per entity) |
|---|---|---|---|---|
| New SCI Entities | Initial | 23 | 160 | 3,680 |
| | Annual | 23 | 145 | 3,335 |

The table below summarizes the Commission's estimates for the average internal cost of compliance for New SCI Entities:

| Respondent type | Burden type | Estimated respondents (entities) | Average internal cost of compliance per entity | Total internal cost of compliance (estimated respondents × average internal cost of compliance per entity) |
|---|---|---|---|---|
| New SCI Entities | Initial | 23 | [1] $60,980 | $1,402,540 |
| | Annual | 23 | [2] 52,380 | 1,204,740 |

[1] (100 Senior Systems Analyst hours × $316) + (20 Chief Compliance Officer hours × $589) + (10 Director of Compliance hours × $542) + (30 Compliance Attorney hours × $406) = $60,980.

[2] (100 Senior Systems Analyst hours × $316) + (10 Chief Compliance Officer hours × $589) + (5 Director of Compliance hours × $542) + (30 Compliance Attorney hours × $406) = $52,380.

[479] Current SCI Entities would incur no additional burden as they are already required to include the required standards in their policies and procedures.

[480] These estimates are consistent with the Commission-approved baseline initial and ongoing average compliance burdens per SCI entity. *See* 2022 PRA Supporting Statement, *supra* note 471. The 160 hour initial burden includes 100 Compliance Manager hours, 20 Chief Compliance Officer hours, 10 Director of Compliance hours, and 30 Compliance Attorney hours. The 145 annual burden hours includes 100 Compliance Manager hours, 10 Chief Compliance Officer hours, 5 Director of Compliance hours, and 30 Compliance Attorney hours.

The Commission estimates that on average, Current SCI Entities would seek outside legal and/or consulting services to initially update their policies and procedures for the proposed additional requirements at a cost of $29,050 per SCI entity,[481] while New SCI Entities would seek such services in the initial preparation of the policies and procedures (including the proposed requirements) at a cost of $73,800 per SCI entity.[482]

| Respondent type | Estimated respondents (entities) | Average external cost per entity | Total internal cost of compliance (estimated respondents × average external cost per entity) |
|---|---|---|---|
| Current SCI Entities | 47 | $29,050 | $1,365,350 |
| New SCI Entities | 23 | 73,800 | 1,697,400 |

b. Rule 1001(b)

New SCI Entities would be required to meet the requirements of Rule 1001(b), which requires each SCI entity to establish, maintain, and enforce systems compliance policies. The Commission estimates a compliance burden of 270 hours initially to design the systems compliance policies and procedures and 95 hours annually to review and update such policies and procedures.[483] The table below summarizes the initial and ongoing annual burden estimates for New SCI Entities to comply with Rule 1001(b):

| Respondent type | Burden type | Estimated respondents | Burden hours per entity | Estimated burden hours for all entities (estimated respondents × burden hours per entity) |
|---|---|---|---|---|
| New SCI Entities | Initial | 23 | 270 | 6,210 |
| | Annual | 23 | 95 | 2,185 |

The table below summarizes the Commission's estimates for the average internal cost of compliance for New SCI Entities:

| Respondent type | Burden type | Estimated respondents (entities) | Average internal cost of compliance per entity | Total internal cost of compliance (estimated respondents × average internal cost of compliance per entity) |
|---|---|---|---|---|
| New SCI Entities | Initial | 23 | [1] $96,640 | $2,222,720 |
| | Annual | 23 | [2] 35,140 | 808,220 |

[1] (200 Senior Systems Analyst hours × $316) + (20 Chief Compliance Officer hours × $589) + (10 Director of Compliance hours × $542) + (40 Compliance Attorney hours × $406) = $96,640.

[2] (66 Senior Systems Analyst hours × $316) + (10 Chief Compliance Officer hours × $589) + (5 Director of Compliance hours × $542) + (14 Compliance Attorney hours × $406) = $35,140.

In establishing, maintaining, and enforcing the policies and procedures required by Rule 1001(b), the Commission believes that each new SCI entity will seek outside legal and/or consulting services in the initial preparation of such policies and procedures. The total annualized cost of seeking outside legal and/or consulting services will be $621,000.[484]

c. Rule 1001(c)

The proposed amendments would newly impose a burden on New SCI Entities to develop and maintain policies with Rule 1001(c), relating to

[481] The Commission's currently approved baseline for annualized recordkeeping cost per SCI entity to consult outside legal and/or consulting services in the initial preparation policies and procedures required by Rule 1001(a) is $47,000. *See* 2022 PRA Supporting Statement, *supra* note 471. Rule 1001(a)(2) currently requires seven elements (including Rule 1001(a)(2)(vi)) to be included in the policies and procedures required by Rule 1001(a)(1). The cost per element would be approximately $6,700 per policy element ($47,000 hours/7 policy elements = $6,714). As noted earlier, the Commission proposes to add four additional elements to the policies and procedures. $6,700 per policy element × 4 additional policy elements = $26,800. The Commission also estimates a one-time burden of approximately $2,250 per SCI entity (one-third of $6,700 per policy element) to address the unavailability of third-party providers in their BC/DR plans. $26,800 + $2,250 = $29,050.

[482] $47,000 + $26,800 = $73,800.

[483] The Commission estimates that the burden for New SCI Entities is consistent with the Commission's current approved baselines for the initial and ongoing burdens. For the initial recordkeeping burden, this baseline is 270 hours (40 Compliance Attorney hours + 200 Senior System Analyst hours + 20 Chief Compliance Officer hours + 10 Director of Compliance hours). The Commission estimated separate baselines for the ongoing recordkeeping burden for SCI SROs and entities that were not SROs. Since none of the entities that would potentially be subject to Regulation SCI as a result of the proposed amendments are SROs, the Commission is basing its estimates on the baseline for non-SROs. The Commission's current approved baseline for the ongoing recordkeeping burden for entities that are not SROs is 95 hours (14 Compliance Attorney hours + 66 Senior System Analyst hours + 10 Chief Compliance Officer hours + 5 Director of Compliance hours). *See* 2022 PRA Supporting Statement, *supra* note 471.

[484] The Commission estimates that the cost for outside legal and/or consulting services for New SCI Entities is consistent with the Commission's current approved baselines, which is $27,000 per new SCI entity. *See* 2022 PRA Supporting Statement, *supra* note 471. $27,000 for the first year × 23 New SCI Entities = 621,000.

the policies for designation of responsible SCI personnel. The Commission estimates a compliance burden of 114 hours initially to design the systems compliance policies and procedures and 39 hours annually to review and update such policies and procedures.[485] The table below summarizes the initial and ongoing annual burden estimates for New SCI Entities to comply with Rule 1001(b):

| Respondent type | Burden type | Estimated respondents | Burden hours per entity | Estimated burden hours for all entities (estimated respondents × burden hours per entity) |
|---|---|---|---|---|
| New SCI Entities | Initial | 23 | 114 | 2,622 |
| | Annual | 23 | 39 | 897 |

The table below summarizes the Commission's estimates for the average internal cost of compliance for New SCI Entities:

| Respondent type | Burden type | Estimated respondents (entities) | Average internal cost of compliance per entity | Total internal cost of compliance (estimated respondents × average internal cost of compliance per entity) |
|---|---|---|---|---|
| New SCI Entities | Initial | 23 | [1] $47,672 | $1,096,456 |
| | Annual | 23 | [2] 17,427 | 400,821 |

[1] (32 Compliance Manager hours × 344) + (32 Attorney hours × $462) + (10 Senior Systems Analyst hours × $316) + (10 Operations Specialist hours × $152) + (20 Chief Compliance Officer hours × $589) + (10 Director of Compliance hours × $542) = $47,672.
[2] (9.5 Compliance Manager hours × $344) + (9.5 Attorney hours × $462) + (2.5 Senior Systems Analyst hours × $316) + (2.5 Operations Specialist hours × $152) + (10 Chief Compliance Officer hours × $589) + (5 Director of Compliance hours × $542) = $17,427.

The Commission does not expect SCI entities to incur any external PRA costs in connection with the policies and procedures required under Rule 1001(c).

2. Rule 1002

The rules under Regulation SCI that would require an SCI entity to take corrective action, provide certain notifications and reports, and disseminate certain information regarding SCI events are discussed more fully in sections II.B, and the proposed amendments are discussed more fully in sections III.A and III.C above.

a. Rule 1002(a)

As noted above, Rule 1002(a) requires each SCI entity, upon any responsible SCI personnel having a reasonable basis to conclude that an SCI event has occurred, to begin to take appropriate corrective action. The Commission has previously expressed the view that Rule 1002(a) would likely result in SCI entities developing and revising their processes for corrective action.[486] The Commission believes that the requirement to take corrective action for these additional systems intrusions would likely result in SCI entities updating their processes for corrective action.[487]

The Commission continues to believe that Rule 1002(a) will likely result in SCI entities developing and revising their processes for corrective action as well as review them annually.[488] Current SCI Entities are already required to take corrective action pursuant to Rule 1002(a) and therefore already incur the initial [489] and ongoing [490] baseline burdens for developing and revising their corrective action process, so the amendments should only impose a one-time burden required to update the procedures to account for the additional types of systems intrusions.[491] The Commission estimates that the one-time burden for each SCI entity to include in its corrective action process the proposed systems intrusions would be 20% of the 114 hours baseline

[485] The Commission's current approved baseline 114 hours for the initial burden to establish the criteria for identifying responsible SCI personnel and the escalation procedures (32 Compliance Manager hours + 32 Attorney hours × $412 + 10 Senior Systems Analyst hours × $282 + 10 Operations Specialist hours × $135 + 20 Chief Compliance Officer hours × $526 + 10 Director of Compliance). The Commission's approved baseline is 39 hours for the ongoing burden to annually review and update the criteria and the escalation procedures (9.5 Compliance Manager hours + 9.5 Attorney hours + 2.5 Senior Systems Analyst hours + 2.5 Operations Specialist hours + 10 Chief Compliance Officer hours + 5 Director of Compliance hours). *See* 2022 PRA Supporting Statement, *supra* note 471.

[486] *See* 2022 PRA Supporting Statement, *supra* note 471.

[487] The Commission's estimate includes the amendments to the definition of systems intrusions adding (1) cybersecurity events that disrupt, or significantly degrade, the normal operation of an SCI system and (2) significant attempted unauthorized entries into the SCI systems or indirect SCI systems of an SCI entity. It does not include the systems intrusions that would previously have been classified as de minimis events because Current SCI Entities are already required to take corrective action to resolve such SCI events.

[488] *See* 2022 PRA Supporting Statement, *supra* note 471.

[489] The Commission's currently approved baseline for average compliance burden per respondent to develop a process for corrective action is 114 hours (32 Compliance Manager hours + 32 Attorney hours + 10 Senior Systems Analyst hours + 10 Operations Specialist hours + 20 Chief Compliance Officer hours + 10 Director of Compliance hours). *See* 2022 PRA Supporting Statement, *supra* note 471.

[490] The average compliance burden for each SCI entity to review their process is 39 hours (9 Compliance Manager hours + 9 Attorney hours + 3 Senior Systems Analyst hours + 3 Operations Specialist hours + 10 Chief Compliance Officer hours + 5 Director of Compliance hours. *See* 2022 PRA Supporting Statement, *supra* note 471.

[491] The Commission also proposes to remove the option for SCI entities to classify systems intrusions as de minimis and potentially report them pursuant to Rule 1002(b)(5) on the quarterly SCI reports as de minimis events. SCI entities would instead report these systems intrusions pursuant to Rule 1002(b)(1) through (4). The Commission believes that the burden for developing a corrective action plan for these systems intrusions is already incorporated in the baseline burden estimates. *See supra* notes 489–490.

burden.[492] Presently, the New SCI Entities are not required to comply with requirement in Rule 1002(a) to take corrective action, but the proposed amendments will newly impose these burdens, including the burden for incorporating the additional systems intrusions into the corrective action process. For Current SCI Entities, the Commission estimates a one-time compliance burden of 23 hours. For New SCI Entities, the Commission estimates an initial burden of 137 hours[493] and an annual compliance burden of 39 hours[494] for New SCI Entities. The table below summarizes the initial and ongoing annual burden estimates for Current SCI Entities and New SCI Entities:

| Respondent type | Burden type | Estimated respondents | Burden hours per SCI entity | Burden hours for all respondents (estimated respondents × burden hours per SCI entity) |
|---|---|---|---|---|
| Current SCI Entities | One-time Burden | 47 | 23 | 1,081 |
| New SCI Entities | Initial | 23 | 137 | 3,151 |
| | Ongoing | | 39 | 897 |

The table below summarizes the Commission's estimates for the cost of compliance for Current SCI Entities and New SCI Entities:

| Respondent type | Burden type | Estimated respondents | Average internal cost of compliance per entity | Total internal cost of compliance (estimated respondents × average internal cost of compliance per entity) |
|---|---|---|---|---|
| Current SCI Entities | One-time Burden | 47 | [1] $9,556 | $449,132 |
| New SCI Entities | Initial | 23 | [2] 57,228 | 1,316,244 |
| | Ongoing | | [3] 17,258 | 396,934 |

[1] (7 Compliance Manager hours × 344) + (6 Attorney hours × $462) + (2 Senior Systems Analyst hours × $316) + (2 Operations Specialist hours × $152) + (4 Chief Compliance Officer hours × $589) + (2 Director of Compliance hours × $542) = $9,556.
[2] (39 Compliance Manager hours × 344) + (38 Attorney hours × $462) + (12 Senior Systems Analyst hours × $316) + (12 Operations Specialist hours × $152) + (24 Chief Compliance Officer hours × $589) + (12 Director of Compliance hours × $542) = $57,228.
[3] (9 Compliance Manager hours × 344) + (9 Attorney hours × $462) + (3 Senior Systems Analyst hours × $316) + (3 Operations Specialist hours × $152) + (10 Chief Compliance Officer hours × $589) + (5 Director of Compliance hours × $542) = $17,258.

The Commission does not expect SCI entities to incur any external PRA costs in connection with the requirement to take corrective actions under Rule 1002(a).

b. Rule 1002(b)(1) Through (4)

As noted earlier, SCI entities have certain reporting obligations regarding SCI events. Current SCI Entities are already required to submit the notifications, updates, and reports required by Rule 1002(b)(1) through (4) and therefore already incur a baseline burden. As a result of the additional systems intrusions, including the amendments to the definition of systems intrusions and the exclusion of systems intrusions from de minimis SCI events required to be reported to the Commission, Current SCI Entities could potentially incur new burdens pursuant to Rule 1002(b)(1) through (4) reporting additional SCI events for which they currently either do not report or which they currently report quarterly as de minimis. As proposed, New SCI Entities would for the first time be required to provide the submissions required by Rule 1002(b)(1) through (4) and would bear the existing burden for compliance with Rule 1002(b)(1) through (4) and the additional burden to report the proposed systems intrusions.

The Commission estimates that on average each Current SCI Entity will experience an additional three SCI events each year that are not de minimis SCI events[495] and New SCI Entities will experience an average of eight SCI events each year that are not de minimis SCI events.[496]

As a result, pursuant to Rule 1002(b)(1), which requires immediate notification of SCI events, the Commission estimates that each Current SCI Entity will submit, on average, an additional three notifications per year beyond the current baseline,[497] and each New SCI Entity will submit eight

[492] 114 hours × 0.20 = 23 hours. The burden hours include 7 Compliance Manager hours, 6 Attorney hours, 2 Senior Systems Analyst hours, 2 Operations Specialist hours, 4 Chief Compliance Officer hours, and 2 Director of Compliance hours.

[493] 114 baseline burden hours + 23 burden hours for additional systems intrusions = 137 hours. The burden hours include 39 Compliance Manager hours, 38 Attorney hours, 12 Senior Systems Analyst hours, 12 Operations Specialist hours, 24 Chief Compliance Officer hours, and 12 Director of Compliance hours.

[494] The Commission estimates that the ongoing recordkeeping burden for each New SCI Entity to review its corrective action process would be the same as the baseline ongoing recordkeeping burden of 39 hours. *See supra* note 490.

[495] The Commission's currently approved baseline for the number of SCI events is five events per year that are not de minimis. *See* 2022 PRA Supporting Statement, *supra* note 471. The Commission estimates that as a result of the additional systems intrusions that SCI entities would be required to report, the number of SCI events would increase by three events per year that are not de minimis.

[496] The Commission estimates that each New SCI Entity would experience the baseline burden of five SCI events and three additional SCI events, for a total of eight SCI events that are not de minimis.

[497] The Commission's currently approved baseline for the number of notifications submitted by an SCI entity pursuant to Rule 1002(b)(1) is five notifications per year, with one-fourth of the five notifications submitted in writing (*i.e.,* approximately one event per year for each SCI entity), and approximately three-fourths provided orally (*i.e.,* approximately four events per year for each SCI entity). *See* 2022 PRA Supporting Statement, *supra* note 471. The Commission estimates that the proposed systems intrusions will result in each SCI entity submitting three additional notifications, one for each of the three estimated additional SCI events.

notifications per year.[498] These notifications can be made orally or in writing, and the Commission estimates that approximately one-fourth of these notifications will be submitted in writing (*i.e.,* approximately one event per year for each Current SCI Entity and two events per year for each New SCI Entity[499]), and approximately three-fourths will be provided orally (*i.e.,* approximately two events per year for each Current SCI Entity[500] and six events per year for each New SCI Entity[501]). The Commission estimates that each written notification will require two hours and each oral notification will require 1.5 hours.[502] The Commission estimates a burden of 5 hours[503] for each Current SCI Entities and 13 hours[504] for New SCI Entities. The table below summarizes the initial and ongoing annual burden estimates for Current SCI Entities and New SCI Entities:

| Respondent type | Estimated respondents (entities) | Burden hours per SCI entity | Burden hours for all respondents (estimated respondents × burden hours per SCI entity) |
|---|---|---|---|
| Current SCI Entities | 47 | 5 | 235 |
| New SCI Entities | 23 | 13 | 299 |

The table below summarizes the Commission's estimates for the average internal cost of compliance associated with the ongoing reporting burden for Current SCI Entities and New SCI Entities:

| Respondent type | Estimated respondents (entities) | Average internal cost of compliance per SCI entity | Total internal cost of compliance (estimated respondents × average internal cost of compliance per entity) |
|---|---|---|---|
| Current SCI Entities | 47 | [1] $1,737.50 | $81,663 |
| New SCI Entities | 23 | [2] 4,499 | 103,477 |

[1] The average internal cost of compliance for each Current SCI entity to submit an additional written notification per year is $713.50 (0.5 Compliance Manager hours × $344) + (0.5 Attorney hours × $462) + (0.5 Senior Systems Analyst hours × $316) + (0.5 Senior Business Analyst hours × $305) = $713.50 per written notification. $713.50 × 1 written notification each year = $713.50.

(0.25 Compliance Manager hours × $344) + (0.25 Attorney hours × $462) + (0.5 Senior Systems Analyst hours × $316) + (0.5 Senior Business Analyst hours × $305) = $512 per oral notification. $512 × 2 = $1,024.

$713.50 + $1,024 = $1,737.50.

[2] $713.50 per written notification × 2 written notifications + $512 per written notification × 6 oral notifications = $4,499.

The Commission estimates that each notification submitted pursuant to Rule 1002(b)(2) will require 24 hours per SCI entity.[505] The Commission estimates an average of 72 hours[506] for each Current SCI Entity and 192 hours[507] for each New SCI Entity to submit the 24 hour written notifications required by Rule 1002(b)(2). The table below summarizes the initial and ongoing annual burden estimates for Current SCI Entities and New SCI Entities:

| Respondent type | Estimated respondents (entities) | Burden hours per SCI entity | Burden hours for all respondents (estimated respondents × burden hours per SCI entity) |
|---|---|---|---|
| Current SCI Entities | 47 | 72 | 3,384 |
| New SCI Entities | 23 | 192 | 4,416 |

[498] The Commission estimates that each New SCI Entity will submit both the current baseline of five notifications and the additional three notifications, for a total of eight notifications. *See supra* note 497 (discussing the 3 additional notifications).

[499] 8 SCI events ÷ 4 = 2 SCI events reported in writing. The Commission estimates that each Current SCI Entities already reports one SCI event per year in writing. *See* 2022 PRA Supporting Statement, *supra* note 471. The Commission therefore estimates that they would report one additional SCI event in writing. New SCI Entities would report two SCI events in writing.

[500] 3 SCI events − 1 SCI event reported in writing = 2 SCI events reported orally.

[501] 8 SCI events − 2 SCI events reported in writing = 6 SCI events reported orally.

[502] The Commission-approved baseline for the burden hours for each notification are 2 hours for written communications (0.5 Compliance Manager hours + 0.5 Attorney hours + 0.5 Senior Systems Analyst hours + 0.5 Senior Business Analyst hours) and 1.5 hours for oral communications (0.25 Compliance Manager hours + 0.25 Attorney hours + 0.5 Senior Systems Analyst hours + (0.5 Senior Business Analyst hours). *See* 2022 PRA Supporting Statement, *supra* note 471. The Commission does not believe that reporting the proposed systems intrusions would change the estimated burden hours.

[503] 1 written notification each year * 2 hours per notification + 2 oral notifications each year * 1.5 hours per notification = 5 hours.

[504] 2 written notification each year * 2 hours per notification + 6 oral notifications each year * 1.5 hours per notification = 13 hours.

[505] The Commission-approved baseline for the burden hours for each written notification is 24 hours (5 Compliance Manager hours + 5 Attorney hours + 6 Senior Systems Analyst hours + 1 Assistant General Counsel hour + 1 Chief Compliance Officer hour + 6 Senior Business Analyst hours) for each SCI entity. *See* 2022 PRA Supporting Statement, *supra* note 471.

[506] 3 additional notifications × 24 hours per notification = 72 hours. *See supra* note 497 (discussing the three additional notifications for each Current SCI Entity).

[507] 8 notifications × 24 hours per notification = 192 hours. *See supra* note 498 (discussing the eight notifications for each New SCI Entity).

The table below summarizes the Commission's estimates for the cost of compliance associated with the ongoing reporting burden for Current SCI Entities and New SCI Entities:

| Respondent type | Estimated respondents (entities) | Average internal cost of compliance per SCI entity | Total internal cost of compliance (estimated respondents × average internal cost of compliance per entity |
|---|---|---|---|
| Current SCI Entities | 47 | [1] $26,589 | $1,249,683 |
| New SCI Entities | 23 | [2] 70,904 | 1,630,792 |

[1] The average internal cost of compliance for each Current SCI entity to submit an additional written notification per year is $8,863 per notification ((5 Compliance Manager hours × $344) + (5 Attorney hours × $462) + (6 Senior Systems Analyst hours × $316) + (1 Assistant General Counsel × $518) + (6 Senior Business Analyst hours × $305) + (1 Chief Compliance Officer hour × $589)). $8,863 per notification × 3 notifications each year = $26,589.

[2] $8,863 per notification × 8 notifications each year = $70,904.

As for Rule 1002(b)(3), the Commission estimates that, based on past experience, each Current SCI entity will submit 1 additional written update and 1 additional oral update each year and each New SCI Entity will submit 2 written updates (on Form SCI) and 2 oral updates.[508] The Commission estimates that each written update will require 6 hours and each oral update will require 4.5 hours.[509] The Commission estimates a total burden of 10.5 hours[510] for Current SCI Entities and 21 hours[511] for New SCI Entities. The table below summarizes the initial and ongoing annual burden estimates for Current SCI Entities and New SCI Entities:

| Respondent type | Estimated respondents (entities) | Burden hours per SCI entity | Burden hours for all respondents (estimated respondents × burden hours per SCI entity) |
|---|---|---|---|
| Current SCI Entities | 47 | 10.5 | 493.5 |
| New SCI Entities | 23 | 21 | 483 |

The table below summarizes the Commission's estimates for the cost of compliance associated with the ongoing reporting burden for Current SCI Entities and New SCI Entities:

| Respondent type | Estimated respondents (entities) | Average internal cost of compliance per SCI entity | Total internal cost of compliance (estimated respondents × average internal cost of compliance per entity) |
|---|---|---|---|
| Current SCI entities | 47 | [1] $3,677 | $172,819 |
| New SCI Entities | 23 | [2] 7,354 | 169,142 |

[1] The average internal cost of compliance for each SCI entity to submit an additional written update is $2,141 per notification ((1.5 Compliance Manager hours × $344) + (1.5 Attorney hours × $462) + (1.5 Senior Systems Analyst hours × $316) + (1.5 Senior Business Analyst hours × $305)).

The average internal cost of compliance for each SCI entity to submit an additional oral update is $1,536 ((0.75 Compliance Manager hours × $344) + (0.75 Attorney hours × $462) + (1.5 Senior Systems Analyst hours × $316) + (1.5 Senior Business Analyst hours × $305)).

$2,141 + $1,536 = $3,677 for each Current SCI Entity to submit two additional updates (one written update and one oral update).

[2] $2,141 per written update × 2 written updates per year + $1,536 per oral update × 2 oral updates per year = $7,354 for each New SCI Entity to submit updates in compliance with Rule 1002(b)(3).

[508] The Commission's currently approved baseline for the number of updates submitted by an SCI entity pursuant to Rule 1002(b)(3) is one written update and one oral update each year, for a total of two updates per a year. *See* 2022 PRA Supporting Statement, *supra* note 471. The Commission estimates that as a result of the three additional SCI events resulting from the additional systems intrusions each SCI entity is potentially required to be report, the total number of updates would increase to two written updates and two oral updates each year, for a total of four updates per a year.

[509] The Commission-approved baseline for the burden hours for each update are 6 hours for the written update (1.5 Compliance Manager hours + 1.5 Attorney hours + 1.5 Senior Systems Analyst hours + 1.5 Senior Business Analyst hours) and 4.5 hours for the oral update (0.75 Compliance Manager hours + 0.75 Attorney hours + 1.5 Senior Systems Analyst hours + 1.5 Senior Business Analyst hours). *See* 2022 PRA Supporting Statement, *supra* note 471. The Commission does not propose to change the estimated burden hours at this time and notes that the estimated hours for the Senior Systems Analyst and Senior Business Analyst regarding the oral update reflect a correction to a typographical error in the 2022 PRA Supporting Statement.

[510] 1 written notification × 6 hours per written notification + 1 oral notification × 4.5 hours per oral notification = 10.5 hours.

[511] 2 written notifications × 6 hours per written notification + 2 oral notifications × 4.5 hours per oral notification = 21 hours.

As for Rule 1002(b)(4), the Commission estimates that Current SCI Entities will submit an additional 3 reports per year above and beyond the current baseline [512] and New SCI Entities will submit 8 reports per year.[513] The Commission estimates that compliance with Rule 1002(b)(4) for a particular SCI event will require 35 hours.[514] The Commission estimates that each Current SCI Entity will incur 105 hours [515] and each New SCI Entity will incur 280 hours [516] to meet the requirements of Rule 1002(b)(4). The table below summarizes the initial and ongoing annual burden estimates for Current SCI Entities and New SCI Entities:

| Respondent type | Estimated respondents (entities) | Burden hours per SCI entity | Burden hours for all respondents (estimated respondents × burden hours per SCI entity) |
|---|---|---|---|
| Current SCI Entities | 47 | 105 | 4,935 |
| New SCI Entities | 23 | 280 | 6,440 |

The Commission estimates that the average internal cost of compliance per notification is $13,672.[517] The table below summarizes the Commission's estimates for the cost of compliance associated with the ongoing reporting burden for Current SCI Entities and New SCI Entities:

| Respondent type | Estimated respondents (entities) | Average internal cost of compliance per SCI entity | Total internal cost of compliance (estimated respondents × average internal cost of compliance per entity |
|---|---|---|---|
| Current SCI Entities | 47 | [1] $41,016 | $1,927,752 |
| New SCI Entities | 23 | [2] 109,376 | 2,515,648 |

[1] $13,672 per notification × 3 notifications each year = $41,016.
[2] $13,672 per notification × 8 notifications per year = $109,376 average internal cost of compliance for each New SCI Entity.

c. Rule 1002(b)(5)

The Commission estimates that eliminating systems intrusions from the SCI events reported as de minimis events [518] on the quarterly reports reduces the burden for each SCI entity to submit the quarterly report by 10% less compared to the current baseline, or 36 hours.[519] Each Current SCI Entity would experience a decrease in its reporting burden of 4 hours per quarterly report,[520] for a total decrease of 16 hours per SCI entity.[521] As New SCI Entities are not currently required to meet this burden, they would newly incur a burden of 36 hours per report, for a total burden per SCI entity of 144 hours.[522]

The table below summarizes the initial and ongoing annual burden estimates for Current SCI Entities and New SCI Entities:

| Respondent type | Estimated respondents (entities) | Number of reports | Hours per report | Burden hours per SCI entity (number of reports × hours per report) | Burden hours for all respondents (estimated respondents × burden hours per SCI entity) |
|---|---|---|---|---|---|
| Current SCI Entities | 47 | 4 | (4) | (16) | (752) |

[512] The Commission's currently approved baseline for the number of reports submitted by an SCI entity pursuant to Rule 1002(b)(4) is five reports per year. *See* 2022 PRA Supporting Statement, *supra* note 471. The Commission estimates that as a result of the increase in the estimated number of SCI events from five events to eight events, SCI entities would potentially be required to submit an additional three reports per year.

[513] As noted earlier, the Commission estimates that New SCI Entities would submit both the baseline estimate of five reports and the additional three reports, for a total of eight reports.

[514] The Commission's currently approved baseline for burden hours each SCI entity would incur to comply with Rule 1002(b)(4) for each SCI event would be 35 hours (8 Compliance Manager hours + 8 Attorney hours + 7 Senior Systems Analyst hours + 2 Assistant General Counsel hours + 1 General Counsel hour + 2 Chief Compliance Officer hours + 7 Senior Business Analyst hours). *See* 2022 PRA Supporting Statement, *supra* note 471. The Commission does not propose to change the estimated burden hours at this time.

[515] 3 notifications each year × 35 hours per notification = 105 hours.

[516] 8 notifications each year × 35 hours per notification = 280 hours.

[517] (8 Compliance Manager hours × $344) + (8 Attorney hours × $462) + (7 Senior Systems Analyst hours × $316) + (2 Assistant General Counsel hours × $518) + (1 General Counsel hour × $663) + (2 Chief Compliance Officer hours × $589) + (7 Senior Business Analyst hours × $305) = $13,672.

[518] Systems intrusions, whether de minimis or non-de minimis, would be reported pursuant to Rules 1002(b)(1) through (4), as discussed earlier. *See* section III.C.3. The burdens for reporting all systems intrusions as non-de minimis events is discussed above. *See supra* notes 495–517 and accompanying text.

[519] The Commission's currently approved baseline for the initial and ongoing reporting burden to comply with the quarterly report requirement is 40 hours. *See* 2022 PRA Supporting Statement, *supra* note 471. 40 hours × 10% = 36 hours. This estimate includes 7 hours for a Compliance Manager, 7 hours for an Attorney, 9 hours for a Senior Systems Analyst, 1 hours for an Assistant General Counsel, 9 hours for a Senior Business Analyst, 1 hours for a General Counsel, and 2 hours for a Chief Compliance Officer.

[520] 40 hours (baseline estimate) − 36 hours (revised estimate) = 4 hours per quarterly report. This estimate includes 0.75 hours for a Compliance Manager, 0.75 hours for an Attorney, 1 hour for a Senior Systems Analyst, 0.2 hours for an Assistant General Counsel, 1 hours for a Senior Business Analyst, 0.1 hours for a General Counsel, and 0.2 hours for a Chief Compliance Officer.

[521] 4 quarterly submissions per year × 4 hours per submission = 16 hours decrease per SCI entity.

[522] 4 quarterly submissions per year × 36 hours per submission = 144 hours per SCI entity.

| Respondent type | Estimated respondents (entities) | Number of reports | Hours per report | Burden hours per SCI entity (number of reports × hours per report) | Burden hours for all respondents (estimated respondents × burden hours per SCI entity) |
|---|---|---|---|---|---|
| New SCI Entities | 23 | 4 | 36 | 144 | 3,312 |

The table below summarizes the Commission's estimates for the average internal cost of compliance associated with the ongoing reporting burden for Current SCI Entities and New SCI Entities:

| Respondent type | Estimated respondents (entities) | Number of reports | Internal cost of compliance per report | Average internal cost of compliance per SCI entity (number of reports × internal cost of compliance per report) | Total internal cost of compliance (estimated respondents × average internal cost of compliance per entity |
|---|---|---|---|---|---|
| Current SCI entities | 47 | 4 | [1] $(1,513) | [2] $(6,052) | $(284,444) |
| New SCI entities | 23 | 4 | [3] 13,619 | [4] 54,476 | 1,252,948 |

[1] (0.75 Compliance Manager hours × $344) + (0.75 Attorney hours × $462) + (1 Senior Systems Analyst hours × $316) + (0.2 Assistant General Counsel hours × $518) + (0.1 General Counsel hour × $663) + (0.2 Chief Compliance Officer hours × $589) + (1 Senior Business Analyst hours × $305) = $1,513.

[2] $1,513 per notification × 4 notifications each year = $6,052 per Current SCI Entity.

[3] (6.75 Compliance Manager hours × $344) + (6.75 Attorney hours × $462) + (9 Senior Systems Analyst hours × $316) + (1.8 Assistant General Counsel hours × $518) + (0.9 General Counsel hour × $663) + (1.8 Chief Compliance Officer hours × $589) + (9 Senior Business Analyst hours × $305) = $13,619.

[4] $13,619 per notification × 4 notifications each year = $54,476 per New SCI Entity.

The Commission estimates that while SCI entities will handle internally most of the work associated with Rule 1002(b), SCI entities will seek outside legal advice in the preparation of certain Commission notifications. The Commission estimates that the total annual reporting cost of seeing outside legal advice is $5,800 per SCI entity.[523] Because Rule 1002(b) will impose approximately 32 reporting requirements[524] per SCI entity per year and each required notification will be require an average of $181.25.[525] The total annual reporting costs for Current SCI Entities and New SCI Entities is summarized below:

| Rule | Type of respondent | Number of respondents | Number of reporting requirements | Cost per reporting requirement | Cost per SCI entity (number of reporting requirements × cost per reporting requirement) | Total cost burdens (cost per SCI entity × number of respondents) |
|---|---|---|---|---|---|---|
| Rule 1002(b)(1) | Current SCI Entities | 47 | 3 | $181.25 | $544 | $25,556 |
| | New SCI Entities | 23 | 8 | 181.25 | 1,450 | 33,350 |
| Rule 1002(b)(2) | Current SCI Entities | 47 | 3 | 181.25 | 544 | 25,556 |
| | New SCI Entities | 23 | 8 | 181.25 | 1,450 | 33,350 |
| Rule 1002(b)(3) | Current SCI Entities | 47 | 2 | 181.25 | 363 | 17,038 |
| | New SCI Entities | 23 | 4 | 181.25 | 725 | 16,675 |
| Rule 1002(b)(4) | Current SCI Entities | 47 | 3 | 181.25 | 544 | 25,556 |
| | New SCI Entities | 23 | 8 | 181.25 | 1,450 | 33,350 |
| Rule 1002(b)(5) | Current SCI Entities | 47 | 0 | 181.25 | 0 | 0 |
| | New SCI Entities | 23 | 4 | 181.25 | 725 | 16,675 |

d. Rule 1002(c)

The Commission anticipates that the proposed amendment will newly impose the information dissemination requirements of Rule 1002(c)(1) on New SCI Entities, and New SCI Entities will incur the same burdens that Current SCI Entities already incur to comply with these requirements.[526] The table below summarizes the burden that would be newly imposed on New SCI Entities:

[523] The Commission-approved baseline for the annual reporting cost of seeking outside legal advice is $5,800 per SCI entity. *See* 2022 PRA Supporting Statement, *supra* note 471.

[524] The Commission-approved baseline for the number of reporting requirements required by Rule 1002(b) is 21 requirements for each SCI entity. *See* 2022 PRA Supporting Statement, *supra* note 471. The proposed amendments add an additional 11 reporting requirements (3 immediate notifications + 3 24-hour notifications + 2 updates pertaining to an SCI event + 3 interim/final notifications). 21 + 11 = 32 reporting requirements.

[525] $5,800 per SCI entity/32 reporting requirements = $181.25 per reporting requirement.

[526] Current SCI Entities are already required to comply with Rule 1002(c)(1). The burdens for compliance are summarized in the most recent PRA Supporting Statement. *See* 2022 PRA Supporting Statement, *supra* note 471. The proposed amendments impose no additional burden related to this section. The Commission does not anticipate that New SCI Entities would incur burdens beyond what is estimated in the 2022 PRA Supporting Statement.

| Rule | Respondent type | Estimated respondents | Number of dissemination | Hours per dissemination | Burden hours per SCI Entity (number of reports × hours per report) | Burden hours for all respondents (estimated respondents × burden hours per SCI entity) |
|---|---|---|---|---|---|---|
| Rule 1002(c)(1)(i) | New SCI Entities | 23 | 3 information disseminations [1]. | [2] 7 | 21 | 483 |
| Rule 1002(c)(1)(ii) and (iii) | | | 9 updates [3] | [4] 13 | 117 | 2,691 |

[1] The Commission's currently approved baseline for the number of each SCI entity's information disseminations per year under Rule 1002(c)(1)(i) is three information disseminations. *See* 2022 PRA Supporting Statement, *supra* note 471.

[2] The Commission's currently approved baseline is that each information dissemination under Rule 1002(c)(1)(i) would require 7 hours. This includes 1 Compliance Manager hour, 2.67 Attorney hours, 1 Senior System Analyst hour, 0.5 General Counsel hours, 0.5 Director of Compliance hours, 0.5 Chief Compliance Officer hours, 0.5 Corporate Communications Manager hours, and 0.33 Webmasters hours. *See* 2022 PRA Supporting Statement, *supra* note 471.

[3] The Commission's currently approved baseline for Rule 1002(c)(1)(ii) and (iii) is that each SCI entity will disseminate three updates for each SCI event. 3 updates per SCI Event × 3 SCI events = 9 updates each year.

[4] The Commission's currently approved baseline is that each information dissemination under Rule 1002(c)(1)(ii) and (iii) would require 13 hours. This includes 2 Compliance Manager hours, 4.67 Attorney hours, 2 Senior System Analyst hour, 1 General Counsel hours, 1 Director of Compliance hours, 1 Chief Compliance Officer hours, 1 Corporate Communications Manager hours, and 0.33 Webmasters hours. *See* 2022 PRA Supporting Statement, *supra* note 471, at 25–26.

The table below summarizes the Commission's estimates for the average internal cost of compliance associated with the ongoing reporting burden for Current SCI Entities and New SCI Entities:

| Rule | Respondent type | Estimated respondents (entities) | Average internal cost of compliance per SCI entity | Total internal cost of compliance (estimated respondents × average internal cost of compliance per entity) |
|---|---|---|---|---|
| Rule 1002(c)(1)(i) | New SCI Entities | 23 | [1] $9,212 | $211,876 |
| Rule 1002(c)(1)(ii) and (iii) | | | [2] 51,666 | 1,188,318 |

[1] (1 Compliance Manager hours × $344) + (2.67 Attorney hours × $462) + (1 Senior Systems Analyst hours × $316) + (0.5 General Counsel hour × $663) + (0.5 Chief Compliance Officer hours × $589) + (0.5 Director of Compliance hours × $542) + (0.5 Corporate Communications Manager hours × $378) + (0.33 Webmaster hours × $276) = $3,071. $3,071 per notification × 3 notifications each year = $9,212.

[2] (2 Compliance Manager hours × $344) + (4.67 Attorney hours × $462) + (2 Senior Systems Analyst hours × $316) + (1 General Counsel hour × $663) + (1 Chief Compliance Officer hours × $589) + (1 Director of Compliance hours × $542) + (1 Corporate Communications Manager hours × $378) + (0.33 Webmaster hours × $276) = $5,741. $5,741 per notification × 9 notifications each year = $51,666.

With respect to the Rule 1002(c)(2) requirement to disseminate information regarding systems intrusions, the Commission estimates that each Current SCI Entity will disseminate information regarding 3 systems intrusions each year and each New SCI Entity will disseminate information regarding 4 systems intrusions each year.[527] The Commission estimates that each dissemination under Rule 1002(c)(2) will require 10 hours.[528]

The table below summarizes the initial and ongoing annual burden estimates for Current SCI Entities and New SCI Entities:

| Respondent type | Estimated respondents (entities) | Burden hours per SCI entity | Burden hours for all respondents (estimated respondents × burden hours per SCI entity) |
|---|---|---|---|
| Current SCI Entities | 47 | [1] 30 | 1,410 |
| New SCI Entities | 23 | [2] 40 | 920 |

[1] 3 information disseminations × 10 hours per dissemination = 30 hours.

[2] 4 information disseminations × 10 hours per dissemination = 40 hours.

The Commission estimates that the average internal cost of compliance per notification is $4,406.[529] The table below summarizes the Commission's estimates for the cost of compliance associated with the ongoing reporting burden for Current SCI Entities and New SCI Entities:

[527] The Commission's currently approved baseline for the number of each SCI entity's information disseminations per year under Rule 1002(c)(2) is that each SCI entity will disseminate information about one systems intrusion each year. *See* 2022 PRA Supporting Statement, *supra* note 471. As discussed above, the Commission estimates an additional three SCI events (*i.e.,* three additional systems intrusions) as a result of the additional types of systems intrusions added to the definition systems intrusions in Rule 1000 and the elimination of systems intrusions from the de minimis SCI events reported quarterly in Rule 1002(b)(5). The Commission estimates that each SCI entity would disseminate information related to four systems intrusions each year. Each Current SCI Entity would disseminate information for three systems intrusions beyond the baseline estimate of one systems intrusion. As New SCI Entities will newly incur this burden, and as a result will report four systems intrusions.

[528] The Commission's currently approved baseline is that each dissemination under Rule 1002(c)(2) will require 10 hours. *See* 2022 PRA Supporting Statement, *supra* note 471.

[529] (1.5 Compliance Manager hours × $344) + (3.67 Attorney hours × $462) + (1.5 Senior Systems Analyst hours × $316) + (0.75 General Counsel hour × $633) + (0.75 Director of Compliance hours × $542) + (0.75 Chief Compliance Officer hours × $589) + (0.75 Corporate Communications Manager hours × $378) + (0.33 Webmasters hours × $276) = $4,406 per notification.

| Respondent type | Estimated respondents (entities) | Average internal cost of compliance per SCI entity | Total internal cost of compliance (estimated respondents × average internal cost of compliance per entity) |
|---|---|---|---|
| Current SCI Entities | 47 | [1] $13,218 | $621,246 |
| New SCI Entities | 23 | [2] 17,624 | 405,352 |

[1] $4,406 per notification × 3 information disseminations each year = $13,218.
[2] $4,406 per notification × 4 information disseminations per year = $17,624.

The Commission believes SCI entities will seek outside legal advice in the preparation of the information dissemination under Rule 1002(c). The Commission estimates that the total annual reporting cost of seeing outside legal advice is $3,320 per SCI entity.[530] Because Rule 1002(c) will impose approximately 16 third-party disclosure requirements[531] per SCI entity per year and each required disclosure will be require an average of $207.50.[532] The total annual reporting costs for Current SCI Entities and New SCI Entities are summarized below:

| Rule | Respondent type | Number of respondents | Number of disclosures | Cost per disclosure | Cost per SCI entity (number of disclosures × cost per disclosure) | Total cost burdens (cost per SCI entity × number of respondents) |
|---|---|---|---|---|---|---|
| Rule 1002(c)(1)(i) | New SCI Entities | 23 | 3 | $207.50 | $622.50 | $14,317.50 |
| Rule 1002(c)(1)(ii) and (iii) | New SCI Entities | 23 | 9 | 207.50 | 1,867.50 | 42,952.50 |
| Rule 1002(c)(2) | Current SCI Entities | 47 | 3 | 207.50 | 622.50 | 29,257.50 |
| | New SCI Entities | 23 | 4 | 207.50 | 830 | 19,090 |

As noted above, Regulation SCI requires SCI entities to identify certain types of events and systems. The Commission believes that the identification of critical SCI systems, major SCI events, and de minimis SCI events will impose an initial one-time implementation burden on new SCI entities in developing processes to quickly and correctly identify the nature of a system or event. The identification of these systems and events may also impose periodic burdens on SCI entities in reviewing and updating the processes. The Commission anticipates that the because the proposed amendment will newly impose the requirements of Rule 1002(b) on New SCI Entities, New SCI Entities will incur the burden to develop processes to comply with these requirements.[533] The Commission estimates that each New SCI entity will initially require 198 hours to establish criteria for identifying material systems changes and 39 hours to annually to review and update the criteria.[534] The table below summarizes the burden that would be newly imposed on New SCI Entities:

| Respondent type | Burden type | Estimated respondents (entities) | Burden hours per entity | Estimated burden hours for all entities (estimated respondents × burden hours per entity) |
|---|---|---|---|---|
| New SCI Entities | Initial | 23 | 198 | 4,554 |
| | Annual | 23 | 39 | 897 |

The table below summarizes the Commission's estimates for the average internal cost of compliance for New SCI Entities:

[530] The Commission-approved baseline for the annual reporting cost of seeking outside legal advice is $3,320 per SCI entity. *See* 2022 PRA Supporting Statement, *supra* note 471.

[531] The Commission-approved baseline for the number of disclosure requirements required by Rule 1002(c) is 13 requirements for each SCI entity. *See* 2022 PRA Supporting Statement, *supra* note 471. The proposed amendments add an additional 3 reporting requirements (3 additional information disseminations related to 3 additional systems intrusions). 13 + 3 = 16 disclosure requirements.

[532] $3,320 per SCI entity/16 reporting requirements = $207.50 per reporting requirement.

[533] Current SCI Entities are already required to comply with Rule 1003(a). The burdens for compliance are summarized in the most recent PRA Supporting Statement. *See* 2022 PRA Supporting Statement, *supra* note 471. The proposed amendments impose no additional burden related to this section.

[534] These estimates reflect the Commission-approved baseline. *See* 2022 PRA Supporting Statement, *supra* note 471. The Commission does not anticipate that New SCI Entities would incur burdens beyond what is estimated in the 2022 PRA Supporting Statement.

| Respondent type | Burden type | Estimated respondents (entities) | Average internal cost of compliance per entity | Total internal cost of compliance (estimated respondents × average internal cost of compliance per entity) |
|---|---|---|---|---|
| New SCI Entities | Initial | 23 | [1] $78,144 | $1,797,312 |
| | Annual | 23 | [2] 17,258 | 396,934 |

[1] (64 Compliance Manager hours × $344) + (64 Attorney hours × $462) + (20 Senior Systems Analyst hours × $316) + (20 Operations Specialist hours × $152) + (20 Chief Compliance Officer hours × $589) + (10 Director of Compliance hours × $542) = $78,144.
[2] (9 Compliance Manager hours × $344) + (9 Attorney hours × $462) + (3 Senior Systems Analyst hours × $316) + (3 Operations Specialist hours × $152) + (10 Chief Compliance Officer hours × $589) + (5 Director of Compliance hours × $542) = $17,258.

As discussed above in section III.C.3.c, the proposed amendments to the definition of systems intrusion would require SCI entities to establish reasonable written criteria to identify significant attempted unauthorized entries into the SCI systems or indirect SCI systems of an SCI entity. As this is a new burden for both Current SCI Entities and New SCI Entities, the Commission estimates an average burden across all SCI entities of 89 hours [535] initially to establish the criteria for identifying material systems changes and 14.5 hours [536] annually to review and update the criteria.

The table below summarizes the initial and ongoing annual burden estimates for Current SCI Entities and New SCI Entities:

| Respondent type | Burden type | Estimated respondents (entities) | Burden hours per entity | Estimated burden hours for all entities (estimated respondents × burden hours per entity) |
|---|---|---|---|---|
| Current SCI Entities | Initial | 47 | 89 | 4,183 |
| | Annual | 47 | 14.5 | 681.5 |
| New SCI Entities | Initial | 23 | 89 | 2,047 |
| | Annual | 23 | 14.5 | 333.5 |

The table below summarizes the Commission's estimates for the average internal cost of compliance for New SCI Entities:

| Respondent type | Burden type | Estimated respondents (entities) | Average internal cost of compliance per entity | Total internal cost of compliance (estimated respondents × average internal cost of compliance per entity) |
|---|---|---|---|---|
| Current SCI Entities | Initial | 47 | [1] $37,065 | $1,742,055 |
| | Annual | 47 | [2] 6,946 | 326,462 |
| New SCI Entities | Initial | 23 | [3] 37,065 | 852,495 |
| | Annual | 23 | [4] 6,946 | 159,758 |

[1] (25 Compliance Manager hours × $344) + (25 Attorney hours × $462) + (8 Senior Systems Analyst hours × $316) + (8 Operations Specialist hours × $152) + (15 Chief Compliance Officer hours × $589) + (8 Director of Compliance hours × $542) = $37,065.
[2] (2 Compliance Manager hours × $344) + (2 Attorney hours × $462) + (1 Senior Systems Analyst hours × $316) + (1 Operations Specialist hours × $152) + (5.5 Chief Compliance Officer hours × $589) + (3 Director of Compliance hours × $542) = $6,946.
[3] *See supra* note 1 of this table.
[4] *See supra* note 2 of this table.

[535] This estimate is based on the Commission's burden estimate for Rule 1001(a), because Rule 1001(a) requires policies and procedures. *See supra* notes 474–475 and accompanying text. Rule 1001(a) (excluding Rule 1001(a)(2)(vi)) requires a total of ten policy elements at a minimum, consisting of six currently required policy elements and four proposed policy elements. *See supra* notes 471 and 474. Because the proposed amendment to the definition of systems intrusion in Rule 1000 requires only one set of written criteria, the Commission estimates that the initial staff burden to draft the criteria required to identify significant attempted unauthorized systems intrusions is one-tenth of the initial staff burden to draft the policies and procedures required by Rule 1001(a) (excluding Rule 1001(a)(2)(vi)). 890 hours/10 policy elements = 89 burden hours per policy element. The 89 burden hours includes 25 hours for a Compliance Manager, 25 hours for an Attorney, 8 hours for a Senior Systems Analyst, and 8 hours for an Operations Specialist. The Commission also estimates that a Chief Compliance Officer will spend 15 hours and a Director of Compliance and a Director of Compliance will spend 8 hours reviewing the policies and procedures.

[536] This estimate is based on the Commission's burden estimate for Rule 1001(a), because Rule 1001(a) requires policies and procedures. *See supra* notes 475–476 and accompanying text. Rule 1001(a) (excluding Rule 1001(a)(2)(vi)) requires a total of ten policy elements at a minimum, consisting of six currently required policy elements and four proposed policy elements. *See supra* notes 472 and 475. Because the proposed amendment to the definition of systems intrusion in Rule 1000 requires only one set of written criteria, the Commission estimates that the ongoing staff burden to review and update the criteria required to identify significant attempted unauthorized systems intrusions is one-tenth of the ongoing staff burden to review and update the policies and procedures required by Rule 1001(a) (excluding Rule 1001(a)(2)(vi)). 145 hours/10 policy elements = 14.5 burden hours per policy element. The 14.5 burden hours includes 2 hours for a Compliance Manager, 2 hours for an Attorney, 1 hours for a Senior Systems Analyst, and 1 hours for an Operations Specialist. The Commission also estimates that a Chief Compliance Officer will spend 5.5 hours and a Director of Compliance and a Director of Compliance will spend 3 hours reviewing the policies and procedures.

3. Rule 1003

The Commission anticipates that the proposed amendment will newly impose the Rule 1003(a) requirements to report material system changes on New SCI Entities, and New SCI Entities will incur the same burdens that Current SCI Entities already incur to comply with these requirements.[537] The table below summarizes the burden that would be newly imposed on New SCI Entities:

| Rule | Respondent type | Estimated respondents (entities) | Number of reports | Hours per report | Burden hours per SCI entity (number of reports × hours per report) | Burden hours for all respondents (estimated respondents × burden hours per SCI entity) |
|---|---|---|---|---|---|---|
| Rule 1003(a)(1) | New SCI Entities | 23 | 4 reports (1 per quarter). | [1] 125 | 500 | 11,500 |
| Rule 1003(a)(2) | | | [2] 1 supplemental report. | [3] 15 | 15 | 345 |

[1] The Commission's currently approved baseline is that each quarterly report under Rule 1003(a)(1) would require 125 hours. This includes 7.5 Compliance Manager hours, 7.5 Attorney hours, 5 Chief Compliance Officer hours, 75 Senior System Analyst hours, and 30 Senior Business Analyst hours. *See* 2022 PRA Supporting Statement, *supra* note 471.
[2] The Commission's currently approved baseline for Rules 1002(c)(1)(ii) and (iii) is that each SCI entity will submit one supplemental report each year. *See* 2022 PRA Supporting Statement, *supra* note 471.
[3] The Commission's currently approved baseline is that the supplemental report under Rule 1003(a)(1) would require 15 hours. This includes 2 Compliance Manager hours, 2 Attorney hours, 1 Chief Compliance Officer hours, 7 Senior System Analyst hours, and 3 Senior Business Analyst hours. *See* 2022 PRA Supporting Statement, *supra* note 471.

The table below summarizes the average internal cost of compliance that would be newly imposed on New SCI Entities:

| Rule | Respondent type | Estimated respondents (entities) | Number of reports | Cost of compliance per report | Average internal cost of compliance per entity | Total internal cost of compliance (estimated respondents × average internal cost of compliance per entity) |
|---|---|---|---|---|---|---|
| Rule 1003(a)(1) | New SCI Entities | 23 | 4 reports (1 per quarter). | [1] $41,480 | [2] $167,360 | $3,849,280 |
| Rule 1003(a)(2) | | | 1 supplemental report. | [3] 5,328 | 5,328 | 122,544 |

[1] (7.5 Compliance Manager hours × $344) + (7.5 Attorney hours × $462) + (5 Chief Compliance Officer hours × $589) + (75 Senior Systems Analyst hours × $316) + (30 Senior Business Analyst hours × $305) = $41,840.
[2] $41,480 per report × 4 reports each year = $167,360.
[3] (2 Compliance Manager hours × $344) + (2 Attorney hours × $462) + (1 Chief Compliance Officer hours × $589) + (7 Senior Systems Analyst hours × $316) + (3 Senior Business Analyst hours × $305) = $5,328.

Rule 1003(a)(1) requires each SCI entity to establish reasonable written criteria for identifying a change to its SCI systems and the security of indirect SCI systems as material. The Commission anticipates that the proposed amendment will newly impose these requirements on New SCI Entities, and New SCI Entities will incur the same burdens that Current SCI Entities already incur to comply with these requirements.[538] The Commission estimates that each New SCI entity will initially require 114 hours to establish criteria for identifying material systems changes and 27 hours to annually to review and update the criteria.[539] The table below summarizes the burden that would be newly imposed on New SCI Entities:

| Respondent type | Burden type | Estimated respondents (entities) | Burden hours per entity | Estimated burden hours for all entities (estimated respondents × burden hours per entity) |
|---|---|---|---|---|
| New SCI Entities | Initial | 23 | 114 | 2,622 |
| | Annual | 23 | 27 | 621 |

The table below summarizes the Commission's estimates for the cost of compliance for New SCI Entities:

[537] Current SCI Entities are already required to comply with Rule 1003(a). The burdens for compliance are summarized in the most recent PRA Supporting Statement. *See* 2022 PRA Supporting Statement, *supra* note 471. The proposed amendments impose no additional burden related to this section. The Commission does not anticipate that New SCI Entities would incur burdens beyond what is estimated in the 2022 PRA Supporting Statement.

[538] Current SCI Entities are already required to comply with Rule 1003(a). The burdens for compliance are summarized in the most recent PRA Supporting Statement. *See* 2022 PRA Supporting Statement, *supra* note 471. The proposed amendments impose no additional burden related to this section.

[539] These estimates reflect the Commission-approved baseline. *See* 2022 PRA Supporting Statement, *supra* note 471. The Commission does not anticipate that New SCI Entities would incur burdens beyond what is estimated in the 2022 PRA Supporting Statement.

| Respondent type | Estimated respondents (entities) | Average internal cost of compliance per entity | Total internal cost of compliance (estimated respondents × average internal cost of compliance per entity) |
|---|---|---|---|
| New SCI Entities | 23 | [1] $47,672<br>[2] 12,929 | $1,096,456<br>297,367 |

[1] (32 Compliance Manager hours × $344) + (32 Attorney hours × $462) + (10 Senior Systems Analyst hours × $316) + (10 Operations Specialist hours × $152) + (20 Chief Compliance Officer hours × $589) + (10 Director of Compliance hours × $542) = $47,672.
[2] (4.5 Compliance Manager hours × $344) + (4.5 Attorney hours × $462) + (1.5 Senior Systems Analyst hours × $316) + (1.5 Operations Specialist hours × $152) + (10 Chief Compliance Officer hours × $589) + (5 Director of Compliance hours × $542) = $12,929.

The Commission does not expect SCI entities to incur any external PRA costs in connection with the reports required under Rule 1003(a).

As for Rule 1003(b), each Current SCI Entity is already required to perform an SCI review and therefore already incurs a baseline burden [540] for compliance, so the amendments should only impose a burden required to comply with the additional requirements. Presently, none of the New SCI Entities are required to comply with the requirements of Rule 1003(b), but the proposed amendments will newly impose both the baseline burden to conduct the SCI review and the additional burden to meet the proposed requirements for the SCI review.

The Commission estimates that the proposed additional requirements for conducting the SCI review will increase the burden of conducting the SCI review and submitting the report by 50%. With respect to Rule 1003(b)(1) and (2), the Commission estimates an additional burden for Current SCI Entities of 345 hours [541] and 1,035 hours [542] for New SCI Entities. The table below summarizes the initial and ongoing annual burden estimates for Current SCI Entities and New SCI Entities:

| Respondent type | Estimated respondents | Burden hours per entity | Estimated burden hours for all entities (estimated respondents × burden hours per entity) |
|---|---|---|---|
| Current SCI Entities | 47 | 345 | 16,215 |
| New SCI Entities | 23 | 1,035 | 23,805 |

The table below summarizes the Commission's estimates for the average internal cost of compliance for Current SCI Entities and New SCI Entities:

| Respondent type | Estimated respondents | Average internal cost of compliance per entity | Total internal cost of compliance (estimated respondents × average internal cost of compliance per entity |
|---|---|---|---|
| Current SCI Entities | 47 | [1] $123,848 | $5,820,856 |
| New SCI Entities | 23 | [2] 371,543 | $8,545,489 |

[1] (17.5 Compliance Manager hours × $344) + (40 Attorney hours × $462) + (187.5 Senior Systems Analyst hours × $316) + (2.5 General Counsel hours × $663) + (2.5 Director of Compliance hours × $542) + (10 Chief Compliance Officer hours × $589) + (85 Internal Audit Manager hours × $367) = $123,848.
[2] (52.5 Compliance Manager hours × $344) + (120 Attorney hours × $462) + (562.5 Senior Systems Analyst hours × $316) + (7.5 General Counsel hours × $663) + (7.5 Director of Compliance hours × $542) + (30 Chief Compliance Officer hours × $589) + (255 Internal Audit Manager hours × $367) = $371,543.

With respect to Rule 1003(b)(3), the Commission estimates that the burden for SCI entities would increase to 25 hours from the current baseline estimate.[543] Thus, the Commission estimates an additional burden for

[540] The Commission's currently approved baseline for the annual recordkeeping burden of conducting an SCI review and submitting the SCI review to senior management of the SCI entity for review is 690 hours (35 Compliance Manager hours + 80 Attorney hours + 375 Senior Systems Analyst hours + 5 General Counsel hours + 5 Director of Compliance hours + 20 Chief Compliance Officer hours +170 Internal Audit Manager hours). *See* 2022 PRA Supporting Statement, *supra* note 471.

[541] 690 hours (baseline burden) × 0.5 = 345 hours. This estimate includes 17.5 hours for a Compliance Manager, 40 hours for an Attorney, 187.5 hours for a Senior Systems Analyst, 2.5 hours for General Counsel, 10 hours for a Chief Compliance Officer, 2.5 hours for a Director of Compliance, and 85 hours for an Internal Audit Manager.

[542] 690 baseline burden hours + 345 additional burden hours = 1,035 hours. This estimate includes 52.5 hours for a Compliance Manager, 120 hours for an Attorney, 562.5 hours for a Senior Systems Analyst, 7.5 hours for General Counsel, 30 hours for a Chief Compliance Officer, 7.5 hours for a Director of Compliance, and 255 hours for an Internal Audit Manager.

[543] The Commission's currently approved baseline to submit the report for the SCI review to the board of directors is 1 hour (1 Attorney hour). *See* 2022 PRA Supporting Statement, *supra* note 471. The Commission estimates an increase to 25 hours as a result of the proposed requirement that senior management provide a response to the SCI review.

Current SCI Entities of 24 hours [544] and a new burden of 25 hours [545] for New SCI Entities. The table below summarizes the initial and ongoing annual burden estimates for Current SCI Entities and New SCI Entities:

| Respondent type | Estimated respondents (entities) | Burden hours per entity | Estimated burden hours for all entities (estimated respondents × burden hours per entity) |
|---|---|---|---|
| Current SCI Entities | 47 | 24 | 1,128 |
| New SCI Entities | 23 | 25 | 575 |

The table below summarizes the Commission's estimates for the average internal cost of compliance for Current SCI Entities and New SCI Entities:

| Respondent type | Estimated respondents (entities) | Average internal cost of compliance per entity | Total internal cost of compliance (estimated respondents × average internal cost of compliance per entity) |
|---|---|---|---|
| Current SCI Entities | 47 | [1] $8,629 | $405,563 |
| New SCI Entities | 23 | [2] 8,945 | 205,735 |

[1] (1 Compliance Manager hours × $344) + (3 Attorney hours × $462) + (13 Senior Systems Analyst hours × $316) + (1 Chief Compliance Officer hours × $589) + (6 Internal Audit Manager hours × $367) = $8,629.
[2] (1 Compliance Manager hours × $344) + (3 Attorney hours × $462) + (14 Senior Systems Analyst hours × $316) + (1 Chief Compliance Officer hours × $589) + (6 Internal Audit Manager hours × $367) = $8,945.

Rule 1003(b) imposes recordkeeping costs for SCI entities. The Commission estimates that while SCI entities will handle internally some or most of the work associated with compliance with Rule 1003(b), SCI entities will outsource some of the work associated with an SCI review. The Commission estimates that the proposed amendments to the SCI review would increase the annual recordkeeping cost by 50% beyond the current baseline.[546] The table below summarizes the Commission's estimates for the cost of outsourcing for Current SCI Entities and New SCI Entities:

| Respondent type | Estimated respondents (entities) | Average internal cost of compliance per entity | Total internal cost of compliance (estimated respondents × average internal cost of compliance per entity) |
|---|---|---|---|
| Current SCI Entities | 47 | [1] $25,000 | $1,175,000 |
| New SCI Entities | 23 | [2] 75,000 | 1,725,000 |

[1] 50,000 (baseline estimate) × 0.5 = $25,000.
[2] 50,000 (baseline estimate) × 1.5 = $75,000.

4. Rule 1004

The rules under Regulation SCI that would require an SCI entity to mandate member or participant participation in business continuity and disaster recovery plan testing are discussed more fully in sections II.B, and the proposed amendments including third-party providers in the requirement are discussed more fully in III.C.2 above.

Current SCI Entities are already required to establish standards and designate members or participants for testing pursuant to Rule 1004 and therefore already incur baseline initial [547] and ongoing burdens [548] for complying with Rule 1004, so the amendments should only impose a burden required to comply with the additional requirements. Presently, none of the New SCI Entities are required to comply with the requirements of Rule 1004, but the proposed amendments will newly

[544] 25 hours (revised estimate) − 1 hour (baseline estimate) = 24 hours. This estimate includes 1 hours for a Compliance Manager, 3 hours for an Attorney, 13 hours for a Senior Systems Analyst, 1 hours for a Chief Compliance Officer, and 6 hours for an Internal Audit Manager.

[545] This estimate includes 1 hours for a Compliance Manager, 3 hours for an Attorney, 14 hours for a Senior Systems Analyst, 1 hours for a Chief Compliance Officer, and 6 hours for an Internal Audit Manager.

[546] The Commission-approved baseline for the annual recordkeeping cost per SCI entity of outsourcing is $50,000. *See* 2022 PRA Supporting Statement, *supra* note 471.

[547] The Commission's currently approved baseline for average initial compliance burden per respondent with 17 CFR 242.1004(a) (''Rule 1004(a)'') (*i.e.,* establishment of standards for the designation of members and participants) and (c) (*i.e.,* the coordination of testing on an industry- or sector-wide basis) is 360 hours (40 Compliance Manager hours + 60 Attorney hours + 20 Assistant General Counsel hours + 60 Senior Operations Manager hours + 140 Operations Specialist hours + 26 Chief Compliance Officer hours + 14 Director of Compliance hours). *See* 2022 PRA Supporting Statement, *supra* note 471. The estimate of 360 hours includes the burden for designating members or participants for testing, as required by 17 CFR 242.1004(b) (''Rule 1004(b)''). *Id.* at 18 n.50.

[548] The average annual compliance burden for each SCI entity to review and update the policies and procedures is 135 hours for each entity that is not a plan processor. *See* 2022 PRA Supporting Statement, *supra* note 471. None of the New SCI Entities are plan processors, so the Commission is applying the 135 hour estimate to the New SCI Entities.

impose both the baseline burden to establish standards for the designation of members and participants for BC/DR testing and coordinate industry or sector-wide basis testing and additional burden to establish standards for the designation of third-party providers for BC/DR testing and coordinate industry or sector-wide basis testing for third-party providers. The Commission estimates an initial compliance burden of 90 hours [549] for Current SCI Entities and 450 hours [550] for New SCI Entities. The Commission estimates an annual compliance burden of 34 hours [551] for Current SCI Entities and 169 hours [552] for New SCI Entities. The table below summarizes the initial and ongoing annual burden estimates for Current SCI Entities and New SCI Entities:

| Respondent type | Burden type | Estimated respondents (entities) | Burden hours per entity | Estimated burden hours for all entities (estimated respondents × burden hours per entity) |
|---|---|---|---|---|
| Current SCI Entities | Initial | 47 | 90 | 4,230 |
| | Annual | 47 | 34 | 1,598 |
| New SCI Entities | Initial | 23 | 450 | 10,350 |
| | Annual | 23 | 169 | 3,887 |

The table below summarizes the Commission's estimates for the cost of compliance for Current SCI Entities and New SCI Entities:

| Respondent type | Burden type | Estimated respondents (entities) | Average internal cost of compliance per entity | Total internal cost of compliance (estimated respondents × average internal cost of compliance per entity) |
|---|---|---|---|---|
| Current SCI Entities | Initial | 47 | [1] $30,072 | $1,413,384 |
| | Annual | 47 | [2] 10,011 | 470,517 |
| New SCI Entities | Initial | 23 | [3] 150,478 | 3,460,994 |
| | Annual | 23 | [4] 50,331 | 1,157,613 |

[1] (10 Compliance Manager hours × $344) + (15 Attorney hours × $462) + (5 Assistant General Counsel hours × $518) + (35 Operations Specialist hours × $152) + (6 Chief Compliance Officer hours × $589) + (4 Director of Compliance hours × $542) + (15 Senior Operations Manager hours × $406) = $30,072.

[2] (3 Compliance Manager hours × $344) + (3 Attorney hours × $462) + (1 Assistant General Counsel hours × $518) + (18 Operations Specialist hours × $152) + (3 Chief Compliance Officer hours × $589) + (1 Director of Compliance hours × $542) + (5 Senior Operations Manager hours × $406) = $10,011.

[3] (50 Compliance Manager hours × $344) + (75 Attorney hours × $462) + (25 Assistant General Counsel hours × $518) + (175 Operations Specialist hours × $152) + (32.5 Chief Compliance Officer hours × $589) + (17.5 Director of Compliance hours × $542) + (75 Senior Operations Manager hours × $406) = $150,478.

[4] (13 Compliance Manager hours × $344) + (18 Attorney hours × $462) + (6 Assistant General Counsel hours × $518) + (88 Operations Specialist hours × $152) + (13 Chief Compliance Officer hours × $589) + (6 Director of Compliance hours × $542) + (25 Senior Operations Manager hours × $406) = $50,331.

The Commission continues to believe that SCI entities (other than plan processors) would handle internally the work associated with the requirements of Rule 1004.

5. Rule 1005

Rules 1005 and 1007 impose on SCI entities recordkeeping requirements related to their compliance with Regulation SCI. These requirements would be newly imposed on New SCI Entities as a result of the proposed amendment. The table below summarizes the Commission's estimates as to the burden that each New SCI Entity would incur to meet the requirements of Rules 1005 and 1007: [553]

[549] The Commission estimates that the additional burden to establish standards for the designation of third-party providers for BC/DR testing and coordinate testing would be 25% of the 360 hour baseline burden hours. 360 hours × 0.25 = 90 hours. The burden hours include 10 Compliance Manager hours, 15 Attorney hours, 5 Assistant General Counsel hours, 35 Operations Specialist hours, 6 Chief Compliance Officer hours, 4 Director of Compliance hours, and 15 Senior Operations Manager hours.

[550] 360 baseline burden hours + 90 additional burden hours = 450 hours.

[551] The Commission estimates that the additional annual burden would be 25% of the 135 hour baseline burden hours, or 34 hours (135 hours × 0.25). The burden hours include 3 Compliance Manager hours, 3 Attorney hours, 1 Assistant General Counsel hours, 18 Operations Specialist hours, 3 Chief Compliance Officer hours, 1 Director of Compliance hours, and 5 Senior Operations Manager hours.

[552] 135 baseline burden hours + 34 additional burden hours = 169 hours.

[553] Current SCI Entities are already required to comply with Rules 1005 and 1007. The burdens for compliance are summarized in the most recent PRA Supporting Statement. *See* 2022 PRA Supporting Statement, *supra* note 471. The proposed amendments impose no additional burden related to this section. The Commission does not anticipate that New SCI Entities would incur burdens beyond what is estimated in the 2022 PRA Supporting Statement.

| Respondent type | Burden type | Estimated respondents (entities) | Burden hours per SCI entity | Burden hours for all respondents (estimated respondents × burden hours per SCI entity) |
|---|---|---|---|---|
| New SCI Entities | Initial<br>Annual | 23 | [1] 170<br>[2] 25 | 3,910<br>575 |

[1] The Commission approved baseline estimate for each new non-SRO SCI entity to set up or modify a recordkeeping system is 170 hours. *See* 2022 PRA Supporting Statement, *supra* note 471.
[2] The Commission approved baseline estimate for each new non-SRO SCI entity to make, keep, and preserve records relating to compliance with Regulation SCI, as required by Rule 1005(b), is 25 hours. *See* 2022 PRA Supporting Statement, *supra* note 471.

The table below summarizes the average internal cost of compliance that would be newly imposed on New SCI Entities:

| Respondent type | Burden type | Estimated respondents (entities) | Average internal cost of compliance per entity | Total internal cost of compliance (estimated respondents × average internal cost of compliance per entity) |
|---|---|---|---|---|
| New SCI Entities | Initial<br>Annual | 23 | [1] $13,260<br>[2] 1,950 | $304,980<br>44,850 |

[1] 170 Compliance Clerk hours × $78 per hour = $13,260.
[2] 25 Compliance Clerk hours × $78 per hour = $1,950.

The recordkeeping requirements impose recordkeeping costs for SCI entities other than SCI SROs. The Commission estimates that a New SCI Entity other than an SCI SRO will incur a one-time cost of $900 for information technology costs for purchasing recordkeeping software, for a total of $20,700.[554]

6. Rule 1006

SCI entities submit Form SCI through the Electronic Form Filing System (''EFFS''), which is also used by SCI SROs to file Form 19b–4 filings. Access to EFFS establishes reporting burdens for all SCI entities. An SCI entity will submit to the Commission an External Application User Authentication Form (''EAUF'') to register each individual at the SCI entity who will access the EFFS system on behalf of the SCI entity. The Commission is including in its burden estimates the reporting burden for completing the EAUF for each individual at a New SCI Entity that will request access to EFFS.[555] The table below summarizes the initial and ongoing burdens that would be New SCI Entities would incur to establish access to EFFS:

| Respondent type | Type of burden | Estimated respondents (entities) | Number of individuals requesting access | Time to complete EAUF | Burden hours per SCI entity (number of individuals requesting access × time to complete EAUF) | Burden hours for all respondents (estimated respondents × burden hours per SCI entity) |
|---|---|---|---|---|---|---|
| New SCI Entities | Initial<br>Annual | 23 | [1] 2<br>[3] 1 | [2] 0.15 | 0.3<br>0.15 | 6.9<br>3.5 |

[1] The Commission approved baseline estimate for the number of individuals per SCI entity who will request access to EFFS initially through the EAUF is two individuals. *See* 2022 PRA Supporting Statement, *supra* note 471.
[2] The Commission approved baseline estimate to complete the EAUF is 0.15 hours. *See* 2022 PRA Supporting Statement, *supra* note 471.
[3] The Commission approved baseline estimate for the number of individuals per SCI entity who will request access to EFFS annually through the EAUF is one individual. *See* 2022 PRA Supporting Statement, *supra* note 471.

The table below summarizes the average internal cost of compliance that would be newly imposed on New SCI Entities:

[554] $900 per SCI entity × 21 SCI entities = $18,900.

[555] Current SCI Entities would already have incurred these burdens, which are summarized in the most recent PRA Supporting Statement. *See* 2022 PRA Supporting Statement, *supra* note 471. The proposed amendments impose no additional burden related to this section. The Commission does not anticipate that New SCI Entities would incur burdens beyond what is estimated in the 2022 PRA Supporting Statement.

| Respondent type | Burden type | Estimated respondents (entities) | Average internal cost of compliance per entity | Total internal cost of compliance (estimated respondents × average internal cost of compliance per entity) |
|---|---|---|---|---|
| New SCI Entities | Initial | 23 | [1] $139 | $3,197 |
| | Annual | | [2] 69 | 1,587 |

[1] 0.3 Attorney hours × $462 = $139.
[2] 0.15 Attorney hours × $462 = $69.

Obtaining the ability for an individual to electronically sign a Form SCI imposes reporting costs for SCI entities. The table below summarizes the cost for individuals at each New SCI Entity to obtain digital IDs to sign Form SCI:

| Respondent type | Estimated respondents (entities) | Number of individuals to sign form SCI | Cost to obtain digital ID | Cost per SCI entity (number of individuals requesting access × time to complete EAUF) | Cost for all respondents (estimated respondents × burden hours per SCI entity) |
|---|---|---|---|---|---|
| New SCI Entities | 23 | [1] 2 | [2] $25 | $50 | $1,150 |

[1] The Commission approved baseline estimate for the number of individuals per SCI entity who will sign Form SCI each year is two individuals. *See* 2022 PRA Supporting Statement, *supra* note 471.
[2] The Commission approved baseline estimate to obtain a digital ID is $50. *See* 2022 PRA Supporting Statement, *supra* note 471.

7. Summary of the Information Collection Burden

The table below summarizes the Commission's estimate of the total hourly burden, total internal costs of compliance, and external cost estimates for SCI entities under Regulation SCI.

| Rule | Respondent type | Burden hours | | Costs of compliance | |
|---|---|---|---|---|---|
| | | Initial | Annual | Initial | Annual |
| Policies and procedures required by Rule 1001(a) (except Rule 1001(a)(2)(vi)) (Recordkeeping). | Current SCI Entities | 18,142 | 2,726 | $6,804,989 | $1,099,941 |
| | New SCI Entities | 20,470 | 3,335 | 7,667,533 | 1,341,245 |
| Policies and procedures required by Rule 1001(a)(2)(vi) (Recordkeeping). | New SCI Entities | 3,680 | 3,335 | 1,402,540 | 1,204,740 |
| Costs for outside legal/consulting services in initial preparation of policies and procedures required by Rule 1001(a) (Recordkeeping). | Current SCI Entities | N/A | N/A | 1,365,350 | N/A |
| | New SCI Entities | N/A | N/A | 1,697,400 | N/A |
| Policies and procedures required by Rule 1001(a) Total. | Current SCI Entities | 18,142 | 2,726 | 8,170,339 | 1,099,941 |
| | New SCI Entities | 24,150 | 6,670 | 10,767,473 | 2,545,985 |
| Policies and procedures required by Rule 1001(b) (Recordkeeping). | New SCI Entities | 6,210 | 2,185 | 2,222,720 | 808,220 |
| Costs for outside legal/consulting services in initial preparation of policies and procedures required by Rule 1001(b) (recordkeeping). | New SCI Entities | N/A | N/A | 621,000 | 0 |
| Policies and procedures required by Rule 1001(b) Total. | New SCI Entities | 6,210 | 2,185 | 2,843,720 | 808,220 |
| Policies and procedures required by Rule 1001(c) (Recordkeeping). | New SCI Entities | 2,622 | 897 | 1,096,456 | 400,821 |
| Mandate participation in certain testing required by Rule 1004 (Recordkeeping). | Current SCI Entities | 4,230 | 1,598 | 1,413,384 | 470,517 |
| | New SCI Entities | 10,350 | 3,887 | 3,460,994 | 1,157,613 |
| SCI Event Notice Required By Rule 1002(b)(1) (Reporting). | Current SCI Entities | 235 | 235 | 81,663 | 81,663 |
| | New SCI Entities | 299 | 299 | 103,477 | 103,477 |
| External Legal Costs for Rule 1001(b)(1) (Reporting). | Current SCI Entities | N/A | N/A | 25,556 | 25,556 |
| | New SCI Entities | N/A | N/A | 33,350 | 33,350 |
| SCI Event Notice Required By Rule 1002(b)(1) Total. | Current SCI Entities | 235 | 235 | 107,219 | 107,219 |
| | New SCI Entities | 299 | 299 | 136,827 | 136,827 |
| SCI Event Notice Required By Rule 1002(b)(2) (Reporting). | Current SCI Entities | 3,384 | 3,384 | 1,249,683 | 1,249,683 |
| | New SCI Entities | 4,416 | 4,416 | 1,630,792 | 1,630,792 |
| External Legal Costs for Rule 1001(b)(2) (Reporting). | Current SCI Entities | N/A | N/A | 25,556 | 25,556 |
| | New SCI Entities | N/A | N/A | 33,350 | 33,350 |
| SCI Event Notice Required By Rule 1002(b)(2) Total. | Current SCI Entities | 3,384 | 3,384 | 1,275,239 | 1,275,239 |
| | New SCI Entities | 4,416 | 4,416 | 1,664,142 | 1,664,142 |
| SCI Event Notice Required By Rule 1002(b)(3) (Reporting). | Current SCI Entities | 493.5 | 493.5 | 172,819 | 172,819 |
| | New SCI Entities | 483 | 483 | 169,142 | 169,142 |
| External Legal Costs for Rule 1002(b)(3) (Reporting). | Current SCI Entities | N/A | N/A | 17,038 | 17,038 |
| | New SCI Entities | N/A | N/A | 16,675 | 16,675 |

| Rule | Respondent type | Burden hours | | Costs of compliance | |
|---|---|---|---|---|---|
| | | Initial | Annual | Initial | Annual |
| SCI Event Notice Required By Rule 1002(b)(3) Total. | Current SCI Entities ..... | 493.5 | 493.5 | 189,857 | 189,857 |
| | New SCI Entities ..... | 483 | 483 | 185,817 | 185,817 |
| SCI Event Notice Required By Rule 1002(b)(4) (Reporting). | Current SCI Entities ..... | 4,935 | 4,935 | 1,927,752 | 1,927,752 |
| | New SCI Entities ..... | 6,440 | 6,440 | 2,515,648 | 2,515,648 |
| External Legal Costs for 1001(b)(4) (Reporting) .. | Current SCI Entities ..... | N/A | N/A | 25,556 | 25,556 |
| | New SCI Entities ..... | N/A | N/A | 33,350 | 33,350 |
| SCI Event Notice Required By Rule 1002(b)(4) Total. | Current SCI Entities ..... | 4,935 | 4,935 | 1,953,308 | 1,953,308 |
| | New SCI Entities ..... | 6,440 | 6,440 | 2,548,998 | 2,548,998 |
| SCI Event Notice Required By Rule 1002(b)(5) (Reporting). | Current SCI Entities ..... | (752) | (752) | (284,444) | (284,444) |
| | New SCI Entities ..... | 3,312 | 3,312 | 1,252,948 | 1,252,948 |
| External Legal Costs for Rule 1002(b)(5) (Reporting). | Current SCI Entities ..... | N/A | N/A | 0 | 0 |
| | New SCI Entities ..... | N/A | N/A | 16,675 | 16,675 |
| SCI Event Notice Required By Rule 1002(b)(5) Total. | Current SCI Entities ..... | (752) | (752) | (284,444) | (284,444) |
| | New SCI Entities ..... | 3,312 | 3,312 | 1,269,623 | 1,269,623 |
| Dissemination of information required by Rule 1002(c)(1) (Third-Party Disclosure). | New SCI Entities ..... | 3,174 | 3,174 | 1,400,194 | 1,400,194 |
| External Legal Costs for Rule 1002(c)(1) (Third-Party Disclosure). | New SCI Entities ..... | N/A | N/A | 57,270 | 57,270 |
| Dissemination of information required by Rule 1002(c)(1) Total. | New SCI Entities ..... | 3,174 | 3,174 | 1,457,464 | 1,457,464 |
| Dissemination of information required by Rule 1002(c)(2) (Third-Party Disclosure). | Current SCI Entities ..... | 1,410 | 1,410 | 621,246 | 621,246 |
| | New SCI Entities ..... | 920 | 920 | 405,352 | 405,352 |
| External Legal Costs for Rule 1002(c)(2) (Third-Party Disclosure). | Current SCI Entities ..... | N/A | N/A | 29,257.50 | 29,257.50 |
| | New SCI Entities ..... | N/A | N/A | 19,090 | 19,090 |
| Dissemination of information required by Rule 1002(c)(2) Total. | Current SCI Entities ..... | 1,410 | 1,410 | 650,503.5 | 650,503.5 |
| | New SCI Entities ..... | 920 | 920 | 424,442 | 424,442 |
| Burden to develop processes to identify the nature of a system or event. | New SCI Entities ..... | 4,554 | 897 | 1,797,312 | 396,934 |
| Establish reasonable written criteria for identifying a significant attempted unauthorized systems intrusion. | Current SCI Entities ..... | 4,183 | 681.5 | 1,742,055 | 326,462 |
| | New SCI Entities ..... | 2,047 | 333.5 | 852,495 | 159,758 |
| Material systems change notice required by Rule 1003(a)(1) and (2) (Reporting). | New SCI Entities ..... | 11,845 | 11,845 | 3,971,824 | 3,971,824 |
| Establish reasonable written criteria for identifying a material change to its SCI systems and the security of indirect SCI systems. | New SCI Entities ..... | 2,622 | 621 | 1,096,456 | 297,367 |
| SCI review required by Rule 1003(b)(1) and (2) (Recordkeeping). | Current SCI Entities ..... | 16,215 | 16,215 | 5,820,856 | 5,820,856 |
| | New SCI Entities ..... | 23,805 | 23,805 | 8,545,489 | 8,545,489 |
| SCI review required by Rule 1003(b)(3) (Reporting). | Current SCI Entities ..... | 1,128 | 1,128 | 405,563 | 405,563 |
| | New SCI Entities ..... | 575 | 575 | 205,735 | 205,735 |
| External Legal Costs for Rule 1003(b) (Recordkeeping). | Current SCI Entities ..... | N/A | N/A | 1,175,000 | 1,175,000 |
| | New SCI Entities ..... | N/A | N/A | 1,725,000 | 1,725,000 |
| SCI Review Costs (Rule 1003(b)) Total ..... | Current SCI Entities ..... | 17,343 | 17,343 | 7,401,419 | 7,401,419 |
| | New SCI Entities ..... | 24,380 | 24,380 | 10,476,224 | 10,476,224 |
| Corrective action required by Rule 1002(a) (Recordkeeping). | Current SCI Entities ..... | 1,081 | N/A | 449,132 | N/A |
| | New SCI Entities ..... | 3,151 | 897 | 1,316,244 | 396,934 |
| Recordkeeping required by Rules 1005/1007 (Recordkeeping). | New SCI Entities ..... | 3,910 | 575 | 304,980 | 44,850 |
| One-time cost to purchase recordkeeping software Rules 1005/1007 (Recordkeeping). | New SCI Entities ..... | N/A | N/A | 20,700 | N/A |
| Total recordkeeping costs required by Rules 1005/1007. | New SCI Entities ..... | 3,910 | 575 | 325,680 | 44,850 |
| Request access to EFFS (Rule 1006) (Reporting) | New SCI Entities ..... | 6.9 | 3.5 | 3,197 | 1,587 |
| Rule 1006—obtain digital IDs (Reporting) ..... | New SCI Entities ..... | N/A | N/A | 1,150 | 1,150 |
| Total Costs to comply with Rule 1006 ..... | New SCI Entities ..... | 6.9 | 3.5 | 4,347 | 2,737 |
| Total ..... | Overall Total ..... | 169,576 | 104,289 | 68,764,549 | 41,536,601 |
| | Current SCI Entities ..... | 54,685 | 32,054 | 23,068,011 | 13,190,021 |
| | New SCI Entities ..... | 112,845 | 72,235 | 45,696,538 | 28,346,580 |
| Per Entity Hourly Burden/Cost ..... | Current SCI Entities [1] ... | 1,163 | 682 | 490,808.75 | 280,639.75 |
| | New SCI Entities ..... | 4,995 | 3,141 | 1,986,806 | 1,232,460 |

[1] As noted earlier, currently no SCI competing consolidators have registered with the Commission. *See supra* note 469. To the extent that a competing consolidator registers with the Commission, its initial and ongoing burdens as a result of the proposed amendments would be the same as the initial and ongoing burden per entity calculated for Current SCI Entities.

In summary, the estimated paperwork related compliance burdens for SCI entities as a result of the amendments are approximately 170,000 hours and $69 million initially and approximately 104,000 hours and $41 million annually.

*E. Collection of Information Is Mandatory*

The collections of information pursuant to Regulation SCI is mandatory as to all entities subject to the rule.

*F. Confidentiality of Responses to Collection of Information*

The Commission expects that the written policies and procedures, processes, criteria, standards, or other written documents developed or revised by SCI entities pursuant to Regulation SCI will be retained by SCI entities in accordance with, and for the periods specified in 17 CFR 240.17a–1 (''Rule 17a–1'' of the Exchange Act) and Rule 1005, as applicable. Should such documents be made available for examination or inspection by the Commission and its representatives, they would be kept confidential subject to the provisions of applicable law.[556] In addition, the information submitted to the Commission pursuant to Regulation SCI that is filed on Form SCI, as required by Rule 1006, will be treated as confidential, subject to applicable law, including amended 17 CFR 240.24b–2 (''Rule 24b–2'').[557] The information disseminated by SCI entities pursuant to Rule 1002(c) under Regulation SCI to their members or participants will not be confidential.

*G. Request for Comment*

Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicits comment on the proposed collections of information in order to:

91. Evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the Commission, including whether the information would have practical utility;

92. Evaluate the accuracy of the Commission's estimates of the burden of the proposed collections of information;

93. Determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and

94. Evaluate whether there are ways to minimize the burden of the collection of information on those who respond, including through the use of automated collection techniques or other forms of information technology.

Persons submitting comments on the collection of information requirements should direct them to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and should also send a copy of their comments to Vanessa A. Countryman, Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090, with reference to File Number S7–07–23. Requests for materials submitted to OMB by the Commission with regard to this collection of information should be in writing, with reference to File Number S7–07–23 and be submitted to the Securities and Exchange Commission, Office of FOIA/PA Services, 100 F Street NE, Washington, DC 20549–2736. As OMB is required to make a decision concerning the collections of information between 30 and 60 days after publication, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

## V. Economic Analysis

*A. Introduction*

The Commission is sensitive to the economic effects, including the costs and benefits, of its rules. When engaging in rulemaking pursuant to the Exchange Act that requires the Commission to consider or determine whether an action is necessary or appropriate in the public interest, section 3(f) of the Exchange Act requires the Commission to consider, in addition to the protection of investors, whether the action would promote efficiency, competition, and capital formation. In addition, section 23(a)(2) of the Exchange Act requires the Commission in making rules pursuant to the Exchange Act to consider the impact any such rule would have on competition. The Exchange Act prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.

As explained above, the Commission believes that developments in the U.S. securities markets since the adoption of Regulation SCI in 2014 warrant expanding the scope of Regulation SCI as well as strengthening the obligations of SCI entities. These developments include the growth of electronic trading, which allows greater volumes of securities transactions to take place across a multitude of trading systems in our markets. In addition, large institutional and other professional market participants today employ sophisticated methods to trade electronically on multiple venues simultaneously in ever-increasing volumes with increasing speed. In recent years, financial institutions have increasingly used and relied on third parties that provide information and communications technology systems.[558] Together, these developments have resulted in greater dispersal, sophistication, and interconnection of the systems underpinning our U.S. securities markets, thereby bringing potential new risks.

The proposed amendments to Regulation SCI would expand the definition of ''SCI entity'' to include a broader range of entities that perform key functions in U.S. securities market infrastructure, and update certain other definitions and provisions to take account of technological market developments, including cybersecurity and vendor management, since the adoption of Regulation SCI in 2014. The proposed expansion would add to the definition of ''SCI entity'' registered security-based swap data repositories, and registered broker-dealers exceeding certain asset and transaction activity thresholds, and the proposal would expand the category of exempt clearing agencies subject to Regulation SCI to include all clearing agencies exempted from registration. Additional proposed amendments to Regulation SCI are designed to update the requirements of Regulation SCI relating to: (i) systems classification and lifecycle management; (ii) vendor management; (iii) cybersecurity; (iv) SCI review; (v) current SCI industry standards; and (vi) other matters.

The Commission is sensitive to the economic effects of the proposed expansion and strengthening of Regulation SCI, including its costs and benefits. As discussed further below, the Commission requests comment on all

[556] *See, e.g.,* 15 U.S.C. 78x (governing the public availability of information obtained by the Commission); 5 U.S.C. 552 *et seq.*

[557] *See, e.g.,* 15 U.S.C. 78x (governing the public availability of information obtained by the Commission); 5 U.S.C. 552 *et seq. See also* Form SCI section IV (including a provision stating ''Confidential treatment is requested pursuant to 17 CFR 240.24b–2(g) (''Rule 24b–(g)'')).

[558] *See, e.g.,* FINRA, *Cloud Computing in the Securities Industry* (Aug. 16, 2021), *available at https://www.finra.org/rules-guidance/key-topics/fintech/report/cloud-computing*; *see also* Franklin Allen et al., *A Survey of Fintech Research and Policy Discussion,* 1 Rev. Corp. Fin. 259, 259 (2021) (''Cloud storage and cloud computing have also played increasing roles in payment systems, financial services, and the financial system overall''). *See also* Financial Stability Board, *Regulatory and Supervisory Issues Relating to Outsourcing and Third-Party Relationships,* (discussion paper Nov. 9, 2020), *available at https://www.fsb.org/wp-content/uploads/P091120.pdf.*

aspects of the costs and benefits of the proposal, including any effects the proposed rules may have on efficiency, competition, and capital formation.

*B. Baseline*

The Commission proposes to expand the scope of Regulation SCI to include new entities as well as strengthen the obligations of SCI entities. In order to assess the benefits and costs that can properly be attributed to the proposed rules, the Commission begins by considering the relevant baselines—the current market practices as well as applicable regulations in the absence of these proposed rules.

1. New SCI Entities

The proposed rules will affect new SCI entities, specifically SBSDRs, certain broker-dealers, and certain exempt clearing agencies, in addition to existing SCI entities. The baseline for each category of entities is discussed in turn, including applicable regulatory baselines and relevant market descriptions.

a. Registered Security-Based Swap Data Repositories

i. Affected Parties

The Commission proposes to include SBSDRs as SCI entities. SBSDRs are required for the dissemination of SBS market data to provide price transparency, limit risk posed to the maintenance of fair and orderly markets, promote the market stability, prevent market abuses, and reduce operational risk. They play an important role in transparency in the market for SBSs and make available to the Commission SBS data that will provide a broad view of this market and help monitor for pockets of risk and potential market abuses that might not otherwise be observed by the Commission and other relevant authorities.

Security-based swaps entail the transfer of financial obligations between two parties with sometimes a long time horizon. Counterparties to a security-based swap rely on each other's creditworthiness and bear this credit risk and market risk until the security-based swap terminates or expires.[559] The information provided by SBSDRs, such as individual counterparty trade and position data, helps the Commission gain a better understanding of the actual and potential market risks.[560] This information also helps the Commission and other relevant authorities investigate market manipulation, fraud, and other market abuses.

As of February 2023, two data repositories for security-based swap markets are registered with the Commission. The registered SBSDRs are Depository Trust & Clearing Corporation Data Repository (''DDR'') and the ICE Trade Vault (''ITV''). DDR operates as a registered SBSDR for security-based swap transactions in the credit, equity, and interest rate derivatives asset classes. ITV operates as a registered SBSDR for security-based swap transactions in the credit derivatives asset class.[561] As of March 2022, 47 entities had registered with the Commission as security-based swap dealers and pursuant to Regulation SBSR, they are required to report the trade activities to the SBSDRs.[562] In total, these two SBSDRs received approximately 542.6 million reports [563] between November 2021 and September 2022, from contracts of 15,593 distinct counterparties.[564]

ii. Regulatory Baseline

As discussed above in section III.A.2, SBSDRs are subject to Rule 13n–6, which requires that ''every security-based swap data repository, with respect to those systems that support or are integrally related to the performance of its activities, shall establish, maintain, and enforce written policies and procedures reasonably designed to ensure that its systems provide adequate levels of capacity, integrity, resiliency, availability, and security.'' [565] The SBSDRs registered with the Commission are also registered with the CFTC as swap data repositories and accordingly are also subject to CFTC rules and regulations related to swap data repositories, including the ''SDR System Safeguards'' rule.[566] That rule requires swap data repositories to establish and maintain emergency procedures, geographically diverse backup facilities and staff, and a business continuity and disaster recovery plan that should enable next day resumption of the swap data repository's operations following the disruption.[567]

In addition, the rule requires programs of risk analysis and oversight with respect to its operations and automated systems to address each of the following categories of risk analysis and oversight: (1) information security; (2) business continuity and disaster recovery planning and resources; (3) capacity and performance planning; (4) systems operations; (5) systems development and quality assurance; (6) physical security and environmental controls; and (7) enterprise risk management.[568] This rule also requires systems monitoring to identify potential systems disruptions and cybersecurity attacks via provisions relating to capacity and performance planning, information security, and physical security and environmental controls. It also requires swap data repositories to maintain a security incident response plan that must include, among other items, policies and procedures for reporting security incidents and for internal and external communication and information sharing regarding security incidents, the hand-off and escalation points in its security incident response process, and the roles and responsibilities of its management, staff and independent contractors in responding to security incidents.[569]

Furthermore, the rule requires regular, periodic testing and review of business continuity and disaster recovery capabilities.[570] Under the rule, both the senior management and the board of directors of a swap data repository receive and review reports setting forth the results of the specified testing and assessment. A swap data repository is required to establish and follow appropriate procedures for the remediation of issues identified through the review, and for evaluation of the effectiveness of testing and assessment protocols.[571]

The System Safeguards rule requires SDRs to conduct testing and review sufficiency to ensure that their

[559] For cleared trades, the clearing agencies generally step in the place of the original counterparties and effectively assume the risk should there be a default.

[560] *See* SBSR Adopting Release, *supra* note 96 (for information required to be reported by SBSDRs to the Commission).

[561] *See* DTCC Data Repository (U.S.) LLC; Order Approving Application, *supra* note 111; ICE Trade Vault, LLC; Order Approving Application, *supra* note 111. Note that additional entities may register as SBSDRs in the future.

[562] *See List of Registered Security-Based Swap Dealers and Major Security-Based Swap Participants, supra* note 110 (providing the list of registered security-based swap dealers and major SBS participants that was updated as of Mar. 28, 2022).

[563] The transaction reports include not only the initial trade, but also life-cycle events.

[564] Number of reports and number of counterparties are calculated from trade activities data of the DDR and ITV reports. Number of counterparties is calculated as the number of unique counterparties' IDs. Due to data limitation, we only included reports occurred on or after Nov. 8, 2021.

[565] *See* 17 CFR 240.13n–6.

[566] *See* 17 CFR 49.24.

[567] *See* 17 CFR 49.24(a).

[568] *See* 17 CFR 49.24(b).

[569] *See* 17 CFR 49.24.

[570] *Id.*

[571] 17 CFR 49.24(m) (Internal reporting and review).

automated systems are reliable, secure, and have adequate scalable capacity.[572] The System Safeguards rule requires SDRs to conduct external and internal penetration testing at a frequency determined by an appropriate risk analysis, but no less frequently than annually.[573]

The System Safeguards rule also specifies and defines five types of system safeguards testing that a SDR necessarily must perform to fulfill the testing requirement: vulnerability testing; penetration testing; controls testing; security incident response plan testing; and enterprise technology risk assessment.[574] SDRs are required to notify CFTC staff of any system malfunctions, cyber security incidents, or activation of the business continuity and disaster recovery plan.[575] A swap data repository must also give CFTC staff advance notice of planned changes to automated systems that may affect the reliability, security, or adequate scalable capacity of such systems.[576] Finally, the CFTC's System Safeguards rule requires an SDR to follow generally accepted standards and best practices with respect to the development, operation, reliability, security, and capacity of automated systems related to SDR data.[577]

b. Broker-Dealers

i. Affected Parties

The Commission is proposing to expand the application of Regulation SCI to include certain broker-dealers in the definition of SCI entity. There are approximately 3,500 broker-dealers registered with the Commission pursuant to section 15(b) of the Exchange Act as of Q3 2022.[578] Figure 1 represents the distribution of all registered broker-dealer firms between Q4 2021 and Q3 2022 by level of total assets[579] (Panel A) and by percentage of aggregate total assets[580] (Panel B) with firm size (Panel A) and percentage of aggregate total assets (Panel B) increasing along the x-axis from left to right. These entities encompass a broad range of sizes, business activities, and business models.[581] The distribution of firms[582] by level of total assets (Panel A) shows that the vast majority of firms[583] fall somewhere within the $30,000 to $450,000,000 dollar range, with a small minority of firms showing up as a descending long right tail. The distribution of broker-dealers[584] by percentage of aggregate total assets (Panel B) shows that a small number of firms individually had percentages of aggregate total assets in the high single digits to low double digits.

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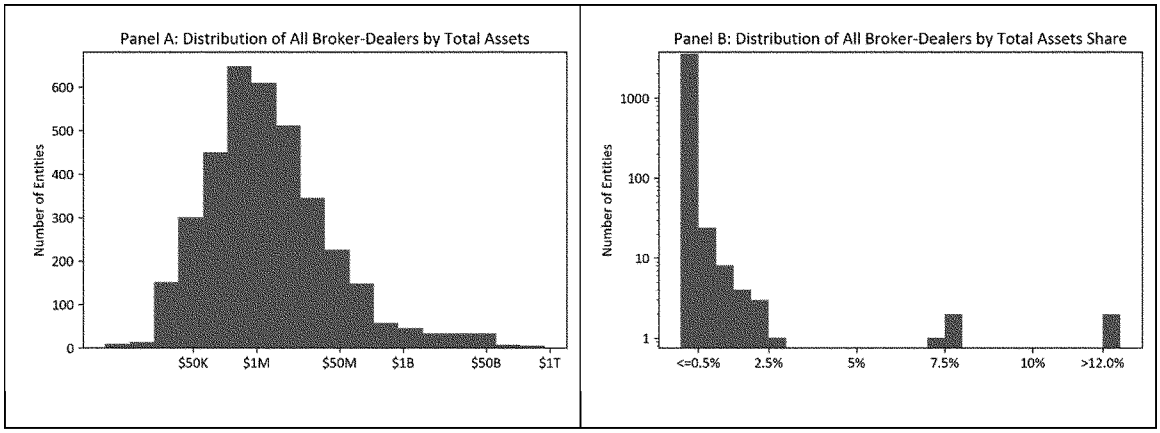


Figure 1. Distribution of broker-dealers by total assets (Panel A) and total assets share (Panel B)

*Notes:* Panel (A): distribution of broker-dealers by average quarterly total assets. Panel (B): distribution of broker-dealers by average quarterly percentage of aggregate total assets. Data are from broker-dealer FOCUS Report Form X-17A-5 Schedule II filings from Q4 2021 to Q3 2022. Also for additional detail on the calculation of total assets of all security broker-dealers, *see supra* note 127.

Figures 2 through 5 represent the distribution of firms by level of transaction activity[585] as measured by average daily dollar volume[586] (Panel A) and the distribution of firms by percentage of transaction activity[587] (Panel B) for each of four asset classes including NMS stocks, exchange-listed options, U.S. Treasury Securities, and Agency Securities respectively. The distributions of firms[588] by level of transaction activity (Panel A) show that the vast majority of firms[589] fall somewhere within the $30,000 to $14.4 billion dollar range, $500,000 to $3.1 billion dollar range, $2,000 to $4.0 billion dollar range, and $500 to $1.2 billion dollar range for the NMS, stock

[572] *See* 17 CFR 49.24(j).

[573] *See* 17 CFR 49.24(j)(3).

[574] *Id.*

[575] *See* 17 CFR 49.24(g).

[576] *See* 17 CFR 49.24(h).

[577] *See* 17 CFR 49.24(c).

[578] *See supra* note 131.

[579] The level of total assets is measured by the average quarterly total assets for each broker-dealer between Q4 2021 and Q3 2022.

[580] The percentage of aggregate total assets is estimated by the average quarterly percentage of aggregate total assets for each broker-dealer between Q4 2021 and Q3 2022.

[581] *See 2022 FINRA Industry Snapshot, supra* note 131.

[582] Panel A of Figures 1 through 5 is represented on a logarithmic scale for ease of viewing when the distribution is far less evenly distributed if displayed using a standard x-axis.

[583] This represents the range of the average quarterly total assets for firms that fall between the 5th and 95th percentile.

[584] The number of individual firms in Panel B of Figures 1 through 5 is more visible here due to use of a standard x-axis even though the y-axis is represented logarithmically. The use of a logarithmic y-axis does however flatten the overall distribution with a disproportionate effect on the firms with percentage of aggregate average daily dollar volume between 0% and 2.5% making it slightly less obvious upon first glance that the vast majority of firms actually fall between 0% and 2.5%.

[585] The level of transaction activity in Panel A of Figures 2 through 5 is measured by the average of monthly average daily dollar volume for each broker-dealer from Jan. 2022 to June 2022.

[586] These measures are described in more detail in section III.A.2.b.iii.

[587] *Id.*

[588] *See supra* note 582.

[589] This represents the range of the average of monthly average daily dollar volume for firms that fall between the 5th and 95th percentile.

exchange-listed options, U.S. Treasury Securities, and Agency Securities markets, respectively.

Figures 2 through 5 (Panel B), showing the distribution of broker-dealers by percentage of aggregate average daily dollar volume,[590] indicate that a very small number of firms [591] individually had percentages of aggregate average daily dollar volume in the high single digits to low double digits.

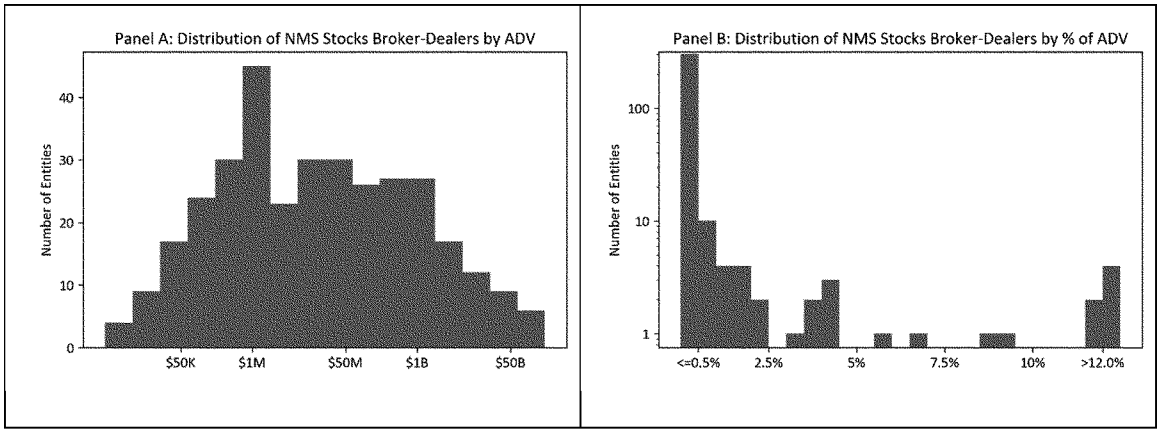


figure 2. Distribution of broker-dealers, NMS stocks asset class

*Notes:* Panel (A): distribution of broker-dealers by average of monthly average daily dollar volume. Panel (B): distribution of broker-dealers by average of monthly percentage of aggregate average daily dollar volume. Data are from Consolidated Audit Trail (CAT) data from Jan. 2022 to June 2022 and the plan processors (SIPs) of the CTA/CQ Plans and Nasdaq UTP Plan. CTA Plan, available at https://www.ctaplan.com; Nasdaq UTP Plan, available at https://www.utpplan.com.

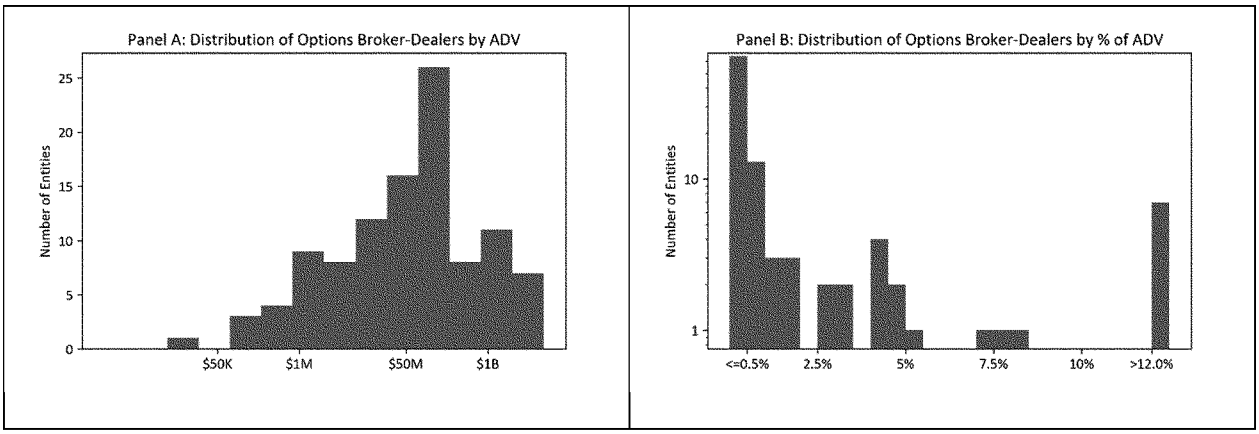


Figure 3. Distribution of broker-dealers, exchange-listed options asset class

*Notes:* Panel (A): distribution of broker-dealers by average of monthly average daily dollar volume. Panel (B): distribution of broker-dealers by average of monthly percentage of aggregate average daily dollar volume. Data are from Consolidated Audit Trail (CAT) data from Jan. 2022 to June 2022 and Options Price Reporting Authority (OPRA) data.

[590] The percentage of aggregate average daily dollar volume in Panel B of figures 2 through 5 is estimated by the average of monthly percentage for each broker-dealer of aggregate average daily dollar volume reported to the plan processors (SIPs) of the CTA/CQ Plans and Nasdaq UTP Plan, OPRA Plan, or FINRA TRACE in each respective asset class from Jan. 2022 to June 2022.

[591] *See supra* note 584.

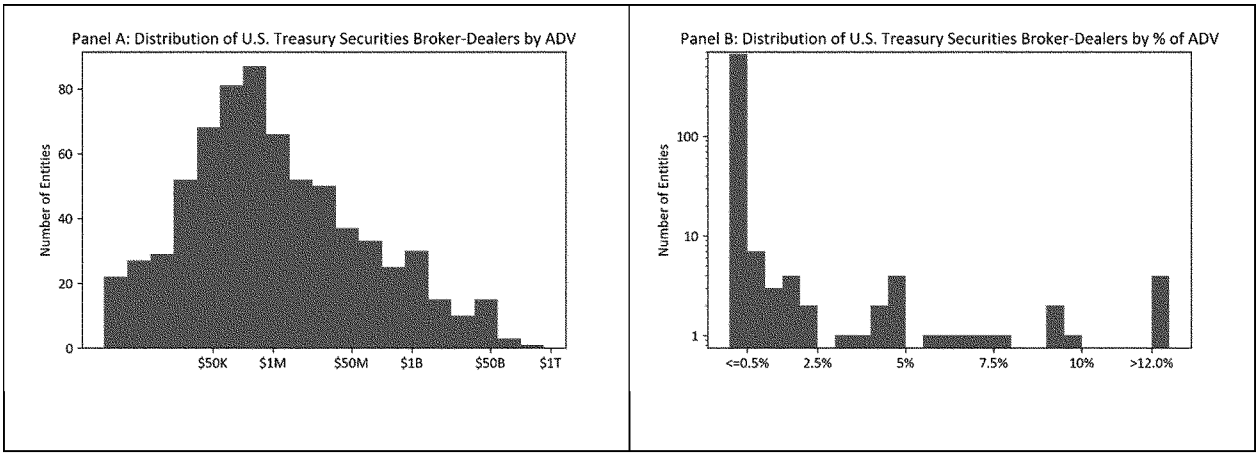


Figure 4. Distribution of broker-dealers, U.S. Treasury Securities asset class

*Notes*: Panel (A): distribution of broker-dealers by average of monthly average daily dollar volume. Panel (B): distribution of broker-dealers by average of monthly percentage of aggregate average daily dollar volume. Data are from TRACE for Treasury Securities data from Jan. 2022 to June 2022 and FINRA TRACE.

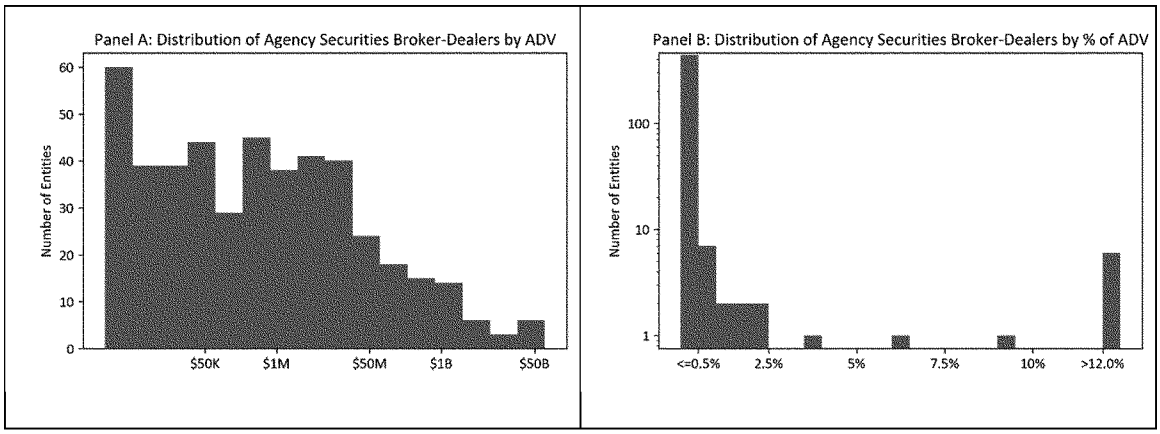


Figure 5. Distribution of broker-dealers, Agency Securities asset class

*Notes*: Panel (A): distribution of broker-dealers by average of monthly average daily dollar volume. Panel (B): distribution of broker-dealers by average of monthly percentage of aggregate average daily dollar volume. Data are from regulatory TRACE data from Jan. 2022 to June 2022 and FINRA TRACE.

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A substantial number of firms had transaction activity [592] across these four markets: 336 had transaction activity in NMS equities,[593] 105 had options transaction activity,[594] 703 had transaction activity in U.S. Treasury Securities,[595] and 461 had transaction activity in Agency Securities.[596]

ii. Regulatory Baseline

As discussed above in section III.A.2.b.ii, there are already a number of Exchange Act and FINRA rules that affect how broker-dealers design and maintain their technology and promote business continuity and regulatory compliance. These include: Commission broker-dealer rules; [597] FINRA supervision rules [598] (discussed at length in section III.A.2.b); and FINRA's business continuity and reporting rules (Rule 4370 and 4530, respectively) discussed previously in section III.A2.b and further in this section. Furthermore, the Commission's cybersecurity-related regulations (Regulation S–P and 17 CFR part 248, subpart C (Regulation S–ID)) are discussed further below.[599]

FINRA Rule 4370 primarily requires that each broker-dealer create and maintain a written business continuity plan [600] identifying procedures relating

[592] The number of firms that had transaction activity here may be different than the number of firms that reported business lines on Form BD at least in part due to differences in how business activities are categorized on Form BD, and also because firms are able to indicate lines of business based on expected business rather than current business. With respect to categorical differences, Form BD does not allow firms to distinguish between NMS and OTC equity business as both types of stocks can be traded over the counter. Additionally, Form BD does not distinguish between lines of business for exchange-traded or OTC options. Finally, Form BD allows firms to indicate government securities broker or dealer lines of business but does not allow firms to specify more granularly treasury or agency securities businesses.

[593] Estimate is based on Consolidated Audit Trail (CAT) data from Jan. 2022 to June 2022.

[594] *Id.*

[595] Estimate is based on TRACE for Treasury Securities data from Jan. 2022 to June 2022 and firm names as of Feb. 1, 2023.

[596] Estimate is based on regulatory TRACE data from Jan. 2022 to June 2022.

[597] *See supra* section III.A.2.b (discussing Rules 17a–3, 17a–4, 17a–11, 15c3–1, 15c3–3, and 15c3–5 (the Market Access Rule)).

[598] FINRA rule 3110 and 3130.

[599] *See supra* note 156.

[600] *See* FINRA, *2019 Report on Examination Findings and Observations: Business Continuity Plans (BCPs)* (Oct. 16, 2019), *available at https://www.finra.org/rules-guidance/guidance/reports/2019-report-exam-findings-and-observations.*

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to an emergency or significant business disruption that are reasonably designed to enable them to meet their existing obligations to customers with explicit requirements for data back-up and recovery with respect to mission critical systems as well as an alternate physical location of employees.[601] Each broker-dealer must update its plan in the event of any material change to the member's operations, structure, business or location. Each member must also conduct an annual review of its business continuity plan to determine whether any modifications are necessary in light of changes to the member's operations, structure, business, or location. FINRA identified that firms[602] frequently tested their BC/DRs plans as part of their annual review and also included key vendors in those tests.[603] Furthermore, a broker-dealer must disclose to its customers through public disclosure statements how its business continuity plan addresses the possibility of a future significant business disruption and how the member plans to respond to events of varying scope. Such required business continuity public disclosure statements[604] offer some summary information on broker-dealer actual practices that relate to FINRA Rule 4370. Recent FINRA exam findings reports[605] in relation to FINRA Rule 4370 suggest increasing attention by broker-dealers to operational resiliency issues and the value of capacity planning, stress testing, and the review of testing and development methodology.

FINRA rules relating to supervision[606] require each member to establish, maintain, and enforce written procedures to supervise the types of business in which it engages and the activities of its associated persons that are reasonably designed to achieve compliance with applicable securities laws and regulations including Federal cybersecurity laws and regulations applicable to broker-dealers such as Regulation S–P[607] and Regulation S–ID.[608] As discussed in section III.D.1.c.i, Regulation S–P's safeguards provisions require broker-dealers to adopt written policies and procedures that address administrative, technical, and physical safeguards for the protection of customer records and information.[609] The Regulation S–P Safeguards Rule further provides that these policies and procedures must: (1) insure the security and confidentiality of customer records and information; (2) protect against any anticipated threats or hazards to the security or integrity of customer records and information; and (3) protect against unauthorized access to or use of customer records or information that could result in substantial harm or inconvenience to any customer.[610] Additionally, the Regulation S–P Disposal Rule requires broker-dealers that maintain or otherwise possess consumer report information for a business purpose to properly dispose of the information by taking reasonable measures to protect against unauthorized access to or use of the information in connection with its disposal.[611] In contrast, Regulation S–ID is more narrowly concerned with identity theft. Broker-dealers subject to Regulation S–ID must develop and implement a written identity theft program that includes policies and procedures to identify and detect relevant red flags.[612]

Past Commission staff statements[613] and FINRA guidance[614] with respect to these rules identify common elements of reasonably designed cybersecurity policies and procedures including risk assessment, user security and access,

Broker-dealers are required to conduct an annual review of their business continuity plans along with recommended testing and evaluation of its effectiveness with vendor participation.

[601] FINRA Rules 4370, 3110 (Supervision), and 4511 (General Requirements), as well as Securities Exchange Act of 1934 (Exchange Act) Rules 17a–3 and 17a–4.

[602] FINRA did not disclose the number or identity of these firms.

[603] *See* FINRA, 2019 Report on Examination Findings and Observations: Business Continuity Plans (BCPs), *supra* note 600.

[604] While broker-dealers are required to provide a brief summary disclosure statement regarding their BCPs to customers, they do not disclose the actual BCP. Based on a review of 2021 and 2022 BCP disclosure statements, firms often did not provide any detail on operational capacity to meet demand surges or any specific timeframes for resumption of service. They sometimes mention the use of redundant service centers, data centers, systems, and staff across geographically diverse locations in case primary centers and systems go offline; immediate failover to backup systems and plans to restore services quickly in the event of a technology disruption; and review of third parties' business contingency plans.

[605] *See* FINRA, *2022 Report on FINRA's Examination and Risk Monitoring Program* (Feb. 9, 2022), *available at https://www.finra.org/sites/default/files/2022-02/2022-report-finras-examination-risk-monitoring-program.pdf. See also* FINRA, *2020 Risk Monitoring and Examination Priorities Letter* (Jan. 9, 2020), *available at https://www.finra.org/rules-guidance/communications-firms/2020-risk-monitoring-and-examination-priorities-letter;* FINRA, *Equity Trading Initiatives: Supervision and Control Practices for Algorithmic Trading Strategies* (Mar. 2015), *available at https://www.finra.org/sites/default/files/notice_doc_file_ref/Notice_Regulatory_15-09.pdf.*

[606] FINRA Rules 3110 (Supervision) and 3120 (Supervisory Control Systems).

[607] *See* 17 CFR 248.1 through 248.30.

[608] *See* 17 CFR 248.201 and 248.202.

[609] *See* 17 CFR 248.30(a).

[610] *See* 17 CFR 248.30(a)(1) through (3).

[611] *See* 17 CFR 248.30(b)(2). Regulation S–P currently defines the term ''disposal'' to mean: (1) the discarding or abandonment of consumer report information; or (2) the sale, donation, or transfer of any medium, including computer equipment, on which consumer report information is stored. *See* 17 CFR 248.30(b)(1)(iii).

[612] *See* 17 CFR 248.201.

[613] *See* OCIE, SEC, *Cybersecurity: Safeguarding Client Accounts against Credential Compromise* (Sep. 15, 2020), *available at https://www.sec.gov/files/Risk%20Alert%20-%20Credential%20Compromise.pdf;* OCIE, SEC, *Select COVID–19 Compliance Risks and Considerations for Broker-Dealers and Investment Advisers* (Aug. 12, 2020), *available at https://www.sec.gov/files/Risk%20Alert%20-%20COVID-19%20Compliance.pdf;* OCIE, SEC, *Cybersecurity: Ransomware Alert* (July 10, 2020), *available at https://www.sec.gov/files/Risk%20Alert%20-%20Ransomware.pdf;* OCIE, SEC, *Report on OCIE Cybersecurity and Resiliency Observations* (Jan. 27, 2020), *available at https://www.sec.gov/files/OCIE%20Cybersecurity%20and%20Resiliency%20Observations.pdf;* OCIE, SEC, *OCIE Safeguarding Customer Records and Information in Network Storage—Use of Third Party Security Features* (May 23, 2019), *available at https://www.sec.gov/files/OCIE%20Risk%20Alert%20-%20Network%20Storage.pdf*; OCIE, SEC, *Investment Adviser and Broker-Dealer Compliance Issues Related to Regulation S–P—Privacy Notices and Safeguard Policies* (Apr. 16, 2019), *available at https://www.sec.gov/files/OCIE%20Risk%20Alert%20-%20Regulation%20S-P.pdf;* OCIE, SEC, *Observations from Cybersecurity Examinations* (Aug. 7, 2017), *available at https://www.sec.gov/files/observations-from-cybersecurity-examinations.pdf;* OCIE, SEC, *Cybersecurity: Ransomware Alert* (May 17, 2017), *available at https://www.sec.gov/files/risk-alert-cybersecurity-ransomware-alert.pdf;* OCIE, SEC, *OCIE's 2015 Cybersecurity Examination Initiative* (Sep. 15, 2015), *available at https://www.sec.gov/files/ocie-2015-cybersecurity-examination-initiative.pdf;* OCIE, SEC, *Cybersecurity Examination Sweep Summary* (Feb. 3, 2015), *available at https://www.sec.gov/about/offices/ocie/cybersecurity-examination-sweep-summary.pdf;* OCIE, SEC, *OCIE's 2014 Cybersecurity Initiative* (Apr. 15, 2014), *available at https://www.sec.gov/ocie/announcement/Cybersecurity-Risk-Alert--Appendix---4.15.14.pdf.*

[614] *See* FINRA, *Core Cybersecurity Threats and Effective Controls for Small Firms* (May 2022), *available at https://www.finra.org/sites/default/files/2022-05/Core_Cybersecurity_Threats_and_Effective_Controls-Small_Firms.pdf;* FINRA, *Cloud Computing in the Securities Industry* (Aug. 16, 2021), *available at https://www.finra.org/rules-guidance/key-topics/fintech/report/cloud-computing;* FINRA, *Common Cybersecurity Threats* (July 9, 2019), *available at https://www.finra.org/rules-guidance/guidance/common-cybersecurity-threats;* FINRA, *Report on Selected Cybersecurity Practices* (Dec. 1, 2018), *available at https://www.finra.org/rules-guidance/guidance/common-cybersecurity-threats*; FINRA, *Report on FINRA Examination Findings* (Dec. 6, 2017), *available at https://www.finra.org/sites/default/files/2017-Report-FINRA-Examination-Findings.pdf;* FINRA, *Small Firm Cybersecurity Checklist* (May 23, 2016), *available at https://www.finra.org/compliance-tools/small-firm-cybersecurity-checklist.* Cybersecurity has also been a regular theme of FINRA's Regulatory and Examination Priorities Letter since 2008 often with reference to Regulation S–P. Similarly the SEC sponsored a Cybersecurity Roundtable and the Division of Examination conducted cybersecurity initiative I and II to assess industry practices and legal and compliance issues associated with broker-dealer and investment adviser cybersecurity preparedness.

information protection, incident response,[615] and training.[616]

Consistent with these rules, nearly all broker-dealers that participated in two Commission exam sweeps in 2015 and 2017 reported [617] maintaining some cybersecurity policies and procedures; conducting some periodic risk assessments to identify threats and vulnerabilities,[618] conducting firm-wide systems inventorying or cataloguing, ensuring regular system maintenance including the installation of software patches to address security vulnerabilities, performing some penetration testing,[619] although both sweeps also discussed various flaws in compliance. A separate staff statement, based on observed industry practices, noted that at least some firms implemented capabilities that are able to control, monitor, and inspect all incoming and outgoing network traffic to prevent unauthorized or harmful traffic and implemented capabilities that are able to detect threats on endpoints.[620] In the two Commission exam sweeps, many firms indicated that policies and procedures were vetted and approved by senior management and that firms provided annual cybersecurity reports to the board while some also provided ad hoc reports in the event of major cybersecurity events.[621] Broadly, many broker-dealers reported relying on industry standards with respect to cybersecurity [622] typically by adhering to a specific industry standard or combination of industry standards or by using industry standards as guidance in designing policies and procedures. In the Commission's 2017 sweep, however, weaknesses in policies and procedures and failure to implement policies and procedures were observed at a majority of the participating firms.[623]

FINRA Rule 3110's supervisory obligation also extends to member firms' outsourcing of certain ''covered activities''—activities or functions that, if performed directly by a member firm, would be required to be the subject of a supervisory system and written supervisory procedures pursuant to FINRA Rule 3110. These vendor management obligations are discussed in further guidance.[624] As discussed in section III.A.2.b of this release, FINRA Rule 4530 requires broker-dealer reporting of certain events to FINRA, including, among other things, compliance issues and other events [625] where a broker-dealer has concluded or should have reasonably concluded that a violation of securities or other enumerated law, rule, or regulation of any domestic or foreign regulatory body or SRO has occurred. Broker-dealers affiliated with a banking organization [626] may also be affected by a cybersecurity notification requirement. For example, if a broker-dealer is a subsidiary of a bank holding company, an incident at the broker-dealer would likely be reported by the bank holding company to its respective banking regulator.

Aside from specific dissemination obligations under Regulation SCI for a limited number of broker-dealers with respect to their related SCI ATSs, there are no Commission or FINRA requirements for broker-dealers to disseminate notifications of breaches to members or clients although many firms do so [627] pursuant to various state data breach laws.[628] Broker-dealers are subject to state laws known as ''Blue Sky Laws,'' which generally are regulations established as safeguards for investors against securities fraud.[629] All 50 states have enacted laws in recent years requiring firms to notify individuals of data breaches, standards differ by state, with some states imposing heightened notification requirements relative to other states.[630]

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[615] *See FINRA, 2021 Report on FINRA's Examination and Risk Monitoring Program* (Feb. 01, 2021), *available at https://www.finra.org/rules-guidance/guidance/reports/2021-finras-examination-and-risk-monitoring-program/cybersecurity* (FINRA recommended among effective practices with respect to incident response: Establishing and regularly testing (often using tabletop exercises) a written formal incident response plan that outlines procedures for responding to cybersecurity and information security incidents; and developing frameworks to identify, classify, prioritize, track and close cybersecurity-related incidents.).

[616] These categories vary somewhat in terms of nomenclature and the specific categories themselves across different Commission and FINRA publications.

[617] *See Cybersecurity Examination Sweep Summary, supra* note 613 (Of 57 examined broker-dealers, the vast majority adopted written information security policies, conducted periodic audits to determine compliance with these information security policies and procedures, conducted risk assessments and reported considering such risk assessments in establishing their cybersecurity policies and procedures. With respect to vendors, the majority of the broker-dealers required cybersecurity risk assessments of vendors with access to their firms' networks and had at least some specific policies and procedures relating to vendors.). *See also Observations from Cybersecurity Examinations, supra* note 613 (This largely aligned with the prior 2015 Exam Sweep but is based on additional data from a mixed group of 75 broker-dealers and investment advisers. For example, nearly all firms had incident response plans. Still, it appeared that a number of firms did not appear to fully remediate some of the high risk observations that they discovered from these tests and vulnerability scans in a timely manner or failed to conduct penetration testing regularly).

[618] *See Report on Selected Cybersecurity Practices, supra* note 614. According to FINRA's 2018 RCA, 94% of higher revenue firms and 70% of mid-level revenue firms use a risk assessment as part of their cybersecurity program. The Risk Control Assessment (RCA) Survey is a voluntary survey conducted by FINRA on an annual basis with all active member firms.

[619] *Id.* According to FINRA's 2018 RCA, 100% of higher revenue firms include penetration testing as a component in their overall cybersecurity program.

[620] *See Cybersecurity and Resiliency Observations, supra* note 614.

[621] *See Cybersecurity Examination Sweep Summary, supra* note 613, and *Observations from Cybersecurity Examinations, supra* note 613.

[622] *Id.* Among the firms that were part of the sweep, nearly 90% used one or more of the NIST, ISO or ISACA frameworks or standards. More specifically, 65% of the respondents reported that they use the ISO 27001/27002 standard while 25% use COBIT. Some firms use combinations of these standards for various parts of their cybersecurity programs. While the report focused on firm utilization of cybersecurity frameworks specifically, in many cases, the referenced frameworks were broader IT frameworks.

[623] *See* OCIE, SEC, *Observations from Cybersecurity Examinations* (Aug. 7, 2017), *available at https://www.sec.gov/files/observations-from-cybersecurity-examinations.pdf.*

[624] *See Regulatory Notice 21–29: Vendor Management and Outsourcing, supra note 165; Notice to Members 05–48: Outsourcing, supra note 165.* FINRA found that most firms had adequate privacy and security language in contracts where customer or firm confidential data or high-risk systems were at risk. Standard contract language topics that firms included were: non-disclosure agreements/confidentiality agreements, data storage, retention, and delivery; breach notification responsibilities; right-to-audit clauses; vendor employee access limitations; use of subcontractors; and vendor obligations upon contract termination. *Id.*

[625] While FINRA has urged firms to report material cyber incidents that do not trigger a reporting obligation to their regulatory coordinator, current practices are unclear.

[626] In the simplification of the Volcker Rule, effective Jan. 21, 2020, Commission staff estimated that there were 202 broker-dealers that were affiliated with banking organizations.

[627] *See Cybersecurity Examination Sweep Summary, supra* note 613 (Based on a small sample of firms, the vast majority of broker-dealers maintained plans for data breach incidents and most had plans for notifying customers of material events.)

[628] *See* Digital Guardian, *The Definitive Guide to U.S. State Data Breach Laws, digitalguardian.com*, *available at https://info.digitalguardian.com/rs/768-OQW-145/images/the-definitive-guide-to-us-state-data-breach-laws.pdf* (last visited Nov. 15, 2022).

[629] *See, e.g.,* Office of Investor Education and Advocacy, Commission, *Blue Sky Laws, available at https://www.investor.gov/introduction-investing/investing-basics/glossary/blue-sky-laws.*

[630] For example, some states may require a firm to notify individuals when a data breach includes biometric information, while others do not. *Compare* Cal. Civil Code sec. 1798.29 (notice to California residents of a data breach generally required when a resident's personal information was or is reasonably believed to have been acquired by an unauthorized person; ''personal information'' is defined to mean an individual's first or last name in combination with one of a list of specified elements, which includes certain unique biometric data), *with* Ala. Stat. secs. 8–38–2, 8–38–4, 8–38–5 (notice of a data breach to Alabama residents is generally required when sensitive personally identifying information has been acquired by an unauthorized person and is reasonably likely to cause substantial harm to the resident to whom the information relates; ''sensitive personally

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Additionally, market data, including bids, offers, quotation sizes, among other types of data, are currently collected from broker-dealers and consolidated and distributed pursuant to a variety of Exchange Act rules and joint industry plans.[631]

c. Exempt Clearing Agencies

i. Affected Parties

Certain SCI entities are in the market for clearance and settlement services. Registered clearing agencies and certain exempt clearing agencies are already SCI entities. The Commission proposes to extend Regulation SCI to include all other exempt clearing agencies. The proposed amendment would have the immediate effect of introducing two exempt clearing agencies into the scope of Regulation SCI.

There are broadly two types of clearing agencies: registered clearing agencies and exempt clearing agencies. There are seven registered and active clearing agencies: DTC, FICC, NSCC, ICC, ICEEU, the Options Clearing Corp., and LCH SA. There are two other clearing agencies that are no longer active but both maintain registration with the Commission.[632] In addition to these registered clearing agencies, there are clearing agencies that have received from the Commission an exemption from registration as a clearing agency under section 17A of the Exchange Act. There are five exempt clearing agencies: Bloomberg STP (inactive), ITPMATCH (DTCC), SSCNET (SS&C Technologies), Euroclear Bank SA/NV, and Clearstream Banking, S.A. Of these exempt clearing agencies, Bloomberg STP, ITPMATCH (DTCC), and SSCNET (SS&C Technologies) are subject to Regulation SCI as ''exempt clearing agencies subject to ARP,'' together with registered clearing agencies.

The other two, Euroclear Bank SA/NV, and Clearstream Banking, S.A, both exempt clearing agencies,[633] have not been required to comply with Regulation SCI. Each performs CSD functions and provides clearance and settlement for U.S. Treasury transactions, subject to volume limits set forth in their exemptions. Euroclear Bank also provides collateral management services for U.S. equity transactions involving a U.S. person and a non-U.S. person.

ii. Regulatory Baseline

The two exempt clearing agencies not subject to ARP are required per Commission exemptive orders to submit to the Commission a number of items including transaction volume data,[634] notification regarding material adverse changes in any account maintained for customers,[635] one or more disclosure documents, amendments to its application for exemption on Form CA–1,[636] responses to a Commission request for information,[637] etc. In the case of one exempt clearing agency, its exemptive order also requires submission of additional items related to its systems including quarterly reports describing completed, ongoing, and planned material system changes,[638] notification [639] regarding systems events; [640] as well as a requirement to take appropriate corrective action regarding such systems events. This exempt clearing agency is also required to maintain policies and procedures that are reasonably designed to identify, manage, and monitor systems operational risk; clearly define the roles and responsibilities of personnel for addressing operational risk; review such policies and procedures; conduct systems audits and system tests periodically and at implementation of significant changes; clearly define operational reliability objectives for the systems; ensure that the systems have scalable capacity adequate to handle increasing stress volumes and achieve the systems service-level objectives; establish comprehensive physical and information security policies that address all potential vulnerabilities and threats to the systems; and establish a business continuity plan [641] for the systems that addresses events posing a significant risk of disrupting the systems' operations, including events that could cause a wide-scale or major disruption in the provision of the clearing agency activities. Such policies and procedures should be consistent with current information technology industry standards [642] and be reasonably designed to ensure that the systems operate on an ongoing basis in a manner that complies with the conditions applicable to the systems and with the exempt clearing agency's rules and governing documents applicable to the clearing agency activities. This exempt clearing agency must also provide the

identifying information'' is defined as the resident's first or last name in combination with one of a list of specified elements, which does not include biometric information).

[631] *See, e.g.,* Rules 601 through 17 CFR 242.604 (''Rule 604'') of Regulation NMS and 17 CFR 242.301(b)(3) (''Rule 301(b)(3)'') of Regulation ATS.

[632] *See* BSECC Notice and SCCP Notice, *supra* note 230.

[633] *See* Euroclear Exemption, *supra* note 231 (providing an exemption to Euroclear Bank SA/NV (successor in name to Morgan Guaranty Trust Company of NY)); Clearstream Exemption, *supra* note 231 (providing an exemption to Clearstream Banking, S.A. (successor in name to Cedel Bank, société anonyme, Luxembourg)). Furthermore, pursuant to the Commission's statement on CCPs in the European Union (''EU'') authorized under the European Markets Infrastructure Regulation (''EMIR''), an EU CCP may request an exemption from the Commission where it has determined that the application of SEC requirements would impose unnecessary, duplicative, or inconsistent requirements in light of EMIR requirements to which it is subject. *See Statement on Central Counterparties Authorized under the European Markets Infrastructure Regulation Seeking to Register as a Clearing Agency or to Request Exemptions from Certain Requirements Under the Securities Exchange Act of 1934 supra* note 240 (stating that in seeking an exemption, an EU CCP could provide ''a self-assessment . . . [to] explain how the EU CCP's compliance with EMIR corresponds to the requirements in the Exchange Act and applicable SEC rules thereunder, such as Rule 17Ad–22 and Regulation SCI.'').

[634] *Id.* This is provided in the form of quarterly reports, calculated on a twelve-month rolling basis, of volume statistics related to government securities. One exempt clearing agency also reports volume statistics related to equities.

[635] *Id.* This is for customers that are members or affiliates of members of a U.S. registered clearing agency in the case of one exempt clearing or US participants in the case of the other.

[636] *Id.* This must be filed prior to the implementation of any change in stated policies, practices, or procedures that makes the information contained in the original Form CA–1 incomplete or inaccurate in any material respect.

[637] *Id.* This would typically concern a U.S. customer or its affiliate about whom the Commission has financial solvency concerns.

[638] This must be filed within 30 calendar days after the end of each quarter. These reported information represents changes related to the Clearing Agency Activities during the prior, current, and subsequent calendar quarters, including the dates or expected dates of commencement and completion.

[639] This requires notification of such systems event within 24 hours after occurrence; regular updates until such time as a systems event is resolved and investigation of the systems event is closed; interim written notification within 48 hours after the occurrence of a systems event or promptly thereafter if such a deadline cannot be met; a written final report within ten business days after the occurrence of a systems event or promptly thereafter if such a deadline cannot be met. For systems events characterized as ''bronze level'' events (*i.e.,* a Systems Event in which the incident is clearly understood, almost immediately under control, involves only one business unit and/or entity, and is resolved within a few hours), the clearing agency is instead required to provide on a quarterly basis an aggregated list of bronze level events.

[640] This includes disruptions, compliance issues, or intrusions of the systems that impact, or is reasonably likely to impact clearing agency activities.

[641] The business continuity plan would require the use of a secondary site designed to ensure two-hour resumption of operation following disruptive events; regular testing of business continuity plans; identification, monitoring, and management of the risks that key participants, other financial market infrastructures, and service and utility providers might pose to the systems' operations in relation to the clearing agency activities.

[642] The exempt clearing agency is required to provide annual notice to the Commission regarding the industry standards utilized. These standards consist of information technology practices that are widely available to information technology professionals in the financial sector and issued by a widely recognized organization.

Commission with an annual update regarding policies and procedures.

Additionally, the two exempt clearing agencies not subject to ARP are subject to Europe's Central Securities Depositories Regulation (CSDR) which provides a set of common requirements for CSDs operating securities settlement systems across the EU.[643] CSDR provides, among other things, Operational Risk rules (Article 45).[644] There are more specific requirements in the CSDR's Regulatory Technical Standards [645] including identifying operational risks; [646] methods to test, address and minimize operational risks; [647] IT systems; [648] and business continuity.[649]

Furthermore, each of these two exempt clearing agencies publish disclosure framework reports [650] that purport to describe the policies and procedures [651] with respect to the operational risk framework of the Principles for Financial Market Infrastructures (PFMI) published by CPSS and IOSCO.[652]

2. Existing SCI Entities

a. Affected Parties

In addition to these proposed new SCI entities, Regulation SCI has applied to entities that facilitate several different markets, including the market for trading services, the market for listing services, the market for regulation and surveillance services, the market for clearance and settlement services, and the market for market data.[653] As of this writing, there are 47 SCI entities. These include 35 SCI SROs (including 24 exchanges, 9 registered clearing agencies, FINRA, and the MSRB), 7 SCI ATSs (including 5 NMS stock ATSs and 2 non-NMS stock ATSs), 2 plan processors, and 3 exempt clearing agencies subject to ARP.[654] All of them are already required to comply with Regulation SCI, and, as discussed in section V.B.2.b, subsets of these entities also have other specific rules that apply to them.

The general characteristics of the markets in which the existing SCI entities operate are described in the SCI Proposing Release [655] and SCI Adopting Release.[656] There are, however, broad changes to these markets—as they pertain to Regulation SCI—that should be noted. The markets have changed in at least four important ways. First, the total trading volumes have increased across all types of securities.[657] Second, there is an increased reliance on technology and automation among financial institutions, a trend which accelerated due to the COVID–19 pandemic.[658] Third, and relatedly, financial institutions have become increasingly dependent on third parties—including cloud service providers—to operate their businesses and provide their services.[659] This is, in fact, a general trend among all global companies, and this trend, too, has been driven in part by the COVID–19 pandemic.[660] Fourth, cybersecurity events have grown in both number and sophistication.[661] These developments in the market have significantly increased the negative externalities that may flow from systems failures.

Current SCI entities are required to report systems intrusions, either immediately or on a quarterly basis, rather than immediately if de miminis in impact. However, current SCI entities have not been reporting attempted intrusions, as they were not required to do so.

b. Regulatory Baseline

The common regulatory baseline for current SCI entities is Regulation SCI which was adopted in 2014. Regulation SCI requires, among other things, that these entities establish, maintain, and enforce written policies and procedures reasonably designed to ensure that their SCI systems have levels of capacity, integrity, resiliency, availability, and security adequate to maintain their operational capability and promote the maintenance of fair and orderly markets and operate in a manner that complies with the Exchange Act and the rules and regulations thereunder and the entity's rules and governing documents, as applicable, and specifies certain minimum requirements for such policies and procedures. As a policies and procedures based rule, and one that employs a risk-based approach, Regulation SCI provides flexibility to allow each SCI entity to determine how

[643] The two exempt clearing agencies may also be subject to the EU Regulation, the Digital Operational Resilience Act (DORA), which went into effect in 2015: *See* Proposal for a Regulation of the European Parliament and of the Council on Digital Operational Resilience for the Financial Sector and Amending Regulations (EC) No 1060/2009, (EU) No 648/2012, (EU) No 600/2014 and (EU) No 909/2014 *available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020PC0595*.

[644] *See* Commission Regulation No. 909/2014 of July 23, 2014, on improving securities settlement in the European Union and on central securities depositories and amending Directives 98/26/EC and 2014/65/EU and Regulation (EU) No 236/2012, art. 45, 2014 O.J. (L 257) 47, *available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32014R0909*.

[645] *See* Commission Delegated Regulation 2017/392, Supplementing Regulation (EU) No 909/2014 of the European Parliament and of the Council with Regard to Regulatory Technical Standards on Authorization, Supervisory and Operational Requirements for Central Securities Depositories. 65 Off. J. Eur. Union 48 (2017) *available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017R0392&from=EN*.

[646] *Id.* art. 45:1.

[647] *Id.* art. 45:2.

[648] *Id.* art. 45:3.

[649] *Id.* art. 45:4.

[650] *See infra* notes 683–684.

[651] The respective disclosure documents have not been reviewed by the Commission and its staff for accuracy and may or may not demonstrate implementation/compliance with international standards.

[652] Bank for International Settlements (BIS), *Principles for Financial Market Infrastructures: Disclosure Framework and Assessment Methodology* (Dec. 2012), *available at https://www.bis.org/cpmi/publ/d106.pdf*.

[653] 17 CFR 242.1000 (definitions of ''SCI systems'' and ''critical SCI systems'').

[654] In 2021, the Commission amended Regulation SCI to add competing consolidators that exceed a 5% consolidated market data gross revenue threshold over a specified time period as SCI entities. Currently, no competing consolidators have registered with the Commission. *See* Market Data Infrastructure Adopting Release, *supra* note 24.

[655] *See* SCI Proposing Release, *supra* note 14, at section V. *See also* Market Data Infrastructure Adopting Release, *supra* note 24, for a description of competing consolidator market characteristics.

[656] *See* SCI Adopting Release, *supra* note 1, at section VI.

[657] *See, e.g., SIFMA Insights: Electronic Trading Market Structure Primer, supra* note 3 (summarizing electronic trading history and trends in different markets); SEC, *Staff Report on Equity and Options Market Structure Conditions in Early 2021* (Oct. 14, 2021), *available at https://www.sec.gov/files/staff-report-equity-options-market-struction-conditions-early-2021.pdf; see also* U.S. House Committee on Financial Services, *Game Stopped: How the Meme Stock Market Event Exposed Troubling Business Practices, Inadequate Risk Practices, and the Need for Legislative and Regulatory Reform* (June 2022), *available at: https://democrats-financialservices.house.gov/uploadedfiles/6.22_hfsc_gs.report_hmsmeetbp.irm.nlrf.pdf*.

[658] *See, e.g.,* Henning Soller, et al., *Innovative Technologies in Financial Institutions: Risk as a Strategic Issue,* McKinsey Digital (Sep. 25, 2020), *available at: https://www.mckinsey.com/business-functions/mckinsey-digital/our-insights/tech-forward/innovative-technologies-in-financial-institutions-risk-as-a-strategic-issue* (''The current COVID–19 crisis has significantly accelerated the need for financial institutions to adopt innovative technologies.'').

[659] *See, e.g.,* Noah Kessler, *Cloud Is on the Rise in Financial Services and Regulators Are Taking Note,* ABA Risk and Compliance (Sept. 29, 2021), *available at https://bankingjournal.aba.com/2021/09/cloud-is-on-the-rise-in-financial-services-and-regulators-are-taking-note/*.

[660] *See, e.g.,* Deloitte, *2021 Global Shared Services and Outsourcing Survey Report* 3, *available at https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Process-and-Operations/gx-2021-global-shared-services-report.pdf* (''[T]here's an increasing shift to leverage global, multifunctional, and virtual or remote models, especially driven by learnings from COVID–19'').

[661] *See, e.g.,* Chuck Brooks, *Alarming Cyber Statistics For Mid-Year 2022 That You Need To Know,* Forbes.com (June 3, 2022), *available at https://www.forbes.com/sites/chuckbrooks/2022/06/03/alarming-cyber-statistics-for-mid-year-2022-that-you-need-to-know/?sh=2429c57e7864*.

to best meet the requirements in Rule 1001(a).

In addition, 17 CFR 242.613 (''Rule 613'') of Regulation NMS requires national securities exchanges and national securities associations (FINRA) to jointly develop and submit to the Commission a Consolidated Audit Trail National Market System (CAT NMS) Plan.[662]

Under the Commission-approved CAT NMS Plan, the national securities exchanges and FINRA (the Participants) conduct the activities related to the CAT through a jointly owned limited liability company, Consolidated Audit Trail, LLC (''Company'').[663] FINRA CAT, LLC—a wholly-owned subsidiary of FINRA—has entered into an agreement with the Company to act as the plan processor for the CAT. However, the Participants remain ultimately responsible for the performance of the CAT and its compliance with any statutes, rules, and regulations.[664] The Plan Processor must develop three sets of policies and procedures: (1) the CAT information security program and related data security policies and procedures; (2) user security and access policies and procedures; and (3) breach management policies and procedures.[665]

First, the Plan Processor must develop and maintain a comprehensive information security program, to be approved and reviewed at least annually by an operating committee, which contains certain specific requirements for the Company related to data security.[666] As part of this requirement, the Plan Processor is required to create and enforce policies, procedures, and control structures to monitor and address CAT data security, including reviews of industry standards and periodic penetration testing.[667] Second, both the Participants and the Plan Processor must implement user security and access policies and procedures that include safeguards to secure access and use of the CAT.[668] The Plan Processor must also review Participant information security policies and procedures related to the Company to ensure that such policies and procedures are comparable to those of the CAT system.[669] Finally, the Plan Processor must develop a cyber-incident response plan and document all information relevant to breaches.[670] In addition to these policies and procedures requirements, the CAT NMS Plan requires several forms of periodic review of CAT, including an annual written assessment,[671] regular reports,[672] and an annual audit.[673] The Commission has proposed amendments to the CAT NMS Plan that are designed to enhance the security of the CAT through increased security requirements as well as limiting the scope of sensitive information required to be collected by the CAT.[674]

3. Current Market Practice

This section describes current and new SCI entities' market practices, as relevant to certain of the proposed and existing provisions. These market practices include entities' compliance efforts that exceed current regulatory baseline requirements, entities' adherence to voluntary standards and best practices, and business practices not directly related to compliance with a regulatory obligation that nevertheless overlap with the substantive or procedural requirements of the proposed rule. To the extent the entities' existing practices already comply with the requirements or proposed requirements of Regulation SCI, or to the extent those practices might facilitate such compliance, the benefits and costs of the proposal could be mitigated. The Commission requests comment on how the new and existing SCI entities' current market practices affect the baseline against which the economic effects are measured.

a. Systems Classification and Lifecycle Management

Based on the experience of Commission most current SCI entities undertake some form of lifecycle management program that includes acquisition, integration, support, refresh and disposal of covered systems, as applicable, and the sanitization of end-of-life systems.

b. Third-Party Vendor Management and Oversight

Globally the end-user spending on public cloud services is estimated to grow 20.4% in 2022 to a total of $494.7 billion, up from $410.9 billion in 2021.[675] In terms of market concentration, as of Q1 2022, the three largest CSPs collectively have the market share of 65 percent global spending on cloud computing [676] and the eight largest CSPs have roughly 80 percent of the market.[677] SCI entities employ cloud service providers. Some of the largest cloud service providers appear to be familiar with the Regulation SCI requirements with which SCI entities are obliged to comply.[678]

[662] 17 CFR 242.613.

[663] Consolidated Audit Trail, LLC, *CAT NMS Plan, secs. 1.1, 3.1, 4.1* (July 2020), *available at https://catnmsplan.com/sites/default/files/2020-07/LLC-Agreement-of-Consolidated-Audit-Trail-LLC-as-of-7.24.20.pdf*; *see also* CAT NMS Plan Approval Order, *supra* note 393; Joint Industry Plan; Order Approving Amendment to the National Market System Plan Governing the Consolidated Audit Trail, Securities Exchange Act Release No. 89397 (July 24, 2020), 85 FR 45941 (July 30, 2020).

[664] CAT NMS Plan, secs. 4.3, 5.1, 6.1. The Participants jointly own on an equal basis the Company. As such, the CAT's Central Repository is a facility of each of the Participants, and also an SCI system of each of the Participants. *See* SCI Adopting Release, *supra* note 1, at 72275 at n. 246; CAT NMS Plan Approval Order, *supra* note 393, at 84758.

[665] CAT NMS Plan, secs. 6.12 and app. D. secs. 4.1 to 4.1.5. The Plan Processor is subject to certain industry standards with respect to its information security program, including, among others, NIST–800–23 (Guidelines to Federal Organizations on Security Assurance and Acquisition/Use of Test/Evaluated Products), NIST 800–53 (Security and Privacy Controls for Federal Information Systems and Organizations), and NIST 800–115 (Technical Guide to Information Security Testing and Assessment). CAT NMS Plan, app D sec 4.2.

[666] CAT NMS Plan, app. D sec. 4.1.

[667] *Id.* sec. 6.2(b)(v) and app. D secs. 4.1 to 4.2.

[668] Specifically, these safeguards must include: (1) restrictions on the acceptable uses of CAT Data; (2) role-based access controls; (3) authentication of individual users; (4) multifactor authentication and password controls; (5) implementation of information barriers to prevent unauthorized staff from accessing CAT Data; (6) separate storage of sensitive personal information and controls on transmission of data; (7) security-driven monitoring and logging; (8) escalation of non-compliance or security events; and (9) remote access controls. *Id.* at secs. 6.2(b)(v), 6.5(c)(i), 6.5(c)(iii) and (iv) and app. D secs. 4.1 to 4.1.4, 4.1.6, 8.1, 8.1.1, 8.1.3, 8.2, 8.2.2.

[669] *Id.* sec. 6.2(b)(vii).

[670] *Id.* app. D sec. 4.1.5.

[671] The Participants are required to provide the Commission with an annual written assessment of the Plan Processor's performance, which must include, among other things, an evaluation of potential technology upgrades and an evaluation of the CAT information security program. *Id.* secs. 6.2(a)(v)(G), 6.6(b).

[672] The Plan Processor is required to provide the operating committee with regular reports on various topics, including data security issues and the Plan Processor. *Id.* secs. 6.1(o), 6.2(b)(vi), 6.2(a)(v)(E), 6.2(b)(vi).

[673] The Plan Processor is required to create and implement an annual audit plan that includes a review of all Plan Processor policies, procedures, control structures, and tools that monitor and address data security. *Id.* secs. 6.2(a)(v)(B) and (C), app. D secs. 4.1.3, 5.3.

[674] Proposed Amendments to the National Market System Plan Governing the Consolidated Audit Trail to Enhance Data Security, Release No. 89632 (Aug. 21, 2020), 85 FR 65990 (Oct. 16, 2020).

[675] *See* Press Release, *Gartner.com* (Apr. 19, 2020), *available at https://www.gartner.com/en/newsroom/press-releases/2022-04-19-gartner-forecasts-worldwide-public-cloud-end-user-spending-to-reach-nearly-500-billion-in-2022*.

[676] *See* Synergy Research Group, *Huge Cloud Market Still Growing at 34% Per Year; Amazon, Microsoft & Google Now Account for 65% of the Total*, PR Newswire (Apr. 28, 2022), *available at https://www.prnewswire.com/news-releases/huge-cloud-market-still-growing-at-34-per-year-amazon-microsoft--google-now-account-for-65-of-the-total-301535935.html* (estimating as of Q1 2022 that the breakdown is: Amazon Web Services (AWS): 33%; Microsoft Azure: 22%; Google Cloud: 10%).

[677] *Id.*

[678] For example, *see* Microsoft Azure, *Regulation Systems Compliance and Integrity (SCI) Cloud*

Both new and existing SCI entities may have existing agreements with third-party providers that govern the obligations and expectations as between an SCI entity and a third-party provider it utilizes. These documents may not currently be consistent with the SCI entity's requirements under the proposed amendments Regulation SCI. Some SCI entities may currently rely on a third-party provider's standard contract or SLA, which may not been drafted with Regulation SCI's requirements in mind. Similarly, some existing agreements between the SCI entity and a third-party provider may provide the third-party provider with the contractual right to be able to make decisions that would negatively impact an SCI entity's obligations in the third-party provider's ''commercially reasonable discretion.'' Likewise, existing agreements may include defined terms that differ from those under the proposed amendments.

Regardless of their size, SCI entities typically enter into contracts with third-party providers to perform a specific function for a given time frame at a set price. At the conclusion of a contract, it may be renewed if both parties are satisfied. Because prices typically increase over time, there may be some need to negotiate a new fee for continued service. Negotiations also occur if additional services are requested from a given third-party provider. In the instance where additional services are required mid-contract, for example, due to increased regulatory requirements, the third-party provider may be able to separately bill for the extra work that it must incur to provide the additional service, particularly if that party is in a highly concentrated market for that service and can wield market power. Alternatively, the service provider may be forced to absorb the additional cost until the contract can be renegotiated. This may be the case because that condition is specified in the contract with the SCI entity.

Request for Comment

95. The Commission requests that commenters provide relevant data on the number of third-party providers available to SCI entities by their types of services they offer or by the types of systems, such as critical SCI systems, SCI systems, and indirect SCI systems.

96. To what extent do third-party providers compete with each other for SCI entities?

c. SCI Review

With respect to business continuity and disaster recovery plan reviews, FINRA Rule 4370 requires a broker-dealer to conduct an annual review of its business continuity plan. FINRA has observed that some broker-dealers [679] engaged in annual testing to evaluate the effectiveness of their business continuity plans.[680] With respect to broker-dealer reporting to their boards regarding cybersecurity policies and procedures and cybersecurity incidents, the board reporting frequency ranged from quarterly to ad-hoc among the firms FINRA reviewed.[681] Approximately two-thirds of the broker-dealers (68%) examined in a 2015 survey had an individual explicitly assigned as the firm's CISO which might suggest extensive executive leadership engagement.

d. Current SCI Industry Standards

As of 2015, the majority of broker-dealers reported utilizing one or more frameworks with respect to cybersecurity [682] either mapping directly to the standard or using it as reference point. Some of the standards such as COBIT may have broad application to various areas of IT but it is unclear to what extent broker-dealers utilize such standards beyond cybersecurity.

Also, each of the two exempt clearing agencies (Euroclear Bank SA/NV, and Clearstream Banking, S.A.) publish disclosure framework reports,[683] that purport to describe the policies and procedures relating to the 24 principles and five responsibilities set forth in the Principles for Financial Market Infrastructures (PFMI) published by CPSS and IOSCO.[684] The PFMI establishes new international standards for financial market infrastructures (FMIs) including payment systems that are systemically important, central securities depositories, securities settlement systems, central counterparties and trade repositories and prescribes the form and content of the disclosures expected of financial market infrastructures. Most relevant, principle 17 on operational risk offers guidelines on policies and procedures to identify, monitor, and manage operational risks, vulnerabilities, and threats; capacity planning; stress testing; systems development and testing methodology; business continuity and disaster recovery planning and testing; vendor risk management; and board supervision of risk management, etc.

e. Penetration Testing

Current SCI entities are required to conduct penetration testing as part of its SCI review [685] once every three years.[686] Among the new SCI entities, two SBSDRs that are currently registered as SDRs are subject to CFTC's rules, which require conducting penetration testing of the systems with the scope of those rules at least once every year.

4. Other Affected Parties

In addition to new and existing SCI entities, the proposed amendments may indirectly affect other parties, namely third-party service providers to which SCI systems functionality is outsourced. As discussed in depth above, an SCI entity may decide to outsource certain functionality to, or utilize the support or services of, a third-party provider (which would include both affiliated providers as well as vendors unaffiliated with the SCI entity) for a variety of reasons, including cost efficiencies,

*Implementation Guide* (2019), *available at https://azure.microsoft.com/mediahandler/files/resourcefiles/microsoft-azure-regulation-systems-compliance-and-integrity-sci-cloud-implementation-guide/AzureRegSCIGuidance.pdf;* or Google Cloud, *U.S. Securities & Exchange Commission Regulation Systems Compliance & Integrity (Regulation SCI)* (Dec. 2021), *available at https://services.google.com/fh/files/misc/sec_regulation_sci_gcp_whitepaper.pdf.*

[679] FINRA did not disclose the number or identity of the firms but it is likely that larger firms have more robust systems and practices given their greater resources.

[680] *See* FINRA, 2019 Report on Examination Findings and Observations: Business Continuity Plans (BCPs), *supra* note 600.

[681] *See Report on Cybersecurity Practices, supra* note 621. At a number of firms, the board received annual cybersecurity-related reporting while other firms report on a quarterly basis. A number of firms also provide ad hoc reporting to the board in the event of major cybersecurity events.

[682] *See supra* note 622. Among the firms that were part of the FINRA sweep, nearly 90% used one or more of the NIST, ISO or ISACA frameworks or standards. More specifically, 65% of the respondents reported that they use the ISO 27001/27002 standard while 25% use COBIT. Some firms use combinations of these standards for various parts of their cybersecurity programs. The COBIT standard, for example, is focused more on information technology governance than cybersecurity per se. In addition, several firms underscored the utility of the PCI Standard as well as the SANS Top 20.

[683] Clearstream, *Principles for financial market infrastructures: Disclosure Framework* (Dec. 23, 2020), *available at https://www.clearstream.com/resource/blob/1386778/3458c1c468e5f40ddf5dc970e8da4af2/cpmi-iosco-data.pdf*; Euroclear Bank, *Disclosure Framework CPMI IOSCO 2020* (June 2020), *available at https://www.euroclear.com/content/dam/euroclear/About/business/PA005-Euroclear-Bank-Disclosure-Framework-Report.pdf.*

[684] Bank for International Settlements (BIS), *Principles for Financial Market Infrastructures: Disclosure Framework and Assessment Methodology* (Dec. 2012), *available at https://www.bis.org/cpmi/publ/d106.pdf.*

[685] Specifically, paragraph (b)(1) of Rule 1003 currently requires that ''[p]enetration test reviews of the network, firewalls, and production systems shall be conducted at a frequency of not less than once every three years. . .''. Rule 1003(b)(1).

[686] *See* SCI Adopting Release, *supra* note 1, at 72344.

increased automation, particular expertise, or functionality that the SCI entity does not have in-house. Based on Commission staff experience, the Commission believes that these third-party providers, play a growing role with respect to SCI systems and indirect SCI systems, and the Commission anticipates that third-party providers will likely arise to provide other types of functionality, service, or support to SCI entities that are not contemplated yet today.[687]

Due to data limitations, we are unable to quantify or characterize in much detail the structure of these various service provider markets.[688] The Commission lacks specific information on the exact extent to which third-party service providers are retained, the specific services they provide, and the costs for those services beyond the estimates discussed above for cloud service providers. We also do not have information about the market for these services, including the competitiveness of such markets. We request information from commenters on the services related to SCI systems and indirect systems provided by third parties to new and existing SCI entities, the costs for those services, and the nature of the market for these services.

### *C. Analysis of Benefits and Costs of Proposed Amendments*

The proposed amendments both expand the scope of Regulation SCI to reach new entities and also strengthen existing requirements in Regulation SCI that would apply to both old and new entities. This section explores the benefits and costs of these changes. First, we discuss the general benefits and costs of the proposed amendments to Regulation SCI. Next, we discuss the expansion of Regulation SCI to certain new SCI entities and the rationale for it. Finally, we analyze the specific benefits and costs of applying each provision of amended Regulation SCI to each of the proposed new SCI entities and current SCI entities.[689] The Commission encourages commenters to identify, discuss, analyze, and supply relevant data, information, or statistics regarding the benefits and costs.

The Commission is providing both a qualitative assessment and quantified estimates, including ranges, of the potential economic effects of the proposal where feasible. The overall magnitude of the economic effects will depend, in part, on the extent to which the new and current SCI entities already have in place practices that are aligned with the requirements of Regulation SCI, including the proposed amendments. New SCI entities' costs of implementing Regulation SCI could also differ with the number and size of their systems affected.

In many cases it is difficult to quantify the economic effects, particularly those beyond the costs estimated in the Paperwork Reduction Act analysis. As explained in more detail below, the Commission in certain cases does not have, and does not believe it can reasonably obtain, data or information necessary to quantify certain effects. For instance, the Commission finds it impracticable to quantify many of the benefits associated with amended Regulation SCI. Indeed, we lack information that would allow us to predict the reduction in frequency and severity of SCI events or the specific cost savings that might arise from avoiding the harm Regulation SCI is designed to prevent. Further, even in cases where the Commission has some data, quantification is not practicable due to the number and type of assumptions necessary to quantify certain economic effects, which render any such quantification unreliable. The Commission requests that commenters provide relevant data and information to assist the Commission in quantifying the economic consequences of proposed amendments to Regulation SCI.

#### 1. General Benefits and Costs of Proposed Amendments

Regulation SCI promotes the capacity, integrity, resiliency, availability, and security of SCI systems, as well as transparency about systems problems when they do occur, and thereby promote investors' confidence in market transactions. SCI events can today have broad impacts because of the growth of electronic trading, which allows increased volumes of securities transactions in a broader range of asset classes, at increasing speed, by a variety of trading platforms;[690] changes in the way SCI entities employ technology, including the increasing importance of third-party service providers to ensure reliable, resilient, and secure systems;[691] a significant increase in cybersecurity events across all types of companies, including SCI entities;[692] and an evolution of the threat environment.[693] A joint report from the World Economic Form and Deloitte states that ''new interconnections and collective dependencies on certain critical providers significantly contribute to the number of vulnerable nodes that could threaten and exploit the financial system's essential functions.''[694]

Expanding Regulation SCI to new SCI entities will help to ensure that the core technology systems of these newly designated SCI entities are robust, resilient, and secure—especially for those entities that have not already adopted comparable measures on their own—and would also help to improve Commission oversight of the core technology of key entities in the U.S. securities markets.[695]

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[687] It has long been recognized that the financial services industry is increasingly relying on service providers through various forms of outsourcing. *See, e.g.,* Bank for International Settlements, *Outsourcing in Financial Services* (Feb. 15, 2005), *available at https://www.bis.org/publ/joint12.htm.* Recent estimates suggest that the aggregate contract value of outsourcing in the financial services industry is on the order of $10 to $20 billion. *See, e.g.,* Business Wire, *Insights on the Finance and Accounting Outsourcing Global Market to 2026* (Jan. 14, 2022), *available at https://www.businesswire.com/news/home/20220114005440/en/Insights-on-the-Finance-and-Accounting-Outsourcing-Global-Market-to-2026---Featuring-Accenture-Capgemini-and-Genpact-Among-Others---ResearchAndMarkets.com.*

[688] Although certain regulatory filings may shed a limited light on the use of third-party service providers, we are unaware of any data sources that provide detail on the overall picture for each of the new and existing SCI entities.

[689] For purposes of measuring the benefits and costs of the proposed rule on both existing and new SCI entities, this analysis assumes that market participants are compliant with existing applicable Commission, FINRA, CFTC, and other applicable rules, including those requiring registration and the rules and regulations applicable to such registered entities. To the extent that some entities engaged in activities including crypto asset securities are not, but should be, FINRA or Commission registered entities, they may incur additional costs to comply with existing registration obligations that are distinct from the costs associated with the proposed rule amendments and are not discussed in this analysis. Similarly, any benefits from coming into compliance with existing registration obligations are also not discussed in this analysis. For such entities, we expect the benefits and costs specifically associated with the proposed rule amendments to be same as those described below for existing and new SCI entities that are currently registered.

[690] *See* section I and *supra* note 3.

[691] *See* sections III.B, III.B.2.a.

[692] *See* section III.B.3.

[693] *See id.*

[694] *See* World Economic Forum, *Beneath the Surface: Technology-Driven Systemic Risks and the Continued Need for Innovation* (Oct. 28, 2021) at 14, *available at https://www.weforum.org/reports/beneath-the-surface-technology-driven-systemic-risks-and-the-continued-need-for-innovation/; see also* Henning Soller, et al., *Innovative Technologies in Financial Institutions: Risk as a Strategic Issue,* McKinsey Digital (Sep. 25, 2020), *available at: https://www.mckinsey.com/business-functions/mckinsey-digital/our-insights/tech-forward/innovative-technologies-in-financial-institutions-risk-as-a-strategic-issue.*

[695] For example, some expert views suggest that current SCI entities' compliance with Regulation SCI likely prepared those entities to be more resilient and more prepared to face times of increased volatility—beyond what their prudent business practices may have allowed. For example, one industry publication notes that even as financial firms ''updated their [business continuity planning] after the Sept. 11, 2001, terrorist attacks

The Commission is also proposing amendments to update Regulation SCI in order to strengthen its requirements. These amendments would benefit markets and market participants by reducing the likelihood, severity, and duration of market disruptions arising from systems issues, among both current and new SCI entities, whether such events may originate from natural disasters, third-party provider service outages, cybersecurity events, hardware or software malfunctions, or any other sources.[696] Decreasing the number of trading interruptions can improve price discovery and liquidity because such interruptions interfere with the process through which relevant information gets incorporated into security prices and, may thereby, temporarily disrupt liquidity flows.[697] Trading interruptions in one security can also affect securities trading in other markets. For example, an interruption in the market for index options and other securities that underlie derivatives securities could harm the price discovery process for derivatives securities, and liquidity flows between the stock market and derivatives markets could be restricted. For this reason, market-based incentives alone are unlikely to result in optimal provision of SCI-related services. In this context, having plans and procedures in place to prepare for and respond to system issues is beneficial,[698] and the proposed amendments to Regulation SCI would help ensure that the infrastructure of the U.S. securities markets remains robust, resilient, and secure. A well-functioning financial system is a public good.

The Commission recognizes that the proposed amendments to Regulation SCI would impose costs on SCI entities, as well as costs on certain members, participants, customers (in the case of SCI broker-dealers), or third-party providers of SCI entities. The majority of these costs would be direct compliance costs, which are discussed in detail below for each requirement of proposed Regulation SCI. For current SCI entities, these costs would relate to the areas of Regulation SCI that are being amended. For new SCI entities, the costs would relate to complying with the entirety of Regulation SCI, including the proposed amendments. For current SCI entities, these costs may be mitigated to the extent the SCI entity's current business practices are already consistent with the proposed requirements, and if, as a result of compliance, the SCI entity avoids the costs associated with a systems failure or breach. Likewise, for new SCI entities, these costs may be mitigated to the extent the SCI entity's current business practices are already consistent with the requirements of Regulation SCI, including the proposed amendments, and if, as a result of compliance, the SCI entity avoids the costs associated with a systems failure or breach.

Some portion of compliance costs could be economic transfers. This may be the case if compliance with a particular provision entails making use of certain third-party providers, and the market for third-party provider services is not itself competitive.[699] In such a case, third-party providers would make economic profits from the services they offer and the fees they charge, and some of the services fees charged would be economic transfers from SCI entities to third-party providers.

The proposed amendments could have other potential costs. For example, entities covered by the proposed rule frequently would need to make systems changes to comply with new and amended rules and regulations under Federal securities laws and SRO rules. For entities that meet the definition of SCI entity, because they would need to comply with the proposed amendments when they make systems changes, the proposed amendments could increase the costs and time needed to make systems changes to comply with new and amended rules and regulations. The Commission requests comment on the nature of such additional costs and time.

Request for Comment

The Commission requests comment on all aspects of the Overall Benefits and Costs of Proposed Amendments discussion. In addition, the Commission is requesting comment on the following specific aspects of the discussion:

97. For new SCI entities, what activities do you currently perform (either because you are required to or you have chosen to voluntarily) that are already consistent with the requirements of Regulation SCI?

98. For new SCI entities and current SCI entities, can compliance with Regulation SCI result in the benefits the Commission describes in the analysis?

99. Are commenters aware of any data that can be used to quantify any aspects of benefits?

100. The Commission seeks commenters' views regarding the prospective costs, as well as the potential benefits, of applying Regulation SCI to SBSDRs. Are there characteristics specific to SBSDRS or the SBS market that would make applying Regulation SCI broadly or any specific provision or proposed new provision Regulation SCI challenging for

and superstorm Hurricane Sandy in 2012, when these events exposed cracks in Wall Street's contingency plans,'' they were still ''more prepared during COVID–19 thanks to Regulation SCI for Systems, Compliance and Integrity.'' *See, e.g., Is Remote Trading Leading to a Paradigm Shift on the Trading Desk?, supra* note 2. Similarly, a senior executive at FINRA stated in an interview that he found most surprising the resiliency of the market during COVID–19 and said ''a lot of credit goes to the SEC for [the market's resiliency] with respect to adopting [Regulation SCI].'' FINRA, Podcast: *Market Structure & COVID–19: Handling Increased Volatility and Volumes,* at 24:38–25:08 (Apr. 28, 2020), *available at https://www.finra.org/media-center/finra-unscripted/market-structure-covid19-coronavirus* (featuring an interview with FINRA's then-Executive VP of Market Regulation and Transparency Services, Tom Gira).

[696] For example, the Ponemon Institute's 2016 Cost of Data Center Outages report estimates the average cost per minute of an unplanned outage was $8,851 for the average data center the Institute surveyed in 2016. *See* Ponemon Institute, *2016 Cost of Data Center Outages* 14 (Jan. 19, 2016) *available at https://www.vertiv.com/globalassets/documents/reports/2016-cost-of-data-center-outages-11-11_51190_1.pdf.* Also, although it is difficult to estimate the total cost of a cyberattack at an SCI entity, a potential effect of a cyberattack involving an SCI entity is a data breach. According to the IBM's 2022 Cost of a Data Breach report, the average cost of a data breach in the United States is $9.44 million, and the report added that ''[f]or 83% of companies, it's not if a data breach will happen, but when. Usually more than once.'' *See* IBM, *2022 Cost of a Data Breach, available at https://www.ibm.com/reports/data-breach#:~:text=Average%20cost%20of%20a%20data,million%20in%20the%202020%20report.* Relatedly, another study reports that in 2020 the average loss in the financial services industry was $18.3 million per company per incident. The average cost of a financial services data breach was $5.85 million. *See* Jennifer Rose Hale, *The Soaring Risks of Financial Services Cybercrime: By the Numbers, Diligent* (Apr. 9, 2021), *available at https://www.diligent.com/insights/financial-services/cybersecurity/#.*

[697] *See* Osipovich, Alexander, *NYSE Glitch Causes Erroneous Prices in Hundreds of Stocks,* Wall St. J. (online edition) (Jan. 24, 2023), *available at https://www.wsj.com/articles/dozens-of-nyse-stocks-halted-in-opening-minutes-after-wild-price-swings-11674585962* (retrieved from Factiva database).

[698] For example, according to the IBM Report, in the context of system issues arising from cybersecurity events, having an incident response plan and ''testing that plan regularly can help [each firm] proactively identify weaknesses in [its] cybersecurity and shore up [its] defenses'' and ''save millions in data breach costs.'' *See 2022 Cost of a Data Breach, supra* note 696. *See also* Alex Asen et al., *Are You Spending Enough on Cybersecurity* (Feb. 19, 2020), *available at https://www.bcg.com/publications/2019/are-you-spending-enough-cybersecurity* (noting ''[a]s the world becomes ever more reliant on technology, and as cybercriminals refine and intensify their attacks, organizations will need to spend more on cybersecurity'').

[699] *See, e.g.,* Yoon-Ho Alex Lee, *SEC Rules, Stakeholder Interests, and Cost-Benefit Analysis,* 10 Mkts L.J. 311 (2015), *available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2541805* (retrieved from SSRN Elsevier database; Yoon-Ho Alex Lee, *The Efficiency Criterion of Securities Regulation: Investor Welfare or Total Surplus?,* 57 Ariz. L. Rev. 85 (2015), *available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2406032* (retrieved from SSRN Elsevier database.

SBSDRs? How much time would an SBSDR reasonably need to come into compliance with Regulation as proposed? Commenters should quantify the costs of applying Regulation SCI to SBSDRs, to the extent possible. Commenters are urged to address specifically each requirement of Regulation SCI and note whether it would be reasonable to apply each such requirement to SBSDRs and what the benefits and costs of such application would be.

101. For current SCI entities, what activities do you currently perform that are already consistent with the proposed amendments that seek to strengthen the obligations of SCI entities?

102. Are the Commission's estimates of incremental compliance costs owing to these proposed reasonable? Please note that the Commission does not purport to estimate the total costs of all activities SCI entities will perform in promoting the capacity, integrity, resiliency, availability, and security of their automated systems. The Commission's estimates pertain only to the increase in costs that will arise directly as a result of having to comply with the specific provisions of the proposed rules to the extent the covered entity has not already been performing such activities on its own or pursuant to other relevant rules or regulations.

103. What activities do you currently perform that go beyond the proposed amendments to Regulation SCI?

104. For current SCI entities, will compliance with the proposed amendments to Regulation SCI result in performing activities that go significantly above and beyond their current approach to promoting the capacity, integrity, resiliency, availability, and security of their automated systems? In other words, will these new rules require a significant rearranging of their resources beyond what they are already complying with voluntarily?

105. What are the costs of Regulation SCI? Are commenters aware of any data that can be used to quantify any aspects of costs?

2. Expansion to New SCI Entities

The Commission proposes to expand the definition of SCI entity to encompass SBSDRs, certain broker-dealers, and additional clearing agencies exempted from registration. These entities are key market participants that play a significant role in the U.S. securities markets and, in the event of a systems issues, they have the potential to impact investors, the overall market, or the trading of individual securities. Under the proposed amendments, the new SCI entities would become subject to all provisions of Regulation SCI, including the provisions that the Commission proposes to amend for SCI entities, as discussed in section III.C of this release. We discuss in this section the entities to which Regulation SCI would be extended, including the rationale for doing so. The benefits and costs associated with applying each of the Regulation SCI requirements to these entities are subsequently discussed in section V.D.3.

The Commission preliminarily estimates that as a result of the proposed amendments to the definition of ''SCI entity'' in Rule 1000, there would be a total of 21 new SCI entities that would become subject to the requirements of Regulation SCI. These include 2 SBSDRs, 17 SCI broker-dealers, and 2 exempt clearing agencies.[700] Generally, inclusion of these new SCI entities in the amended definition is expected to help ensure systems resiliency at such entities and reduce the potential for incidents at these entities to have broad, disruptive effects across the securities markets and for investors. Furthermore, applying Regulation SCI to these entities increases market protections by establishing these obligations under the Exchange Act so that the Commission may enforce them directly and examine for compliance and provides a uniform requirement for all SCI entities.

a. SBSDRs

Currently, two SBSDRs are registered with the Commission and are subject to Rule 13n–6. The SBSDRs registered with the Commission are also registered with the CFTC as swap data repositories (SDRs) and accordingly, with respect to systems of concern to the CFTC, are subject to CFTC rules and regulations related to swap data repositories, including the CFTC's System Safeguards rule.

Systems failures at SBSDRs can limit access to data, call into question the integrity of data, and prevent market participants from being able to report transaction data, and receive transaction data, and thereby have a large impact on market confidence, risk exposure, and market efficiency. For example, were an SBSDR to experience a systems issue, market participants could be prevented from receiving timely information regarding accurate prices for individual SBSs—such as aggregate market exposures to referenced entities (instruments), positions taken by individual entities or groups, and data elements necessary for a person to determine the market value of the transaction.[701] This could contribute to market instability.

Having SBSDRs comply with Regulation SCI would reduce the risk of system issues at SBSDRs and allow continued transparency and access to data. As noted above in the baseline, SBSDRs are currently subject to Rule 13n–6, which requires an SBSDR to ''establish, maintain, and enforce written policies and procedures reasonably designed to ensure that its systems provide adequate levels of capacity, integrity, resiliency, availability, and security.'' However, as described in detail below, the requirements of Regulation SCI that go beyond those required in Rule 13n–6—such as policies and procedures that include specific elements for infrastructure planning, up-to-date system development and testing methodology, regular systems reviews and testing, BC/DR planning, monitoring for SCI events, and standards to facilitate successful collection, processing, and dissemination of market data—should deliver benefits beyond those currently achieved through Rule 13n–6.

The coverage of SBSDRs under the proposed amendments to Regulation SCI would augment the current principles-based requirements for policies and procedures on operational risk with detailed, more specific requirements to help ensure that SBSDR market systems are robust, resilient, and secure and that policies and procedures in place at SBSDRs meet requirements necessary to maintain the robustness of critical systems.

b. SCI Broker-Dealers

The Commission proposes to include certain broker-dealers—to be referred to as ''SCI broker-dealers''—in the definition of SCI entity. This expansion would be limited to broker-dealers that exceed one or more size thresholds. The first proposed threshold is a total assets test. This test scopes within Regulation SCI any broker-dealers with five percent

[700] The Commission is estimating 23 new SCI entities in the PRA section based on the PRA's forward-looking requirement to account for persons to whom a collection of information is addressed by the agency within any 12-month period. But for purposes of the Economic Analysis, this section analyzes the baseline of existing entities that will be new SCI entities and then predicts the cost to those entities if the rule were to be adopted. Accordingly the Economic Analysis assumes 21, rather than 23, new SCI entities.

[701] *See* Access to Data Obtained by Security-Based Swap Data Repositories, Securities Exchange Act Release No. 78716 (Aug. 29, 2016), 81 FR 60585, 60594, 60605–6 (Sep. 2, 2016). In that release, the Commission estimates that approximately 300 relevant authorities may make requests for data from security-based swap data repositories.

(5%) or more of the total assets [702] of all security brokers and dealers during at least two of the four preceding calendar quarters ending March 31, June 30, September 30, and December 31. The second proposed threshold is a transaction activity test. This test scopes within Regulation SCI any broker-dealer that transacted ten percent (10%) or more of the total average daily dollar volume by applicable reporting entities during at least four of the preceding six calendar months in any of the following asset classes: NMS stocks, exchange-listed options contracts, Agency Securities, or U.S. Treasury Securities.

The Commission proposes to limit the definition of ''SCI systems'' for an SCI broker-dealer that qualifies as an SCI entity that satisfies only one or more transaction activity thresholds.[703] Specifically, only those systems that relate to the asset class for which the trading activity threshold is met (*i.e.,* NMS stocks, exchange-listed options contracts, Treasury Securities, or Agency Securities) would be ''SCI systems'' or ''indirect SCI systems.'' [704] Broker-dealers may have multiple business lines and transact in different types of securities, and the proposal reflects the Commission's preliminary conclusion that systems related to asset classes that do not meet the rule's transaction activity threshold are unlikely to pose risk to the maintenance of fair and orderly markets if the systems with respect to that type of security were unavailable (assuming the systems for the distinct asset class are separate) relative to the burden of complying with the regulation's more stringent requirements.

In contrast, no such limitation applies to an SCI broker-dealer that qualifies as an SCI entity because it satisfies the total assets threshold. In this case, broker-dealers that qualify as SCI entities due to the total assets threshold are subject to Regulation SCI requirements for all of its applicable systems, regardless of the asset classes such systems relate to.[705] As discussed in section III.A.2.b.iii, this approach with respect to the total assets threshold takes into consideration the multiple roles that the largest broker-dealers play in the U.S. securities markets. Not only do some of the largest broker-dealers generate liquidity in multiple types of securities, but many also operate multiple types of trading platforms. Entities with assets at this level also take risks that they may seek to hedge across asset classes, in some cases using ''central risk books'' for that and other purposes, and engage in routing substantial order flow to other trading venues. For these reasons, the Commission believes that systems issues at firms having assets at this level could have the potential to impact investors, the overall market, and the trading of individual securities, following a systems failure in any market in which they operate.

The Commission estimates that there would be 17 SCI broker-dealers, five of which would satisfy both the total assets threshold and at least one of the transaction activity thresholds, and twelve others of which would satisfy at least one of the transaction activity thresholds.[706] As discussed in section V.B.1.b.i, figure 6 (Panel A) shows the distribution of all registered broker-dealer firms between Q4 2021 and Q3 2022 by level of total assets. Figure 6 (Panel B) represents the distribution of all registered broker-dealer firms by percentage of aggregate total assets.[707] It shows that five firms accounted for roughly half of broker-dealer aggregate total assets and thus each could pose a substantial risk to the maintenance of fair and orderly markets in the event of a systems issue. During all four quarters from Q4 2021 to Q3 2022, all five firms reported to the Commission, on Form X–17A–5 (§ 249.617), total assets in an amount that equals five percent (5%) or more of the total assets of all security brokers and dealers.[708] Figures 7 through 10 represent the distribution by level of transaction activity as measured by average daily dollar volume [709] (Panel A) and the distribution of firms by percentage of transaction activity [710] (Panel B) for each of four asset classes including NMS stocks, exchange-listed options, U.S. Treasury Securities, and Agency Securities respectively.[711] These figures clearly show that a few firms consistently accounted for a significant percentage of transaction activity over the six month period and thus each could pose a substantial risk to the maintenance of fair and orderly markets in the event of a systems issue. During at least four months of the six month period, six NMS stocks trading firms, six exchange-listed options contracts trading firms, four U.S. Treasury Securities trading firms, and six Agency Securities trading firms transacted average daily dollar volume in an amount that equals ten percent (10%) or more of the total average daily dollar of the corresponding markets. Most of these firms transacted more than ten percent (10%) during all six months.[712]

These large broker-dealers, by virtue of the total assets or transaction activity each represents over a period of time, play a significant role in the orderly functioning of U.S. securities markets. If such a broker-dealer was adversely affected by a system issue, then the impact could not only affect the broker-dealer's own customers, but also disrupt the overall market, by compromising or removing significant liquidity from the market, interrupting the price discovery process, or indirectly contributing to capacity issues at other broker-dealers.[713]

Application of Regulation SCI is expected to reduce the likelihood of system issues at these largest broker-dealers as well as mitigate the effects of any such event. While it is possible that these broker-dealers may have systems in place due to market-based incentives, there are reasons to believe that these incentives may be insufficient. First, as mentioned in section V.C.1, a well-functioning financial system is a public good.[714] Second, investment in SCI

[702] *See supra* note 169.

[703] *See* section III.A.2.b(iv).

[704] *See* section III.A.2.b(iv). As explained above in section III.A.2.b.v, although crypto asset securities are not a separately enumerated asset class for the volume threshold, the SCI systems and indirect SCI systems pertaining to crypto asset securities that are NMS stocks, exchange-listed options, U.S. Treasury Securities, or Agency securities would be subject to Regulation SCI, including as it is proposed to be amended, as discussed in section III. C, with respect to the asset class for which the SCI broker-dealer satisfies the threshold.

[705] As explained above, any system of an SCI broker-dealer meeting the total asset threshold that pertains to any type of security, including crypto asset securities, that meets the definition of SCI systems or indirect SCI systems would be covered by Regulation SCI.

[706] *See* section III.A.2.b(iv).

[707] Panel A and Panel B in figure 6 show the same information as in figure 1 in section V.B.1.b.i., but with 5% threshold lines added. The threshold line in Panel A shows the average of 5% of aggregate total assets in each quarter from Q4 2021 to Q3 2022.

[708] Each of these firms would satisfy the proposed total assets thresholds for an ''SCI broker-dealer''. *See* section III.A.2.b.iii (discussing proposed thresholds for an ''SCI broker-dealer'').

[709] These measures are described in more detail in section III.A.2.b.iii.

[710] *Id.*

[711] Panel A and Panel B in figures 7 through 10 show the same information as in figures 2 through 5 in section V.B.1.b.i., but with 10% threshold lines added. The threshold line in each Panel A shows the average of 10% of aggregate average daily dollar volume reported to the plan processors (SIPs) of the CTA/CQ Plans and Nasdaq UTP Plan, OPRA Plan, or FINRA TRACE in each respective asset class from Jan. 2022 to June 2022. The threshold line in each Panel B equals 10%.

[712] Each of these firms would satisfy the proposed transaction activity thresholds for an ''SCI broker-dealer''. *See* section III.A.2.b.iii (discussing proposed thresholds for an ''SCI broker-dealer'').

[713] *See* section III.A.2.b(iv).

[714] Since broker-dealers are not compensated for the positive impact that their systems investments have on other entities, they lack sufficient

Continued

systems takes the form of a hidden-action problem. As such, due to principal-agent conflict, it may not be possible for customers or counterparties to observe the degree of investment in SCI systems and thus to provide market-based discipline from underinvestment. In this case, a broker-dealer's investment in SCI systems would offer benefits to customers and counterparties who might incur switching costs to find a different broker if a substantial systems issue occurred. These benefits are likely to be especially high for market participants who rely on a single counterparty (such as is sometimes the case in Treasury securities and prime brokerage relationships), and for retail investors who have invested in the relationship with a single retail broker.

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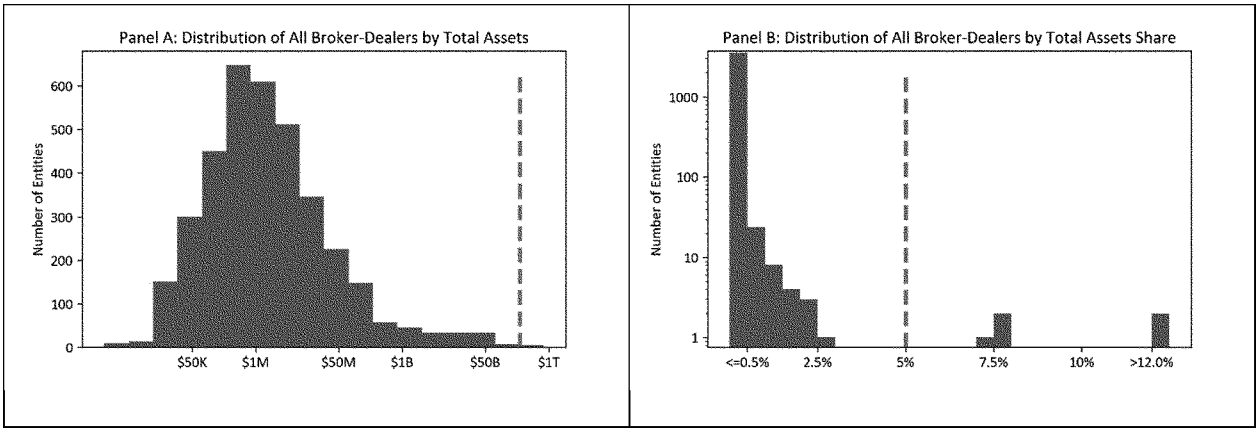


Figure 6. Distribution of broker-dealers by total assets (Panel A) and total assets share (Panel B)

*Notes:* Panel (A): distribution of broker-dealers by average quarterly total assets. Panel (B): distribution of broker-dealers by average quarterly percentage of aggregate total assets. Data are from broker-dealer FOCUS Report Form X-17A-5 Schedule II filings from Q4 2021 to Q3 2022. Also for additional detail on the calculation of total assets of all security broker-dealers, *see supra* note 127.

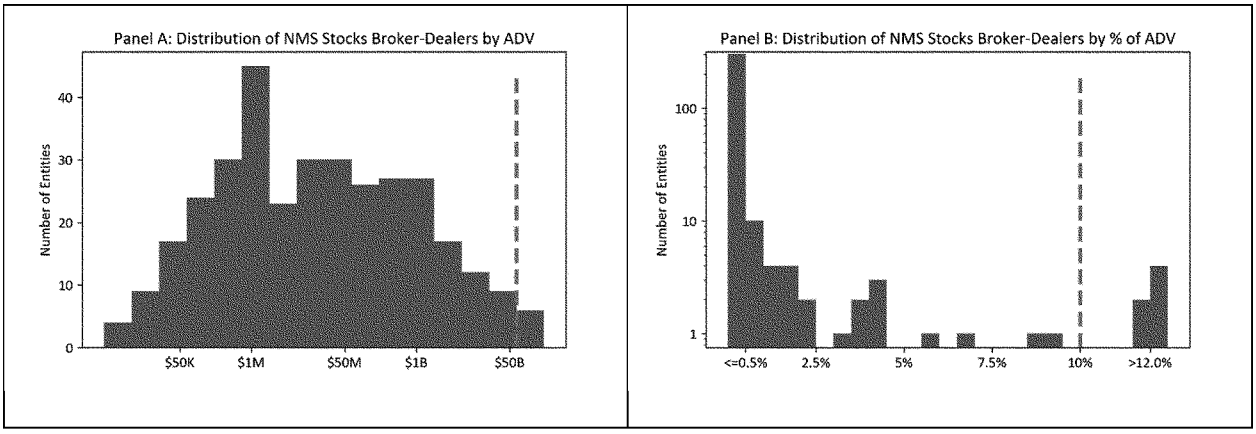


Figure 7. Distribution of broker-dealers, NMS stocks asset class

*Notes:* Panel (A): distribution of broker-dealers by average of monthly average daily dollar volume. Panel (B): distribution of broker-dealers by average of monthly percentage of aggregate average daily dollar volume. Data are from Consolidated Audit Trail (CAT) data from Jan. 2022 to June 2022 and the plan processors (SIPs) of the CTA/CQ Plans and Nasdaq UTP Plan. CTA Plan, available at https://www.ctaplan.com; Nasdaq UTP Plan, available at https://www.utpplan.com.

incentives to invest on others' behalf. *See*, for instance, Mazaher Kianpour et al., *Advancing the concept of cybersecurity as a public good*, 116 Simulation Modeling Practice and Theory 102493 (2022).

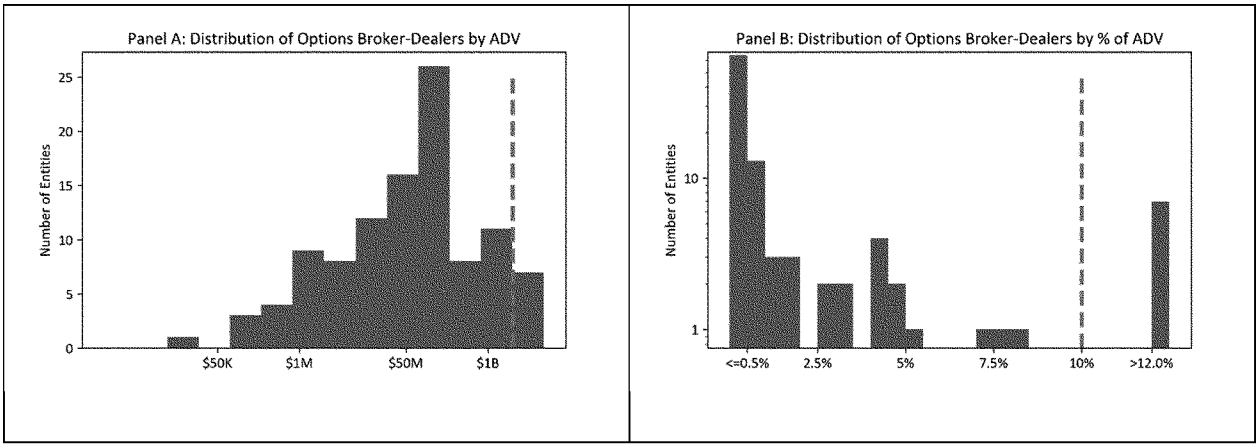


Figure 8. Distribution of broker-dealers, exchange-listed options asset class

*Notes:* Panel (A): distribution of broker-dealers by average of monthly average daily dollar volume. Panel (B): distribution of broker-dealers by average of monthly percentage of aggregate average daily dollar volume. Data are from Consolidated Audit Trail (CAT) data from Jan. 2022 to June 2022 and Options Price Reporting Authority (OPRA) data.

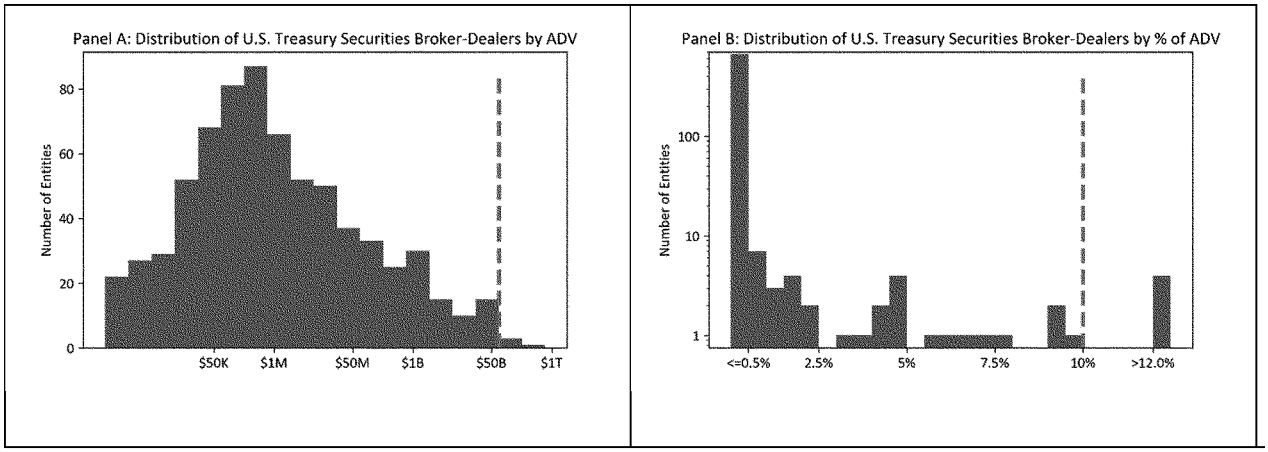


Figure 9. Distribution of broker-dealers, U.S. Treasury securities asset class

*Notes*: Panel (A): distribution of broker-dealers by average of monthly average daily dollar volume. Panel (B): distribution of broker-dealers by average of monthly percentage of aggregate average daily dollar volume. Data are from TRACE for Treasury Securities data from Jan. 2022 to June 2022 and FINRA TRACE.

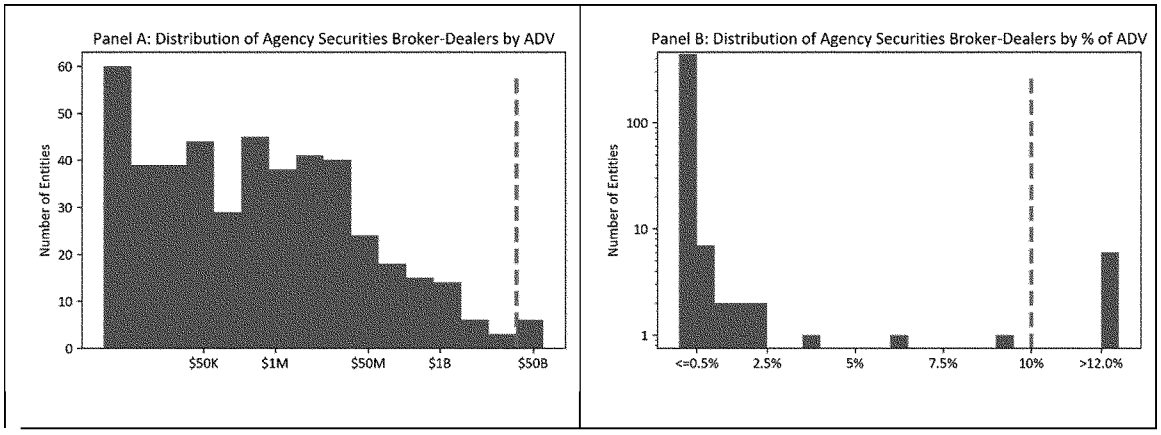


Figure 10. Distribution of broker-dealers, Agency Securities asset class

*Notes*: Panel (A): distribution of broker-dealers by average of monthly average daily dollar volume. Panel (B): distribution of broker-dealers by average of monthly percentage of aggregate average daily dollar volume. Data are from regulatory TRACE data from Jan. 2022 to June 2022 and FINRA TRACE.

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c. Additional Exempt Clearing Agencies

The proposed amendments would expand the scope of exempt clearing agencies covered by Regulation SCI to include two new exempt clearing agencies: Euroclear Bank SA/NV and Clearstream Banking, S.A. These exempt clearing agencies are not currently subject to Regulation SCI because Regulation SCI was initially limited to those exempt clearing agencies that were ''subject to ARP'' and these exempt clearing agencies are not subject to ARP. At the time it adopted Regulation SCI, the Commission stated it was taking a measured approach in applying requirements primarily to entities already covered under the ARP Inspection Program.[715]

The exempt clearing agencies not subject to ARP that the Commission proposes to scope into Regulation SCI provide CSD functions for transactions in U.S. securities between U.S. and non-U.S. persons using similar technologies as registered clearing agencies that are subject to Regulation SCI.[716] The technology systems that underpin operations of these exempt clearing agencies are critical systems that centralize and automate clearance and settlement functions for the global financial markets.[717] Such systems concentrate risk in the clearing agency.[718] A disruption to a clearing agency's operations, or failure on the part of a clearing agency to meet its obligations, could therefore serve as a source of contagion, resulting in significant costs not only to the clearing agency itself and its participants but also to other market participants across the U.S. financial system.[719] For example, an SCI event could cause a delay or disruption in the settlement process with respect to certain securities, leading to a decrease in liquidity. Trading firms could be unwilling or unable to enter into new positions should prior trades suffer settlement timing delays requiring posting of additional margin at clearing agencies and the assumption of additional risk by trading firms.

Notably, Euroclear Bank SA/NV and Clearstream Banking, S.A. are already subject to Europe's CSDR, which has Operational Risk rules (Article 45) that includes many requirements that may align with those in Regulation SCI.[720] Additionally, the Commission exemptive order for one of the exempt clearing agencies requires certain provisions that are consistent with those in Regulation SCI.

3. Specific Benefits and Costs of Regulation SCI Requirements for All SCI Entities

a. Rule 1001—Policies and Procedures

Rule 1001(a) through (c) sets forth requirements relating to the written policies and procedures that SCI entities are required to establish, maintain, and enforce. New SCI entities will need to comply with these requirements for the first time. In addition, the Commission is proposing to amend portions of Rule 1001(a), which will affect existing SCI entities as well. We discuss the benefits and costs of applying existing provisions to new SCI entities, as well as the benefits and costs of the amendments for both new and existing entities, below. We also discuss below the economic effects of these changes specific to the new SCI entities.

i. Benefits

(1) Provisions Applicable Only to New SCI Entities

Rule 1001 requires certain policies and procedures for SCI entities. We consider here the provisions under Rule 1001 that we are not amending and therefore will only have an impact on SCI entities, relative to the baseline. We separately consider the provisions that we propose to amend in the following section, for both new and existing SCI entities.

(i) Capacity, Integrity, Resiliency, Availability, and Security (Rule 1001(a)(1), (a)(2)(i) Through (iv), (vi), and (vii))

Rule 1001(a)(1) requires that each SCI entity establish, maintain, and enforce written policies and procedures reasonably designed to ensure that its SCI systems and, for purposes of security standards, indirect SCI systems, have levels of capacity, integrity, resiliency, availability, and security, adequate to maintain the SCI entity's operational capability and promote the maintenance of fair and orderly markets. Rule 1001(a)(2)(i) through (iv), (vi), and (vii) prescribe certain minimum requirements for an SCI entity's policies and procedures. The Commission is not amending paragraphs (a)(1) and (a)(2)(i) through (iv), (vi), or (vii), and therefore current SCI entities will not be affected whereas new SCI entities will become subject to these provisions for the first time.

Generally, the requirements to establish policies and procedures in Rule 1001(a)(1) should help ensure more robust systems that help reduce the risk and incidence of systems issues affecting the markets by imposing requirements on new entities that are

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[715] SCI Adopting Release, *supra* note 1, at 72259.

[716] *See* section III.A.2.c.

[717] *See* section III.A.2.c.

[718] *See generally* Albert J. Menkveld & Guillaume Vuillemey, *The Economics of Central Clearing,* 13 Ann. Rev. Fin. Econ. 153 (2021), *available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3957021* (retrieved from SSRN Elsevier database). *See also* Paolo Saguato, Financial Regulation, Corporate Governance, and the Hidden Costs of Clearinghouses, 82 Ohio St. L.J. 1071, 1074–75 (2022), *available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3269060* (retrieved from SSRN Elsevier database) (''[T]he decision to centralize risk in clearinghouses made them critical for the stability of the financial system, to the point that they are considered not only too-big-to-fail, but also too-important-to-fail institutions.'').

[719] *See generally* Dietrich Domanski, et al., *Central Clearing: Trends and Current Issues,* BIS Q. Rev. (Dec. 2015), *available at https://www.bis.org/publ/qtrpdf/r_qt1512g.pdf* (describing links between CCP financial risk management and systemic risk); Darrell Duffie, et al., *Policy Perspectives on OTC Derivatives Market Infrastructure,* Fed. Res. Bank N.Y. Staff Rep. No. 424, at 9 (Mar. 2010), *available at https://ssrn.com/abstract=1534729* (retrieved from SSRN Elsevier database) (''If a CCP is successful in clearing a large quantity of derivatives trades, the CCP is itself a systemically important financial institution. The failure of a CCP could suddenly expose many major market participants to losses. Any such failure, moreover, is likely to have been triggered by the failure of one or more large clearing agency participants, and therefore to occur during a period of extreme market fragility.''); Craig Pirrong, *The Inefficiency of Clearing Mandates,* Policy Analysis No. 655, at 11–14, 16–17, 24–26 (July 2010), *available at https://www.cato.org/pubs/pas/PA665.pdf* (stating, among other things, that ''CCPs are concentrated points of potential failure that can create their own systemic risks,'' that ''[a]t most, creation of CCPs changes the topology of the network of connections among firms, but it does not eliminate these connections,'' that clearing may lead speculators and hedgers to take larger positions, that a CCP's failure to effectively price counterparty risks may lead to moral hazard and adverse selection problems, that the main effect of clearing would be to ''redistribute losses consequent to a bankruptcy or run,'' and that clearing entities have failed or come under stress in the past, including in connection with the 1987 market break); Glenn Hubbard et al., *Report of the Task Force on Financial Stability* 96, Brookings Inst.(June 2021), *available at https://www.brookings.edu/wp-content/uploads/2021/06/financial-stability_report.pdf* (''In short, the systemic consequences from a failure of a major CCP, or worse, multiple CCPs, would be severe. Pervasive reforms of derivatives markets following 2008 are, in effect, unfinished business; the systemic risk of CCPs has been exacerbated and left unaddressed.''); Froukelien Wendt, *Central Counterparties: Addressing their Too Important to Fail Nature* (IMF Working Paper No. 15/21, Jan. 2015), *available at https://www.imf.org/external/pubs/ft/wp/2015/wp1521.pdf* (assessing the potential channels for contagion arising from CCP interconnectedness); Manmohan Singh, *Making OTC Derivatives Safe—A Fresh Look* (IMF Working Paper No. 11/66, Mar. 2011), at 5–11, *available at https://www.imf.org/external/pubs/ft/wp/2011/wp1166.pdf* (retrieved from SSRN Elsevier database) (addressing factors that could lead central counterparties to be ''risk nodes'' that may threaten systemic disruption).

[720] The two exempt clearing agencies may also be subject to the EU Regulation, the Digital Operational Resilience Act (DORA), which went into effect in 2015: *https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020PC0595.*

not currently subject to Regulation SCI and by covering systems and events that are not currently within the scope of existing regulations and current practices.[721] In addition, the required policies and procedures may help new SCI entities recover more quickly from SCI events that do occur.

Application of Rule 1001(a)(2)(i) through (iv), (vi), and (vii) to the new SCI entities is expected to benefit securities markets and market participants by leading to the establishment, maintenance, and enforcement of policies and procedures for these entities related to current and future capacity planning; periodic stress testing; systems development and testing methodology; and reviews and testing to identify vulnerabilities; standards for market data collection, processing, and dissemination; and monitoring to identify potential systems problems. These requirements should reduce the risk and incidence of systems issues, such as systems disruptions and systems intrusions. This, in turn, could reduce interruptions in the price discovery process and liquidity flows. Systems issues that directly inhibit execution facilities, order matching, and dissemination of market data could cause slow executions or delayed orders, or cause inoperability of an SCI entity for a period of time. If executions were delayed by a systems disruption in an SCI system related to a trading, order routing, clearance and settlement, or market data system, given the magnitude of the transaction activity in which SCI entities consistently engage, the delay could have cascading effects disruptive to the broader market.[722]

In addition, Rule 1001(a)(2)(vi) provides that an SCI entity's policies and procedures must include standards that result in systems being designed, developed, tested, maintained, operated, and surveilled in a manner that facilitates the successful collection, processing, and dissemination of market data. Rule 1001(a)(2)(vi) is expected to help ensure that timely and accurate market data are made available by new SCI entities. Market participants rely on market data in a variety of ways, including for making markets, formulating trading algorithms, and placing orders, among others. Although new SCI entities currently facilitate the successful collection, processing, and dissemination of market data, improvements in timeliness and accuracy of the generation of market data inputs would help further ensure pricing efficiencies and uninterrupted liquidity flows in markets.

Similarly, by requiring policies and procedures for monitoring systems to identify potential SCI events, Rule 1001(a)(2)(vii) may help ensure that new SCI entities identify potential SCI events, which could allow them to prevent some SCI events from occurring or to take timely appropriate corrective action after the occurrence of SCI events. As discussed above, reducing the frequency and duration of SCI events or reducing the duration of SCI events that disrupt markets would reduce pricing inefficiencies and promote price discovery and liquidity.

In general, setting forth policies and procedures with regard to capacity planning, stress testing, systems development and testing methodology, and reviews and testing to identify vulnerabilities could yield benefits to market participants and new SCI entities, including a potential reduction in the likelihood, duration, or severity of SCI events, thus helping to contain losses from these events, as described above.[723] Capacity planning and stress testing are necessary to help an SCI entity determine its systems' ability to process transactions in an accurate, timely, and efficient manner, and thereby help ensure market integrity. Development and testing systems are important in ensuring the reliability and resiliency of SCI systems. The potential adverse effects of systems failures are described in section V.C.2. for each type of new SCI entity. More reliable and resilient systems should help reduce the occurrence of SCI events and improve systems uptime for the new SCI entities, and thus possibly result in a reduction in losses due to SCI events and a reduction in these adverse effects. Furthermore, the use of inadequately tested software in production could result in substantial losses to market participants if it does not function as intended. For instance, if software malfunctions, it might not execute or route orders as intended and also could have unintended effects on quoted prices and the actual prices at which orders execute. Additionally, if a system's capacity thresholds are improperly estimated, it may become congested, resulting in higher indirect transaction costs due to lower execution quality (*e.g.,* decrease in order fill rates).

The Commission recognizes that the new SCI entities are subject to existing policies and procedures obligations as discussed in the baseline. Pursuant to those obligations, the new SCI entities may already engage in practices that are similar to certain requirements under Regulation SCI. To the extent that the existing policies and procedures are similar to those reflected in Regulation SCI, the magnitude of the costs and benefits discussed above that stem from the application of those policies and procedures will be correspondingly reduced. However, costs and benefits that arise from obligations under Regulation SCI that differ from those existing obligations, such as reporting to the Commission will be maintained.

While some of the existing regulations that apply to the proposed new SCI entities may be consistent with or similar to the policy and procedure requirements of Regulation SCI discussed in this section, the Commission believes it is nevertheless appropriate to apply these policy and procedure requirements to the new SCI entities and doing so would benefit participants in the securities markets in which these entities operate. Applying Regulation SCI to these entities increases market protections by establishing these obligations under the Exchange Act so that the Commission may enforce them directly and examine for compliance and provides a uniform mandatory requirement that will ensure their continued application.

In addition, some new SCI entities may already be voluntarily implementing policies and procedures consistent with the requirements of Regulation SCI. The magnitude of the benefits (and associated costs, as discussed below) from the policy and procedure requirements in Rule 1001(a)(1) and (a)(2)(i) through (iv), (vi), and (vii) for the new SCI entities (and the costs, as discussed below), will therefore depend on the extent to which their current operations already align with the rule's requirements, given both existing regulation and current practice. However, the Commission believes the application of Regulation SCI is still necessary. For example, while SBSDRs that also function as SDRs in the swap markets, may currently apply the CFTC rules to their securities-based swap markets as well as their swaps markets, the CFTC rules only apply to their swap market SDR systems. Therefore, applying Regulation SCI to SBSDRs would help to ensure that the systems relevant to the securities markets are subject to a requirement to have levels of capacity, integrity, resiliency, availability, and security adequate to maintain their operational capability and promote the maintenance of fair

[721] The potential adverse effects of systems failures are described in section V.C.2. for each type of new SCI entity. Benefits to new SCI entities from a reduction in the risk and incidents of systems issues would arise from a reduction in these adverse effects.

[722] *See supra* note 197.

[723] *See* section V.D.1.

and orderly markets and are subject to enhanced Commission oversight.

Additionally, with respect to SBSDRs, the requirements of Regulation SCI are more specific and comprehensive than the principles-based requirements of Rule 13n–6. The requirements of Regulation SCI would thus exist and operate in conjunction with Rule 13n–6, helping ensure that SBSDR market systems are robust, resilient, and secure and enhancing Commission oversight of the these systems.

Similarly, application of Regulation SCI to broker-dealers would complement existing requirements and enhance the policies and procedures already in place for these entities. For example, the Market Access Rule prescribes specific controls and procedures around a broker-dealer entering orders on an exchange or ATS, but the policy and procedure requirements of Regulation SCI are broader in scope and are designed to ensure that the key technology pervasive and important to the functioning of the U.S. securities markets is robust, resilient, and secure. Further, the SCI review requirement obligates an SCI entity to assess the risks of its systems and effectiveness of its technology controls at least annually, identify weaknesses, and ensure compliance with the safeguards of Regulation SCI. In addition, with respect to the requirements concerning the collection, processing, and dissemination of market data, Regulation SCI extends beyond existing requirements to include SCI systems directly supporting proprietary market data, which will provide additional benefits to market participants. Further while Rule 17a–3 has a notification requirement when a broker-dealer fails to make and keep current the records required by that Rule, Regulation SCI more directly addresses mitigating the impact of technology failures with respect to SCI systems and indirect SCI systems (which include systems that are not used to make and keep current the records required by Rule 17a–3) and requires notifications to the Commission for a different set of events—systems intrusions, systems compliance issues, and systems disruptions—than the notification requirements of 17 CFR 240.17a–11 (''Rule 17a–11'').

Likewise, while FINRA Rule 4370 requires broker-dealers to maintain business contingency and disaster recovery plans, it does not include the requirement that the business continuity and disaster recovery plans be reasonably designed to achieve next business day resumption of trading and two-hour resumption of critical SCI systems following a wide-scale disruption, nor does it require the functional and performance testing and coordination of industry or sector-testing of such plans, which are instrumental in achieving the goals of Regulation SCI with respect to SCI entities.

Finally, with respect to the exempt clearing agencies not subject to ARP, subjecting these entities to the policy and procedure requirements of Regulation SCI will ensure that uniform, minimum requirements regarding capacity, integrity, resiliency, availability, and security applies to all exempt clearing agencies. Although some of the conditions underlying the exemptive orders for the two exempt clearing agencies that would be subject to Regulation SCI under the proposed amendments may be consistent with Regulation SCI's policy and procedure requirements, the conditions vary across the agencies and in their similarity to the Regulation SCI requirements. As these exempt clearly agencies and other entities that they interact with become more technologically innovative and interconnected, applying a uniform, minimum set of requirements will improve the Commission's oversight and better ensure the resiliency of the markets in which they operate.

Overall, applying the specific and comprehensive requirements set forth in Rule (a)(2)(i) through (iv), (vi), and (vii) of Regulation SCI to the new SCI entities would create a uniform, mandatory framework under the Commission's oversight thereby furthering the goals of Regulation SCI to strengthen the technology infrastructure of the U.S. securities markets and improve its resilience.

(ii) Systems Compliance (Rule 1001(b))

Rule 1001(b)(1) requires each SCI entity to establish, maintain, and enforce written policies and procedures reasonably designed to ensure that its SCI systems operate in a manner that complies with the Exchange Act and the rules and regulations thereunder, and the entity's rules and governing documents, as applicable. Rule 1001(b)(2)(i) through (iv) provides that an SCI entity's policies and procedures under Rule 1001(b)(1) must include, at a minimum: (i) testing of all SCI systems and any changes to SCI systems prior to implementation; (ii) a system of internal controls over changes to SCI systems; (iii) a plan for assessments of the functionality of SCI systems designed to detect systems compliance issues, including by responsible SCI personnel and by personnel familiar with applicable provisions of the Exchange Act and the rules and regulations thereunder and the SCI entity's rules and governing documents; and (iv) a plan of coordination and communication between regulatory and other personnel of the SCI entity, including by responsible SCI personnel, regarding SCI systems design, changes, testing, and controls designed to detect and prevent systems compliance issues.

These provisions remain unchanged and do not create any new requirement for current SCI entities. New SCI entities, however, would become subject to these provisions for the first time. The Commission recognizes that new SCI entities currently take various measures to ensure that their systems operate in a manner that complies with relevant laws and rules. The specific requirements of Rule 1001(b) will further ensure that new SCI entities operate their SCI systems in compliance with the Exchange Act and relevant rules. For example, the tests under Rule 1001(b)(2)(i) should help new SCI entities to identify potential compliance issues before new systems or systems changes are implemented; the internal controls under 17 CFR 242.1001(b)(2)(ii) (''Rule 1001(b)(2)(ii)'') should help to ensure that new SCI entities remain vigilant against compliance challenges when changing their systems and resolve potential noncompliance before the changes are implemented; and the systems assessment plans under 17 CFR 242.1001(b)(2)(iii) (''Rule 1001(b)(2)(iii)'') and the coordination and communication plans under Rule 1001(b)(2)(iv) should help technology, regulatory, and other relevant personnel of new SCI entities to work together to prevent compliance issues, and to promptly identify and address compliance issues if they occur.[724] To the extent that new SCI entities operate market regulation and market surveillance systems, and to the extent that compliance with Rule 1001(b) reduces the occurrence of systems compliance issues, Rule 1001(b) should advance investor protection.[725]

(iii) Responsible SCI Personnel (17 CFR 242.1001(c)(1) (''Rule 1001(c)(1)''))

Rule 1001(c)(1) requires an SCI entity to establish, maintain, and enforce reasonably designed written policies and procedures that include the criteria

[724] *See* SCI Adopting Release, at 72422.

[725] *See id.* at 72410 and 72422; *see also* section III.A.2.b.ii (policies and procedures, including those for system compliance, are expected to strengthen broker-dealers' operational capabilities independent of any specific SCI event affecting their technology supporting trading, clearance and settlement, order routing, market data, market regulation, and market surveillance).

for identifying responsible SCI personnel, the designation and documentation of responsible SCI personnel, and escalation procedures to quickly inform responsible SCI personnel of potential SCI events. This provision remains unchanged and does not create any new requirement for current SCI entities. New SCI entities, however, will become subject to this provision for the first time.

Requiring policies and procedures to identify and designate responsible SCI personnel and to establish escalation procedures to quickly inform such personnel of potential SCI events should help to effectively determine whether an SCI event occurred and what appropriate actions should be taken without unnecessary delay. As such, Rule 1001(c)(1) is expected to reduce the duration of SCI events as new SCI entities become aware of them and take appropriate corrective actions more quickly. The reduction in the duration of SCI events would benefit markets and their participants as it would promote pricing efficiency and price discovery.

The Commission recognizes that the new SCI entities currently have certain regulatory obligations that may align with certain requirements of Rule 1001(c)(1), as described in the baseline, and in addition the new SCI entities may already be voluntarily implementing policies and procedures that may align with certain requirements of Rule 1001(c)(1). For example, SBSDRs and exempt clearing agencies may have policies and procedures that identify roles and responsibilities for key personnel as well as appropriate escalation procedures including designation and documentation of responsible personnel as noted above.[726] Likewise, as discussed above,[727] broker-dealers may have policies and procedures for designating employees with specific roles and responsibilities and escalation procedures documented in their incident response plans. As discussed above, the extent of these benefits (and related costs, as discussed below) would depend in part on how closely the existing policies and procedures of the new SCI entities align with the specific requirements of Rule 1000(c)(1).

(iv) Periodic Reviews of Policies and Procedures and Prompt Remedial Actions (Rule 1001(a)(3), (b)(3), (c)(2))

Rule 1001(a)(3), (b)(3), and (c)(2) require each SCI entity to periodically review the effectiveness of the policies and procedures required under Rule 1001(a) through (c) related to capacity, integrity, resiliency, availability, and security; systems compliance; and responsible SCI personnel, respectively, and to take prompt action to remedy deficiencies in such policies and procedures. These provisions remain unchanged since the adoption of Regulation SCI in 2014, but new SCI entities will become subject to them for the first time.

Requiring periodic review of the policies and procedures and remedial actions to address any deficiencies in the policies and procedures would help to ensure that new SCI entities maintain robust policies and procedures and update them when necessary so that the benefits of Rule 1001(a) through (c) as discussed in section V.C.1 should continue to be realized. For example, Rule 1001(a)(3), (b)(3), and (c)(2) should help to decrease the number of trading interruptions due to system issues in new SCI entities. It should lead to fewer interruptions in the price discovery process [728] and liquidity flows, thus, may result in fewer periods with pricing inefficiencies. Further, because interruptions in liquidity flows and the price discovery process in one security can affect securities trading in other markets, reducing trading interruptions could have broad effects.

As with the other requirements of Regulation SCI previously discussed, the Commission acknowledges that the new SCI entities are subject to existing regulations, and the extent of the benefits (and costs, as discussed below) will depend on how closely their current policies and procedures align with the requirements for review and remedial action under Rule 1001(a)(3), (b)(3), and (c)(2). The SBSDRs registered with the Commission are registered with the CFTC as swap data repositories (SDRs) and, with respect to systems of concern to the CFTC, are subject to CFTC's rules that require these entities to conduct periodic reviews of automated systems and business continuity-disaster recovery capabilities.[729] While such entities may apply the CFTC rules to the entirety of their repositories, the CFTC rules do not apply to the SBSDR and its security-based swap related systems. Therefore, applying Rule 1001(a)(3), (b)(3), and (c)(2) to SBSDRs would ensure periodic reviews of the effectiveness of policies and procedures specifically related to SCI systems and create a uniform, mandatory framework under the Commission's oversight.

Similarly, SCI broker-dealers also are required under FINRA Rule 4370 to conduct an annual review of the business continuity and disaster recovery plans.[730] Further, as noted above, the two exempt clearing agencies are required to report at least on an annual basis to the competent authority regarding their compliance with CSDR, including on their operational risk management framework and systems and their information security framework.[731] The exempt clearing agencies must also periodically test and review the operational arrangements and policies and procedures with users. Additionally, the exemptive order for one of the exempted clearing agencies requires a review of policies and procedures and reporting on the status of policies and procedures to the Commission. To the extent that that the broker-dealers and the exempt clearing agencies increase the scope of the review of their policies and procedures related to capacity, integrity, resiliency, availability, and security; systems compliance; and responsible SCI personnel, and take prompt action to remedy deficiencies, the exempt clearing agencies, broker-dealers and their customers will benefit from application of Rule 1001(a)(3), (b)(3), and (c)(2) and create a uniform, mandatory framework under the Commission's oversight.

(2) Amended Provisions Applicable to Current and New SCI Entities

The Commission is proposing to amend Rule 1001(a)(2)(v)—to add to that provision a requirement that business continuity and disaster recovery plans be reasonably designed to address the unavailability of any third-party provider that provides functionality, support, or service to the SCI entity without which there would be a material impact on any of its critical SCI systems—and add several new provisions in Rule 1001(a)(2), including proposed Rule 1001(a)(2)(viii) (systems classifications and lifecycle management programs); proposed Rule 1001(a)(2)(ix) (third-party provider management program); proposed Rule 1001(a)(2)(x) (a program to prevent the unauthorized access to such systems and information residing therein); and proposed Rule 1001(a)(2)(xi) (identification of the relevant current industry standard claimed as a safe harbor, if any). In addition, we are

[726] *See* sec. V.B.1.a.ii and V.B.1.c.ii.

[727] *See* section V.B.1.b.ii.

[728] The price discovery process involves trading—buyers and sellers arriving at a transaction price for a specific asset at a given time. Thus, generally, any trading interruptions would interfere with the price discovery process.

[729] *See* 17 CFR 49.24(j); 17 CFR 49.24(m); 17 CFR 49.24(b)(3).

[730] *See* sec. V.B.1.b.ii.

[731] *See* sec. V.B.1.c.ii.

proposing to amend Rule 1001(a)(4) to clarify that policies and procedures that are consistent with current SCI industry standards provide a safe harbor with respect to the requirement that such policies and procedures be reasonably designed. These amendments would impact both new and existing SCI entities.

(i) Business Continuity and Disaster Recovery Plans (Rule 1001(a)(2)(v))

Rule 1001(a)(2)(v) currently requires SCI entities' policies and procedures to set forth business continuity and disaster recovery plans that include maintaining backup and recovery capabilities sufficiently resilient and geographically diverse and that are reasonably designed to achieve next business day resumption of trading and two-hour resumption of critical SCI systems following a wide-scale disruption. The Commission is proposing to also require that such plans are reasonably designed to address the unavailability of any third-party provider that provides functionality, support, or service to the SCI entity, without which there would be a material impact on any of its critical SCI systems.

With respect to the existing requirements that will remain unchanged, these would only affect new SCI entities and not create any new requirement for current SCI entities. Requiring business continuity and disaster recovery plans increases the likelihood that the markets in which they participate will continue to function, and SCI systems can resume operation in a timely manner, even when there are significant outages to SCI systems. Rule 1001(a)(2)(v), among other things, is expected to help ensure prompt resumption of all critical SCI systems, which in turn is expected to help minimize interruptions in trading and clearance and settlement after a wide-scale disruption. Notably, in the case of a wide-scale disruption, multiple SCI entities may be affected by the same incident at the same time. Given that U.S. securities market infrastructure is concentrated in relatively few areas, such as New York City, New Jersey, and Chicago, maintaining backup and recovery capabilities that are geographically diverse could facilitate resumption in trading and critical SCI systems following wide-scale market disruptions.[732] Reducing the frequency and duration of trading interruptions would promote pricing efficiency, price discovery, and liquidity flows in markets.

With respect to the new requirement on the unavailability of third-party providers, both new and current SCI entities will be affected. Financial institutions, including SCI entities, have become increasingly dependent on third parties—such as cloud service providers—to operate their businesses and provide their services.[733] The proposed requirement for business continuity and disaster recovery plans to address the unavailability of any third-party provider would help ensure that SCI entities are appropriately prepared for contingencies relating to a third-party provider with respect to critical SCI systems., including the potential for an extended outage, if, for example the third-party provider goes into bankruptcy or dissolves, or if it breaches its contract and decides to suddenly, unilaterally, and/or permanently cease to provide the SCI entity's critical SCI systems with functionality, support, or service.

The Commission understands that some new SCI entities are already subject to similar requirements and may already have policies and procedures that may align with Rule 1001(a)(2)(v),[734] while others may need to make more significant changes to their current policies, procedures and practices. As discussed above, the extent of the benefits (and costs, as discussed below) will depend on how closely the new SCI entities' current policies and procedures align with the requirements of 1001(a)(2)(v), including the proposed amendment. With respect to SBSDRs, which are also registered as SDRs with the CFTC, the CFTC's System Safeguard rule sets forth requirements for swap data repositories to establish and maintain emergency procedures, geographically diverse[735] backup facilities, and a business continuity-disaster recovery plan that allows for the timely recovery and resumption of next day operations following the disruption. While such entities may apply the CFTC rules to the entirety of their repositories, the CFTC rules do not apply to the SBSDR and its security-based swap related systems. Therefore, Rule 1001(a)(2)(v) would help ensure SBSDR's have in place for their SCI systems business continuity and disaster recovery plans that meet the minimum requirements set forth in the rule and create a uniform, mandatory framework under the Commission's oversight. The proposed amendment would ensure that these plans specifically address the unavailability of any third-party provider that provides functionality, support, or service to the SBSDR's SCI systems, without which there would be a material impact on any of its critical SCI systems.

SCI broker-dealers are likewise required to create and maintain a written business continuity plan under FINRA Rule 4370.[736] Currently required business continuity public disclosure statements[737] generally indicate that some backup systems are geographically diverse, but limited information is disclosed with respect to a specific timeline for resumption of service in the event of a disruption. Similarly, these required business continuity public disclosure statements generally do not provide information on specific BC/DR plans to address the unavailability of any third-party provider, as would be required under the proposed amendment. Applying the requirements of Rule 100(a)(2)(v) to broker-dealers may reduce the frequency and duration of trading interruptions, which would promote pricing efficiency, price discovery, and liquidity flows in markets. Further, the proposed amendment to Rule 1001(a)(2)(v) would help ensure broker-dealers have business continuity and disaster recovery plans in place to address the unavailability of any third-party provider that provides functionality, support, or service to the SCI systems.

Finally, as discussed above, the exempt clearing agencies are currently required to maintain a business continuity policy and disaster recovery plan that ensures two hour resumption of critical operations and geographically diverse backup systems and monitor and test it at least annually.[738] The exempt clearing agencies are also required to address the unavailability of any critical third-party provider.[739] Application of Rule 1000(a)(2)(v), including the proposed amendment, would help ensure exempt clearing agencies have business continuity and disaster recovery plans in place to address the unavailability of any third-

[732] As discussed in section III.C.2, the geographic diversity of data center sites is an important consideration even where an SCI entity uses CSPs as its business continuity and disaster recovery service providers.

[733] *See supra* sec. V.B.4. and note 687.

[734] *See* sections III.A.2.a.ii, III.A.2.b.ii, III.A.2.c.i., V.B.1.a.ii, V.B.1.b.ii, and V.B.1.c.ii.

[735] SDRs deemed critical by the CFTC require geographically diverse backup facilities and staff.

[736] *See* section V.B.1.b.ii.

[737] While broker-dealers are required to provide a brief summary disclosure statement regarding their BCPs to customers, they do not disclose the actual BCP. Based on a review of 2021 and 2022 BCP disclosure statements, firms often do not provide any detail on operational capacity to meet demand surges or any specific timeframes for resumption of service.

[738] *See* sec. V.b.1.e.ii.

[739] *Id.*

party provider that provides functionality, support, or service to the SCI systems and thus would likely incrementally reduce the frequency and duration of trading interruptions and promote pricing efficiency, price discovery, and liquidity flows in markets.

(ii) Systems Classification and Lifecycle Management (Proposed Rule 1001(a)(2)(viii))

Proposed Rule 1001(a)(2)(viii) provides that an SCI entity's policies and procedures must provide for the maintenance of a written inventory and classification of all SCI systems, critical SCI systems, and indirect SCI systems as such, and a program with respect to the lifecycle management of such systems, including the acquisition, integration, support, refresh, and disposal of such systems, as applicable. This is a new provision and applies to both current SCI entities and new SCI entities.

A foundational and essential step for an SCI entity to be able to meet its obligations under Regulation SCI is to be able to clearly identify the different types of its systems that are subject to differing obligations under Regulation SCI. Reasonably designed systems classification and lifecycle management policies and procedures, which include vulnerability and patch management, reduce the risk of SCI system defects and operational issues. The systems classification requirement would promote more efficient and timely compliance with the remaining provisions of Regulation SCI. The lifecycle management requirement would also ensure that sensitive information (including software configuration info, middleware, etc.) is not inadvertently revealed, potentially compromising the security of an SCI entity's data and network—and would further enhance the systems' integrity, resiliency, and security. The Commission understands that one of the first steps many current SCI entities would take to comply with Regulation SCI is to develop a classification of their systems in accordance with the definitions of each type of system in SCI, but not all SCI entities maintain such a list. Accordingly, the extent of the benefits described above will depend on whether existing entities have taken such steps and how closely they align with the proposed requirements.

With respect to new SCI entities, broker-dealers are required to maintain policies and procedures per Regulation S–P and S–ID, as discussed above.[740] In two Commission exam sweeps, the Commission staff observed that most broker-dealers already inventory, catalog, and classify the risks of their systems and had a process in place for ensuring regular system maintenance, including the installation of software patches to address security vulnerabilities.[741] Furthermore, identification of mission critical systems is required by FINRA rule 4370. Accordingly, there would be an incremental benefit (and cost) from applying this particular provision of Regulation SCI to the broker-dealers. Additionally, the practice of inventorying and classifying systems might also encourage the firm to invest in supplemental security measures to reduce the number of indirect SCI systems, which would result in an incremental and upfront or short-term cost.

As discussed in section V.B.1.c.ii, exempt clearing agencies are required by CSDR to prepare a list with all the processes and activities that contribute to the delivery of the services they provide; and identify and create an inventory of all the components of their IT systems that support the processes and activities. This likely would represent an incremental benefit (and cost). Additionally, the practice of inventorying and classifying systems might also encourage the firm to invest in supplemental security measures to reduce the number of indirect SCI systems to reduce the long-time compliance burden which would result in an incremental and upfront or short-term cost.

(iii) Third-Party Provider Management (Proposed Rule 1001(a)(2)(ix))

Proposed Rule 1001(a)(2)(ix) concerns policies and procedures for effective third-party provider management and would newly apply to both existing and new SCI entities. As discussed above, financial institutions have been increasingly outsourcing parts of their services.[742] When a market participant chooses to outsource a particular component of its operation to a third-party vendor, the vendor may offer components of services (of certain quality) at a cheaper rate than the market participant can supply on its own or where the market participant may lack the expertise or ability to provide them. If this is done properly and with full information, it can result in an efficient outcome without compromising the service quality below what is required under Regulation SCI.

But in some cases, if there is information asymmetry—especially with respect to service quality—market dynamics among SCI entities result on the provision of sub-optimal services. This may be the case for a number of reasons, including imperfect communication between the SCI entity and its third-party provider. First, a third-party provider providing its service to an SCI entity may lack the knowledge of the level of resiliency and capacity the SCI entity must maintain. Second, an SCI entity may lack the knowledge of the robustness of the third-party provider's operation. Third, the market for these services may not be competitive, and an SCI entity looking to outsource these services may not have other comparable choices. Failure to ensure that policies and procedures are adequate to reduce these risks may result in unidentified security weaknesses, the inability to analyze potential security events, and delayed business continuity and disaster recovery.

Proposed Rule 1001(a)(2)(ix) would require each SCI entity to have a program to manage and oversee third-party providers that provide functionality, support or service, directly or indirectly, for its SCI systems and, for purposes of security standards, its indirect SCI systems. Each SCI entity would be required to undertake a risk-based assessment of each third-party provider's criticality to the SCI entity, including analyses of third-party provider concentration, of key dependencies if the third-party provider's functionality, support, or service were to become unavailable or materially impaired, and of any potential security, including cybersecurity, risks posed. The Commission believes that specifically requiring each SCI entity to undertake a risk-based assessment of each of its third-party providers' criticality to the SCI entity will help it more fully understand the risks and vulnerabilities of utilizing each third-party provider, and provide the opportunity for the SCI entity to better prepare in advance for contingencies should the provider's functionality, support, or service become unavailable or materially impaired.

Again, the extent of these benefits may depend on whether an SCI entities' existing practices, and applicable regulations, are consistent with the requirements of proposed Rule 1001(a)(2)(ix). As noted above, SBSDRS that are dually registered as SDRs with the CFTC are also subject to the CFTC

[740] *See* sec. V.B.1.b.ii.

[741] *Id.*

[742] *See supra* sec. V.B.4. and note 687.

System Safeguards rule, which requires a SDR to undertake program of risk analysis and oversight of outsourcing and vendor management affecting its operations and automated systems.[743] A dual-registered entity's outsourced systems for processing SDR data might also be SCI systems if such systems also process SBSDR data. Accordingly, an SDR's adherence to the System Safeguard Rule's provision for vendor management and outsourcing is reasonably likely to reduce the benefit (and the cost, as discussed below) of complying with proposed Rule 1001(a)(2)(ix).

Similarly, as discussed above, broker-dealers are already subject to general vendor management obligations in accordance with FINRA Rule 3110 and obligations under Regulation S–P [744] and thus some of their current practices may be consistent with some of the requirements of Rule 1001(a)(ix). However, those rules are different in scope and purpose than the proposed amendment to Regulation SCI.[745] For example, while FINRA rules already require initial and ongoing due diligence, third-party provider contract review and ongoing third-party risk assessment, proposed Rule 1001(a)(2)(ix) also requires an additional risk-based assessment of each third-party provider's criticality to the SCI entity. Accordingly, proposed Rule 1001(a)(2)(ix) may restrict usage of particular third-party providers, if and when they are unwilling or unable to comply with Regulation SCI's third-party provider requirements.

Finally, as discussed in V.B.1.c.ii, the two exempt clearing agencies are required by CSDR to have arrangements for the selection and substitution of IT third-party service providers and proper controls and monitoring tools which seems within the scope of proposed Rule 1001(a)(2)(ix) initial and ongoing due diligence provisions. The exempt clearing agencies are also required to identify critical utilities providers and critical service providers that may pose risks to tier operations due to dependency on them which seems within the scope of ongoing third-party risk assessment. In light of the existing requirements for exempt clearing agencies discussed in the baseline, any benefits (and associated costs, as discussed below) from the proposed amendment are likely to be relatively small with respect to critical service providers. However, the benefit would likely be larger with respect to non-critical service providers where the requirements are less specific.

(iv) Security (Proposed Rule 1001(a)(2)(x))

Since the adoption of Regulation SCI in 2014, the financial system has become more digitized and consequently cybersecurity has become a significant concern for financial firms, investors, and regulatory authorities.[746] In addition, the COVID–19 pandemic and accelerated move to working from home increased the demand for digital services and reliance of SCI entities on third-party providers including CSPs. Moving the majority of activities to the online or digitized environment has increased the risk of cybersecurity events.[747] According to the Bank for International Settlements, the financial sector had the second-largest share of COVID–19-related cybersecurity events between March and June 2020.[748] The Commission is proposing a new paragraph (a)(2)(x) of Rule 1001 that would require policies and procedures of SCI entities include a program to prevent the unauthorized access to SCI systems and, for purposes of security standards, indirect SCI systems and information residing therein. This would be a new provision and would apply to both current SCI entities and new SCI entities.

The Commission anticipates that the primary benefit of the proposed rule would be to ensure that all SCI entities, including the new SCI entities, have policies and procedures to enhance their preparedness against cybersecurity threats. The proposed requirements to develop policies and procedures that are specifically designed to prevent the unauthorized access to SCI systems and information residing therein, would better protect SCI entities against cybersecurity threats. Such policies and procedures can strengthen the security surrounding their information systems and the data contained within, aiding in the prevention of unauthorized access; minimizing the damage from cybersecurity events; and improving incident recovery time.

Another significant benefit is that any such unauthorized access should be reported to the Commission. Thus, this rule, together with the Commission notification requirement in Rule 1002(b), as amended, will help the Commission better understand which entities are most affected by cybersecurity events, what the current trends may be, and provide the Commission with information that may aid in subsequent guidance or rulemaking to further strengthen the affected entities from future cybersecurity events and disruptions to their business operations. Indeed, as we stated in section B.2.a, it is the Commission's understanding that current SCI entities have been reporting de minimis system intrusions on a quarterly basis, rather than immediately, as permitted under the current requirements of Regulation SCI. Current SCI entities are not required to report attempted intrusions.

The extent of these benefits will depend on how consistent the existing policies and procedures of both current and new SCI entities are with the requirements of proposed Rule 1001(a)(2)(x). The Commission believes that many existing SCI entities already have most or all of such policies and procedures in place as part of their security protocols; thus the benefits (and the associated costs) of applying the proposed Rule 1001(a)(2)(x) may be reduced.

Among new SCI entities, both registered SBSDRs have stated they have policies and procedures addressing access management.[749] To the extent that SBSDRs already have access management policies and procedures that are aligned with the requirements of proposed Rule 1001(a)(2)(x), the proposed rule would offer limited benefits. Further, as discussed in section V.B.1.b.ii, broker-dealers are required to maintain policies and procedures addressing security issues per Regulation S–P and S–ID, although those regulations and the required policies and procedures are different in scope and purpose. The extent of the benefits of proposed Rule 1001(a)(2)(x) would thus depend on how consistent the broker-dealer's current policies and procedures are with the requirements of the proposed Rule.

As discussed in section V.B.1.c.ii, the two exempt clearing agencies are required to maintain information security frameworks describing mechanisms to detect and prevent cyber-attacks and a plan in response to cyber-attacks. The information security

[743] 17 CFR 49.24(b)(6).

[744] *See supra* sec. V.B.1.b.ii.

[745] *See* sec. III.A.2.b.ii. and III.D.

[746] *See supra* sec. III.C.3.

[747] Iñaki Aldasoro et al., *COVID–19 and Cyber Risk in the Financial Sector,* BIS Bull. No. 37 (Jan. 14, 2021), *available at https://www.bis.org/publ/bisbull37.pdf.*

[748] *Id.* The health sector is ranked first in term of the cyberattacks.

[749] 17 CFR 49.24(b)(2). *See* Security-Based Swap Data Repositories; ICE Trade Vault, LLC; Notice of Filing of Application for Registration as a Security-Based Swap Data Repository, *available at https://www.sec.gov/rules/other/2021/34-91331.pdf*; Security-Based Swap Data Repositories; DTCC Data Repository (U.S.), LLC; Notice of Filing of Application for Registration as a Security-Based Swap Data Repository, *available at https://www.sec.gov/rules/other/2021/34-91071.pdf.*

framework includes among other requirements access controls to the system and adequate safeguards against intrusions and data misuse. Therefore, proposed Rule 1001(a)(2)(x) may offer only limited incremental benefits.[750]

(v) Current SCI Industry Standards (Proposed Rule 1001(a)(2)(xi)) and Safe Harbor for Policies and Procedures Consistent With SCI Industry Standards (Rule 1001(a)(4))

Proposed Rule 1001(a)(2)(xi) would provide that an SCI entity's policies and procedures must include an identification of the current SCI industry standard(s) with which each such policy and procedure is consistent, if any. This requirement would be applicable if the SCI entity is taking advantage of the safe harbor provision, Rule 1001(a)(4). We are also proposing to amend the text of Rule 1001(a)(4), which deems an SCI entity's policies and procedures under Rule 1001(a) to be reasonably designed if they are consistent with current SCI industry standards, to make clear that its reference to and definition of ''current SCI industry standards'' provides a safe harbor for SCI entities with respect to their Rule 1001(a) policies and procedures. Proposed Rule 1001(a)(2)(xi) and the amendment to Rule 1001(a)(4) would apply to both current SCI entities and new SCI entities.

Rule 1001(a)(4) specifically states that compliance with current SCI industry standards is not the exclusive means to comply with the requirements of Rule 1001(a). Therefore, Rule 1001(a)(4) provides flexibility to allow each SCI entity to determine how to best meet the requirements in Rule 1001(a), taking into account, for example, its nature, size, technology, business model, and other aspects of its business. SCI entities can choose the technology standards that best fit with their business, promoting efficiency. The ability of SCI entities to rely on widely recognized technology standards, if they choose to do so, will provide guidance to SCI entities on policies and procedures that would meet the articulated standard of being ''reasonably designed to ensure that their systems have levels of capacity, integrity, resiliency, availability, and security, adequate to maintain their operational capability and promote the maintenance of fair and orderly markets.''

In addition, the flexibility of this requirement leaves room for industry-wide innovation, while encouraging each SCI entity to conform to an industry standard that is most appropriate for itself given the entity's scope of operation and particular characteristics. These standards currently in place may require protocols that go beyond the level that would have been chosen by an entity that is driven by profit-maximizing or cost-saving motives. Furthermore, as industry standards continue to evolve, Regulation SCI helps to ensure that SCI entities are motivated to adhere to the changing standards that reflect the changes in market conditions and technology. The Commission understands that many existing SCI entities rely on industry standards, typically by adhering to a specific industry standard or combination of industry standards for a particular technology area or by using industry standards as guidance in designing policies and procedures. Thus, overall benefits and costs to existing SCI entities will be incremental, and the benefits and costs are likely to be greater for entities that do not already rely on industry standards and lesser for entities that already adhere closely to industry standards.

Among new entities, both SBSDR entities are also registered with the CFTC as SDRs, and as such are subject to the CFTC's System Safeguard rule in their capacity as SDRs. The System Safeguard rule requires SDRs to follow generally accepted standards and best practices with respect to the development, operation, reliability, security, and capacity of automated systems.[751] While not required, it is likely that dual-registered SDRs/SBSDRs are following these requirements for SBSDRs given the CFTC requirements for SDRs. Therefore, it is likely that SBSDRs already have policies and procedures consistent with existing industry standards.

As discussed above, broker-dealers are required to have certain policies and procedures pursuant to Regulation S–P and S–ID.[752] The 2015 FINRA report on cybersecurity practices observed that broker-dealers reported relying on industry standards with respect to cybersecurity requirements, typically by adhering to a specific industry standard or combination of industry standards or by using industry standards as a reference point for designing policies and procedures.[753] To the extent that any broker-dealers do not rely on industry standards or only selectively, applying Rule 1001(a)(4) and proposed Rule 1001(a)(2)(xi) will likely increase broker-dealer adherence to industry standards and improve overall compliance with Rule 1001.

As discussed in section V.B.1.c.ii, the two exempt clearing agencies are required by CSDR to rely on internationally recognized technical standards and industry best practices with respect to its IT systems. As such, it is likely that they already have policies and procedures that are consistent with one or more industry standards. The proposed amendment may have some incremental benefit and improve overall compliance with Rule 1001.

ii. Costs

The policies and procedures requirements of Regulation SCI would impose certain compliance costs on new SCI entities, which are expected to change at least some of their current practices to comply. In addition, the proposed amendments to certain provisions in Rule 1001 would impose additional costs on new and existing SCI entities. We discuss these costs below.

(1) Compliance Costs for New SCI Entities

Some of the new SCI entities are already subject to existing regulatory requirements that are similar to the requirements in Rule 1001, including the proposed amendments. To the extent these entities already have policies and procedures that are consistent with the Rule 1001 requirements, they could incur lower costs to comply with the requirements of Rule 1001 than entities without such existing policies and procedures. Similarly, the compliance costs associated with Rule 1001 may vary across SCI entities depending on the degree to which their current voluntary practices are already consistent with the requirements of Rule 1001.The compliance costs of Rule 1001 may further depend on the complexity of SCI entities' systems (*e.g.,* the compliance costs will be higher for SCI entities with more complex systems). They may also depend, to a large extent, on the scale as well as the relative criticality of a given SCI entity's systems. We discuss below the costs for new SCI entities to comply with Rule 1001, including the proposed amendments; this includes PRA costs as well as additional compliance costs.

First, with respect to PRA costs, the Commission estimates total initial costs of approximately $13.4 million and annual costs of approximately $3.5

[750] *See* section V.B.1.c.ii.

[751] *See* 17 CFR 49.24.

[752] *See* sec. V.B.1.b.ii.

[753] *See* section V.B.1.b.ii.

million for all new SCI entities.[754] In addition to the compliance costs estimated as part of the PRA analysis, the Commission acknowledges there may, in some cases, be other compliance costs. In the SCI Adopting Release, the Commission formed estimates of non-PRA compliance costs for complying with Rule 1001(a) and (b),[755] which are instructive for determining such costs now for the new SCI entities. The Commission believed then, and continues to do so now, that the costs of complying with Rule 1001(c) are fully captured in the PRA cost estimates. The Commission's estimates then were based on extensive discussions with industry participants as well as information contained in the comment letters submitted during the rulemaking process. After carefully considering all comments, the Commission concluded that to comply with all requirements underlying the policies and procedures required by Rule 1001(a) and (b), other than paperwork burdens, on average, each SCI entity will incur an initial cost of between approximately $320,000 and $2.4 million and an ongoing annual cost of between approximately $213,600 and $1.6 million.[756] Adjusted for inflation since 2014, the initial cost would be between approximately $407,000 and $3.1 million, and the ongoing annual cost would be between approximately $272,000 and $2.0 million.[757]

In the 2014 adopting release, the Commission acknowledged that its cost estimates reflect a high degree of uncertainty because the compliance costs may depend on the complexity of SCI entities' systems (*e.g.,* the compliance costs will be higher for SCI entities with more complex systems). The initial compliance costs associated with Rule 1001 could also vary across SCI entities depending on the degree of that their current practices are already consistent with the requirements of Rule 1001.[758] The Commission explained the difficulty of gauging the degree to which an SCI entity was already taking measures consistent with Regulation SCI, which would affect the compliance costs with respect to Rule 1001. These considerations continue to apply to the Commission's estimate of any non-PRA costs for new SCI entities, which span multiple markets and vary a great deal in terms of the services they provide and the operations they perform. These new SCI entities face different baselines depending on the applicable regulatory requirements that they are subject to and the market practices each SCI entity has been following.

Given these considerations, the Commission believes that the estimates from 2014 are still appropriate estimates for the non-PRA costs associated with Rule 1001(a) and (b) of Regulation SCI without the proposed amendments for the new SCI entities. There are reasons to believe that these ranges should be increased for inflation [759] and technological changes since 2014, such as greater interconnectivity, that have expanded the scope for testing, leading to greater costs. However, there are also reasons to believe that as of 2023 these ranges may have come down.

First, some components of costs may be lower in 2023 because of technological improvements since 2014.[760] Second, the experience of the current 47 SCI entities complying with Regulation SCI since 2014 has likely generated a useful industry knowledge base for new SCI entities, including common practices, industry standards, and cost-saving measures. From this perspective, the cost of learning would be lower, including the start-up cost. Third, the Commission understands that many financial institutions that are not subject to Regulation SCI have voluntarily begun to conform to one or more industry standards and adopted written policies and procedures related to ensuring capacity, integrity, resiliency, availability, and security of their systems. Indeed, the Commission understands—based on the Commission's discussions with industry participants—that the changes in the market—including greater automation and interconnectivity and an overall need to expand the scope of testing—have already incentivized many SCI entities to improve their internal protocols and to increase their technology expenditures. For example, the growing risk of cybersecurity events has already led many corporate executives to significantly increase their cybersecurity budgets.[761] From this perspective, although the overall security and IT spending may have increased manifold for SCI entities over the years, the Commission estimates that the magnitude of compliance costs owing to the adoption of Regulation SCI

[754] *See* section IV.D.7. These are the estimated costs to comply with Rule 1001(a) through (c). For purposes of this Economic Analysis, there are two fewer entities than under the PRA analysis, lowering these estimated costs. *See supra* note 700.

[755] According to the 2014 adopting release, these non-PRA compliance costs include, for example, establishing current and future capacity planning estimates, capacity stress testing, reviewing and keeping current systems development and testing methodology, regular reviews and testing to detect vulnerabilities, testing of all SCI systems and changes to SCI systems prior to implementation, implementing a system of internal controls, implementing a plan for assessments of the functionality of SCI systems, implementing a plan of coordination and communication between regulatory and other personnel of the SCI entity, including by responsible SCI personnel, designed to detect and prevent systems compliance issues, and hiring additional staff. *See* SCI Adopting Release, *supra* note 1, at 72416 n. 1939.

[756] *Id.*

[757] SEC inflation calculations are based on annual GDP price index data from Table 1.1.4. in the National Income and Product Accounts from the Bureau of Economic Analysis, and on inflation projections from *The Budget and Economic Outlook: 2023 to 2033,* published by the Congressional Budget Office in February 2023.

[758] These estimates in the SCI Adopting Release were in turn based on the preliminary estimates included in the SCI Proposing Release, *supra* note 14, at 18171. However, one important assumption the SCI Proposing Release made was to assume that certain SCI entities ''already [had or had] begun implementation of business continuity and disaster recovery plans that include maintaining backup and recovery capabilities sufficiently resilient and geographically diverse to ensure next business day resumption of trading and two-hour resumption of clearance and settlement services following a wide-scale disruption.'' *Id.* at note 633. In the SCI Adopting Release, however, in order to accommodate the cost considerations of those SCI entities that did not already have geographically diverse backup facilities, the Commission estimated the average cost to be approximately $1.5 million annually for such SCI entities. *See* SCI Adopting Release, *supra* note 1, at 72420. In the section discussing Rule 1001(a)(2)(v) below, the Commission estimates the comparable estimate to be between $1.5 million and $1.8 million. This additional estimate range only applies to SCI entities that do not already have geographically diverse backup facilities and would be in addition to the non-paperwork burden estimates discussed in the current section.

[759] For example, GDP Price Index data from the Bureau of Economic Analysis (BEA) and projections from the Congressional Budget Office show that, economy-wide, prices increased by about 27% from 2014 to 2023.

[760] *See* Matt Rosoff, *Why is Tech Getting Cheaper?, weforum.org* (Oct. 16, 2015), *available at https://www.weforum.org/agenda/2015/10/why-is-tech-getting-cheaper/.* For example, price has been dropping for cloud computing services over the last years. *See* Jean Atelsek, et al., *Major Cloud Providers and Customers Face Cost and Pricing Headwinds,* spglobal.com (May 10, 2022), *available at https://www.spglobal.com/marketintelligence/en/news-insights/research/major-cloud-providers-and-customers-face-cost-and-pricing-headwinds; see also* David Friend, *The Coming Era of Simple, Fast, Incredibly Cheap Cloud Storage,* Cloudtweaks.com (Nov. 15, 2022, 9:12 a.m.), *available at https://cloudtweaks.com/2018/02/fast-incredibly-cheap-cloud-storage/* (describing the significant price drop for cloud storage as of 2018, and explaining that ''the prices for cloud storage are heading in the same direction.''). These trends may be reversing. *See* Jean Atelsek, et al., (''Rising energy costs and supply chain woes threaten to push up costs for the cloud hyperscalers in building and operating their data centers; therefore, cloud infrastructure prices are poised to increase.''); Frederic Lardinois, *Google Cloud Gets More Expensive,* TechCrunch+ (Mar. 14, 2022, 11:54 p.m.), *available at https://techcrunch.com/2022/03/14/inflation-is-real-google-cloud-raises-its-storage-prices/.*

[761] For example, according to one source, as of 2020, ''55% of enterprise executives [were planning] to increase their cybersecurity budgets in 2021 and 51% are adding full-time cyber staff in 2021.'' Louis Columbus, *The Best Cybersecurity Predictions for 2021 Roundup,* Forbes.com (Dec. 15, 2020), *available at https://www.forbes.com/sites/louiscolumbus/2020/12/15/the-best-cybersecurity-predictions-for-2021-roundup/?sh=6d6db8b65e8c.*

for new SCI entities, over and above their current expenses, may not necessarily have increased significantly as a result since 2014.

Taking these varied considerations into account, the Commission estimates that, adjusted for inflation since 2014, the 2014 figures remain reasonable ranges for non-PRA costs associated with Rule 1001(a) and (b) in 2023, without accounting for the proposed amendments in Rule 1001(a). In other words, the Commission estimates that a new SCI entity in 2023 will incur an initial non-PRA cost of between approximately $407,000 and $3.1 million and an ongoing annual non-PRA cost of between approximately $272,000 and $2.0 million to comply with the original provisions of Regulation SCI from 2014.

To account for the proposed amendments, the Commission preliminarily estimates that, based on staff experience with current SCI entities' compliance practices, the non-PRA cost of complying with the amended provisions could be up to approximately 20% of the estimated non-PRA cost for complying with the original (*i.e.,* unamended) Rule 1001(a). Accordingly, the Commission estimates that a new SCI entity would incur an additional initial cost of between approximately $81,000 and $611,000 and an additional ongoing annual cost of between approximately $54,000 and $407,000 to comply with the amended provisions of Rule 1001(a).[762] Combined with the non-PRA costs estimates above for complying with the rest of Rule 1001(a) and (b), a new SCI entity will incur an additional initial non-PRA cost of between approximately $489,000 and $3.7 million[763] and an additional ongoing annual non-PRA cost of between approximately $326,000 and $2.4 million, plus the PRA costs estimated above.[764] The Commission estimates that, in the aggregate, all new SCI entities will incur a total initial non-PRA cost of between approximately $10.3 million and $77.0 million to comply with the policies and procedures required by Rule 1001(a) and (b).[765] In addition, the Commission estimates that, in the aggregate, new SCI entities will incur total annual ongoing non-PRA cost of between approximately $6.9 million and $51.3 million.[766] Depending on the price-sensitivity of their customers and the availability of alternative providers, new SCI entities may pass on some of these costs to their customers.[767]

In addition, with respect to the periodic reviews required by Rule 1001(a)(3), (b)(3), and (c)(2), there may be additional indirect costs if an SCI entity takes prompt or unplanned remedial action following the discovery of deficiencies in its policies and procedures. Specifically, the new SCI entities may need to delay or shift their resources away from profitable projects and reallocate their resources towards taking prompt or unplanned remedial actions required by the rules. It is nevertheless difficult to assess such indirect costs imposed on SCI entities because the Commission lacks information necessary to provide a reasonable estimate and such indirect costs will be circumstance-specific.

(2) Compliance Costs for Existing SCI Entities

Existing SCI entities should incur new costs only to comply with the proposed amendments to Rule 1001(a). With respect to PRA costs, the Commission estimates total initial costs of approximately $8.2 million and annual costs of approximately $1.1 million for all current SCI entities.[768] For non-PRA costs associated with these amendments, the Commission estimates that the non-PRA cost of complying with the amended provisions could be up to approximately 20% of the estimated non-PRA cost for complying with the original (*i.e.,* unamended) Rule 1001(a), as explained above. Accordingly, the Commission estimates that an existing SCI entity would incur an additional initial non-PRA cost of between approximately $81,000 and $611,000 and an additional ongoing annual non-PRA cost of between approximately $54,000 and $407,000 to comply with the amended provisions of Rule 1001(a).[769] The Commission in turn estimates that, in the aggregate, current SCI entities will incur a total initial non-PRA cost of between approximately $3.8 million and $28.7 million to comply with the policies and procedures required by Rule 1001(a) and (b).[770] In addition, the Commission estimates that, in the aggregate, current SCI entities will incur total annual ongoing non-PRA cost of between approximately $2.6 million and $19.1 million.[771]

(3) Other Costs for All SCI Entities and Other Affected Parties

Proposed Rule 1001(a)(2)(ix) could raise costs of third-party service providers insofar as they may have to renegotiate contracts and change the terms of their services to accommodate the requirements of SCI entities. SCI entities could also incur costs in enforcing their third-party provider management program. In particular, to the extent that accommodating the terms and conditions that would be demanded by SCI entities under proposed Rule 1001(a)(2)(ix) would be costly to third-party service providers, SCI entities could face higher prices from third-party providers, though any change in prices would also depend upon market conditions (such as the level of competition amongst third-party service providers for the type of services sought after by the SCI entity, the relative bargaining power of the SCI entity in negotiations with third-party service providers, new entry into the market for third-party services, and willingness of service providers to absorb costs or pass costs to other customers).

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106. For current SCI entities, do you agree that the Commission's specified ranges reasonably capture the non-paperwork burden costs owing to Rule 1001(a) and (b) that you have incurred above and beyond amounts you were already spending to ensure your SCI systems' capacity, integrity, resiliency, availability, and security under the existing requirements of Regulation SCI?

[762] These figures are 20% of the range from the Regulation SCI Adopting Release, adjusted for inflation from 2014 to 2023.

[763] These figures are 120% of the range from the Adopting Release of Regulation SCI, adjusted for inflation since 2014.

[764] These figures are approximately 120% of the range from the Adopting Release of Regulation SCI, adjusted for inflation since 2014.

[765] The Commission currently estimates there are 23 new SCI entities, two of which are excluded from the economic analysis as explained above. The range of $10.3 million and $77.0 million represents 21 times the per-entity initial cost range from the Regulation SCI Adopting Release, adjusted for inflation since 2014.

[766] The range of $6.9 million and $51.3 million represents 21 times the per-entity ongoing annual cost range from the Regulation SCI Adopting Release, adjusted for inflation since 2014.

[767] *See, e.g.,* Jonathan Baker, Orley Ashenfelter, David Ashmore & Signe-Mary McKernan, *Identifying the Firm-Specific Cost Pass-Through Rate,* Federal Trade Commission. Bureau of Economics 1 (1998), *available at https://www.ftc.gov/sites/default/files/documents/reports/identifying-firm-specific-cost-pass-through-rate/wp217.pdf.*

[768] *See* section IV.D.7. These include costs for existing entities to comply only with Rule 1001(a), and for new entities to comply with Rule 1001(a) through (c).

[769] These figures are 20% of the range from the Regulation SCI Adopting Release, adjusted for inflation since 2014.

[770] The Commission currently estimates there are 47 current SCI entities. The range of $3.8 million and $28.7 million represents 47 times the per-entity cost range from the SCI Adopting Release, adjusted for inflation since 2014.

[771] The range of $2.6 million and $19.1 million represents 47 times the per-entity cost range from the SCI Adopting Release, adjusted for inflation since 2014.

107. For new SCI entities, do you agree that the Commission's specified ranges reasonably capture the non-paperwork burden costs owing to Rule 1001(a) and (b) that you expect to incur above and beyond the amounts you were already spending to ensure your SCI systems' capacity, integrity, resiliency, availability, and security under the existing requirements of Regulation SCI?

108. For current and new SCI entities, do you agree that the Commission's specified ranges for the non-paperwork cost of complying with the proposed amendments to Rule 1001(a) and (b), at 20 percent of the specified ranges for Rule 1001(a) and (b), reasonably capture such costs that you expect to incur, above and beyond amounts you are already spending to ensure your SCI systems' capacity, integrity, resiliency, availability, and security owing to the proposed amendments?

109. If you are a current SCI entity and currently inventory and classification of all SCI systems, critical SCI systems, and indirect SCI systems, how does your activity differ from the requirements of the rule proposal? What have been the benefits and costs of this activity?

110. If you are a current SCI entity and have a program with respect to the lifecycle management of SCI systems, does it address the acquisition, integration, support, refresh, and disposal of such systems, as applicable? How does your activity differ from the requirements of the rule proposal? What have been the benefits and costs of this activity?

111. If you are a current SCI entity and you currently have a third-party provider management program to ensure that your SCI systems contractors perform their work in accordance with the requirements of Regulation SCI, how does your activity differ from the requirements of the rule proposal? What have been the benefits and costs of this activity?

112. If you are a current SCI entity and you currently require an initial and periodic review of contracts with service providers for consistency with your obligations under Regulation SCI, how does your activity differ from the requirements of the rule proposal? What have been the benefits and costs of this activity?

113. If you are a current or proposed SCI entity and you currently conduct a risk-based assessment of each third-party provider's criticality, to your operations, how does your activity differ from the requirements of the rule proposal? What have been the benefits and costs of this activity?

114. If you are a current SCI entity and your policies and procedures include a program to prevent the unauthorized access to SCI systems and information residing therein, how does your activity differ from the requirements of the rule proposal? What have been the benefits and costs of this activity?

115. The Commission requests that commenters provide relevant data and analysis to assist us in determining the economic consequences of the proposed amendments related to third-party providers' management. In particular, the Commission requests data and analysis regarding the costs SCI entities and third-party providers may incur, and benefits they may receive, from the proposed amendments.

116. Do you agree with the Commission's analysis of the benefits of the proposed amendments related to third-party providers' management? Why or why not? Please explain in detail.

117. Do you agree with the Commission's analysis of the costs of the proposed amendments related to third-party providers' management? Why or why not? Please explain in detail.

b. Rule 1002—Corrective Action, Commission Notification, and Information Dissemination

Regulation SCI requires SCI entities to take appropriate corrective actions in response to SCI events (Rule 1002(a)), notify the Commission of SCI events (Rule 1002(b)), and disseminate information regarding certain major SCI events to all members or participants of an SCI entity and certain other SCI events to affected members or participants (Rule 1002(c)). Rule 1000, in turn, defines SCI events to include systems disruptions, systems compliance issues, and systems intrusions. The Commission is proposing two amendments that affect these provisions. First, it is proposing to expand the definition of systems intrusion in Rule 1000. Second, it is proposing to amend Rule 1002(b)(5) to eliminate the exception to the reporting requirement for de minimis systems intrusions and instead require the reporting of all systems intrusions, whether de minimis or not, within the time frames specified in paragraphs (b)(1) through (4).

New SCI entities will need to comply with these requirements of Rules 1000 and 1002, and their proposed amendments, for the first time. Existing SCI entities will need to apply the new definition of systems intrusion in Rule 1000 to the requirements of Rule 1002, including the amendments to Rule 1002(c). We discuss below the benefits and costs of these provisions and amendments for new and existing SCI entities.

i. Benefits

(1) Rule 1000—Definition of SCI Events

In general, the definition of SCI event (and its component parts) in Rule 1000 circumscribe the scope of the substantive requirements in Rule 1002. Therefore, many of the costs and benefits associated with the definitions are incorporated in the discussion of the substantive requirements. The benefits associated with scoping the substantive requirements for Rule 1002 through the specific definitions of systems disruption, systems compliance issue, and systems intrusion are discussed at length in the 2014 SCI Adopting Release[772] and would apply to the new SCI entities. We summarize those benefits here and discuss the benefits for both new and current SCI entities resulting from expanding the definition of systems intrusion.

*Systems Disruption.* Rule 1000 of Regulation SCI currently defines a ''systems disruption'' as an event in an SCI entity's SCI systems that disrupts, or significantly degrades, the normal operation of an SCI system. This definition would remain unchanged. As the Commission noted in 2014, the definition sets forth a standard that SCI entities can apply in a wide variety of circumstances to determine in their discretion whether a systems issue should be appropriately categorized as a systems disruption. The inclusion of systems disruptions in the definition of SCI event, along with the requirements Rule 1002 should help effectively reduce the severity and duration of events for new SCI entities that harm pricing efficiency, price discovery, and liquidity and help Commission oversight of the securities markets.

*Systems Compliance Issues.* Under Rule 1000, a systems compliance issue is an event at an SCI entity that has caused any SCI system of such entity to operate in a manner that does not comply with the Act and the rules and regulations thereunder or the entity's rules or governing documents, as applicable. The Commission stated in 2014 that inclusion of systems compliance issues in the definition of SCI event and the resulting applicability of the Commission reporting, information dissemination, and recordkeeping requirements are important to help ensure that SCI

[772] *See* SCI Adopting Release, *supra* note 1, at 72423–27.

systems are operated by SCI entities in compliance with the Exchange Act, rules thereunder, and their own rules and governing documents.

*System Intrusion*. Rule 1000 of Regulation SCI currently defines a ''systems intrusion'' as any unauthorized entry into the SCI systems or indirect SCI systems of an SCI entity. The Commission is proposing to expand the definition of systems intrusions to include any cybersecurity attack that disrupts, or significantly degrades, the normal operation of an SCI system. This revision includes cybersecurity events that cause disruption on an SCI entity's SCI systems or indirect SCI systems, whether or not the event resulted in an entry into or access to such systems. In addition, the proposed revised definition would include any significant attempted unauthorized entry into the SCI systems or indirect SCI systems of an SCI entity, as determined by the SCI entity pursuant to established reasonable written criteria. This revision is intended to capture unsuccessful, but significant, attempts to enter an SCI entity's SCI systems or indirect SCI systems. The definition, including the proposed amendments, will apply to new SCI entities for the first time while the proposed amendments will apply to existing SCI entities.

In the SCI Adopting Release, the Commission discussed the benefits of including a system intrusion in the definition of an SCI event for which the requirements of Rule 1002 apply. These same benefits extend to the new SCI entities. Specifically, the Commission stated that unauthorized access, destruction, and manipulation of SCI systems and indirect SCI systems could adversely affect the markets and market participants because intruders could force systems to operate in unintended ways that could create significant disruptions in securities markets. Therefore, the inclusion of systems intrusions in the definition of SCI events can help reduce the risk of such adverse effects for new SCI entities.

The proposed changes, which would apply to new and current SCI entities, would update the definition to include additional types of incidents that are currently considered to be cybersecurity events that are not included in the current definition. If an incident meets the definition, it must then comply with the requirements for corrective action, Commission notice, and information dissemination in Rule 1002. The proposed changes to the definition would thus ensure that the Commission and its staff are made aware when an SCI entity is the subject of a significant cybersecurity threat, including those that may be ultimately unsuccessful, which would provide important information regarding threats that may be posed to other entities in the securities markets, including other SCI entities. Because such cybersecurity events can cause serious harm and disruption to an SCI entity's operations, the Commission believes that the definition of systems intrusion should be broadened to include cybersecurity events that may not entail actually entering or accessing the SCI entity's SCI systems or indirect SCI systems, but still cause disruption or significant degradation, as well as significant attempted unauthorized entries. By requiring SCI entities to submit SCI filings for these new types of systems intrusions, the Commission believes that the revised definition of systems intrusion would also provide the Commission and its staff more complete information to assess the security status of the SCI entity, and also assess the impact or potential impact that unauthorized activity could have on the security of the SCI entity's affected systems as well on other SCI entities and market participants.

(2) Rule 1002—Corrective Action, Commission Notice, Information Dissemination

As noted, Rule 1002 prescribes certain required actions for SCI entities upon any responsible SCI personnel having a reasonable basis to conclude that an SCI event has occurred. The requirements of Rule 1002(a) and (c) remain substantively unchanged from current Regulation SCI except additional events are scoped into the Rules for existing SCI entities through the proposed expanded definition of systems intrusion. These provisions will therefore primarily affect new SCI entities. We discuss generally the benefits of the expanded definition above and do not repeat those here.[773]

*Corrective Action (Rule 1002(a))*. Rule 1002(a) requires an SCI entity to begin to take appropriate corrective action upon any responsible SCI personnel having a reasonable basis to conclude that an SCI event has occurred. Rule 1002(a) also requires corrective action to include, at a minimum, mitigating potential harm to investors and market integrity resulting from the SCI event, and devoting adequate resources to remedy the SCI event as soon as reasonably practicable. Thus, it would not be appropriate for an SCI entity to delay the start of corrective action once its responsible SCI personnel have a reasonable basis to conclude that an SCI event has occurred, and the SCI entity would be required to focus on mitigating potential harm to investors and market integrity resulting from the SCI event and devoting adequate resources to remedy the SCI event as soon as reasonably practicable. This provision remains unchanged for existing SCI entities, except to the extent they must comply with the requirements for additional events scoped in under the expanded definition of systems intrusion, as noted above. For both current and new SCI entities, the benefits of expanding the definition to include certain types of systems intrusions that are not covered by Regulation SCI would include a potential reduction in the length or severity of systems disruptions caused by these types of intrusions and would thus reduce the negative effects of those interruptions on the SCI entity and on market participants.

The corrective action requirement of Regulation SCI will likely reduce the length of systems disruptions, systems compliance issues, and systems intrusions, and thus reduce the negative effects of those interruptions on the SCI entity and market participants. Additionally, to the extent that corrective action could involve wide-scale systems upgrades, some SCI entities may potentially seek to accelerate capital expenditures, for example, by updating their systems with newer technology earlier than they might have otherwise to comply with Regulation SCI. As such, Rule 1002(a) could further help ensure that SCI entities invest sufficient resources as soon as reasonably practicable to address systems issues.

New SCI entities will become subject to Rule 1002(a) for the first time. The Commission believes that new SCI entities already have a variety of procedures in place to take corrective actions when system issues occur. However, Rule 1002(a) may require modifications to those existing practices in part because the rule specifies the

[773] The SCI Adopting Release considered the benefits and costs of the specific definitions for each type of SCI event. *See* SCI Adopting Release, *supra* note 1, at 72404–08. Those costs and benefits remain the same for new SCI entities to which these definitions would apply and are not repeated here, except with respect to the definition of systems intrusions, which the Commission proposes to amend. To the extent that the primary effect of these definitions is realized through the requirements in Rule 1002 to take corrective action, notify the Commission, and disseminate information, we discuss the effects of applying those requirements on new SCI entities below.

timing and enumerates certain goals for corrective action.[774]

*Commission Notification (Rule 1002(b))*. Rule 1002(b) requires an SCI entity to notify the Commission of the SCI event immediately upon any responsible SCI personnel having a reasonable basis to conclude that an SCI event has occurred. Within 24 hours of any responsible SCI personnel having a reasonable basis to conclude that an SCI event has occurred, an SCI entity is required to submit to the Commission a more detailed written notification, on a good faith, best efforts basis, pertaining to the SCI event. Until such time as the SCI event is resolved and the SCI entity's investigation of the SCI event is closed, the SCI entity is required to provide updates regularly, or at such frequency as requested by a representative of the Commission. The SCI entity is also required to submit a detailed final written notification after the SCI event is resolved and the SCI entity's investigation of the event is closed (and an additional interim written notification, if the SCI event is not resolved or the investigation is not closed within a specified period of time). Finally, paragraph (b)(5) currently provides an exception to the reporting requirements of paragraphs (b)(1) through (4) for de minimis SCI events, and SCI entities are currently required to submit a summary to the Commission with respect to systems disruptions and systems intrusions only on a quarterly basis. The Commission is proposing to amend this provision to require SCI entities to exclude systems intrusions from this exception so that SCI entities will need to report systems intrusions, whether de minimis or not, within the time frames specified in paragraphs (b)(1) through (4). This would eliminate quarterly reporting for de minimis systems intrusions. Thus, for current SCI entities, the difference concerns the time frame for, and manner of, reporting de minimis systems intrusions while new SCI entities will be subject to the entire Commission notification regime for the first time.

For the new SCI entities, Rule 1002(b) as a whole would enhance the effectiveness of Commission oversight of the operation of these entities. For example, SCI events notification results in greater transparency for the Commission, including ensuring that the Commission has a view into problems at particular SCI entities for regulatory purposes as well as perspective on the effect of a single problem to the market at-large.[775] Further, the requirements of submitting notifications pertaining to the SCI events to the Commission, set forth by Rule 1002(b), could help prevent systems failures from being dismissed as momentary issues, because notification would help focus the SCI entity's attention on the issue and encourage allocation of SCI entity resources to resolve the issue as soon as reasonably practicable.

Both new and current SCI entities would be subject to the new reporting requirements under the proposed revisions to Rule 1001(b)(5). These revisions eliminate the need for entities to determine if an intrusion (which should be rare and also may be difficult to assess) meets the de minimis threshold before it notifies the Commission, and instead would require reporting to the Commission for all systems intrusions at the time of the event, which will provide more timely information to the Commission. This may result in more frequent reporting for systems intrusions while also eliminating quarterly reporting of systems intrusions, as compared to the baseline.

*Information Dissemination (Rule 1002(c))*. Rule 1002(c) currently requires an SCI entity to disseminate information regarding certain major SCI events to all of its members or participants and certain other SCI events to affected members or participants. Specifically, promptly after any responsible SCI personnel having a reasonable basis to conclude that an SCI event has occurred, an SCI entity is required to disseminate certain information regarding the SCI event. When certain additional information becomes known, the SCI entity is required to promptly disseminate such information to those members or participants (or, as proposed, in the case of an SCI broker-dealer, customers) of the SCI entity that any responsible SCI personnel has reasonably estimated may have been affected by the SCI event. Until the SCI event is resolved, the SCI entity is required to provide regular updates on the required information. In the case of a major SCI event, where the impact is most likely to be felt by many market participants, dissemination of information to all members, participants, or customers, as applicable, of the SCI entity is required. A major SCI event is defined to mean an SCI event that has any impact on a critical SCI system or a significant impact on the SCI entity's operations or on market participants.

The information dissemination requirement currently does not apply to SCI events to the extent that they relate to market regulation or market surveillance systems and de minimis SCI events. The Commission is proposing to add to these exceptions for the information dissemination requirement, a systems intrusion that is a significant attempted unauthorized entry into the SCI systems or indirect SCI systems. Accordingly, Rule 1002(c) remains mostly unchanged for existing SCI entities, except to the extent they must comply with the requirements for additional events scoped in under the expanded definition of systems intrusion (the benefits of which are discussed above) and except for systems intrusions that are significant attempted unauthorized entries, which are exempted from the information dissemination requirements. New SCI entities, however, will become subject to the information dissemination requirements for the first time.

Rule 1002(c) is expected to help market participants—specifically the members, participants, or customers, as applicable of new SCI entities estimated to be affected by an SCI event and, in the case of major SCI events, all members, participants, or customers of a new SCI entity—to better evaluate the operations of SCI entities by requiring certain information about the SCI event to be disclosed. Furthermore, increased awareness of SCI events through information disseminated to members, participants, or customers, as applicable, should provide new SCI entities additional incentives to maintain robust systems and minimize the occurrence of SCI events. More robust SCI systems and the reduction in the occurrence of SCI events at new SCI entities could reduce interruptions in price discovery processes and liquidity flows. For example, in 2014, a commenter stated that sharing information about hardware failures, systems intrusions, and software glitches will alert others in the industry about such problems and help reduce system-wide costs of diagnosing problems, as well as result in improved responses to technology problems.[776]

With respect to the new exception for significant attempted unauthorized entries, which impacts new and existing SCI entities, the Commission is concerned that disseminating information about unsuccessful attempted entries to members or

[774] *See* SCI Adopting Release, *supra* note 1, at 72423.

[775] *See* SCI Adopting Release, *supra* note 1, at 72424 (citing letter by David Lauer).

[776] *See* SCI Adopting Release, *supra* note 1, at 72426 n. 931 (citing letter from James Angel).

participants of an SCI entity would create unnecessary distractions, particularly since the SCI entity's security controls were able, in fact, to repel the cybersecurity event. In addition, disseminating information regarding unsuccessful intrusions could result in the threat actors being unnecessarily alerted that they have been detected, which could make it more difficult to identify the attackers and halt their efforts on an ongoing, more permanent basis.

The Commission recognizes that many of the new SCI entities are currently subject to other regulatory requirements to maintain policies and procedures that address the provisions required by these rules, as discussed in detail above.[777] Similarly, some existing SCI entities engage in current market practices consistent with the expanded definition of systems intrusion.

The benefits from the policy and procedure requirements in Rule 1002(a) through (c) for the new SCI entities (and the costs, as discussed below), will therefore depend on the extent to which their current operations already align with the rule's requirements, given both existing regulation and current practice.

While some of the existing regulations that apply to the proposed new SCI entities may be consistent with or similar to the policy and procedure requirements of Regulation SCI discussed in this section, the Commission believes it is nevertheless appropriate to apply these policy and procedure requirements to the new SCI entities and that doing so would benefit participants in the securities markets in which these entities operate.

Overall, applying the specific and comprehensive requirements set forth in Rule 1002(a) through (c) of Regulation SCI to the new SCI entities would enhance and build on any existing policies and procedures, thereby furthering the goals of Regulation SCI to strengthen the technology infrastructure of the U.S. securities markets and improve its resilience.

ii. Costs

We discuss below the costs of complying with the requirements of Rule 1002, applying the definitions in Rule 1000, including the amended definition of systems intrusion. Because the definitions themselves have no associated costs, all of the costs associated with the amended definition flow through the substantive requirements. New SCI entities will need to comply with these requirements for the first time whereas costs for the existing SCI entities are attributed to the expanded definition of systems intrusion and the amendment to Rule 1002(b)(5). Relative to the current practice and baseline, the proposed rule expansion of the definition of the intrusion would likely result in more frequent reporting by the SCI entities to the Commission, which is reflected in the costs estimates below.

*Corrective Action (Rule 1002(a)).* Rule 1002(a) could impose modestly higher costs for new SCI entities in responding to SCI events relative to their current practice. In the PRA analysis, the Commission estimates those costs as approximately $1.2 million in initial and $0.4 million in annual costs.[778] Furthermore, if Regulation SCI reduces the frequency and severity of SCI events in the future, the cost of corrective action could similarly decline over time. Nevertheless, the Commission lacks data regarding the degree to which Regulation SCI will reduce the frequency and severity of SCI events at new SCI entities.

In addition, if a new SCI entity is required to take corrective action sooner than it might have without the requirements of Regulation SCI, this may impose indirect costs (*i.e.,* opportunity costs) to such SCI entities because they may have to delay or reallocate their resources away from profitable projects and direct their resources toward taking corrective action required by the rule. It is difficult to assess indirect costs imposed on new SCI entities without having comprehensive and detailed information on the value of the potential foregone projects of those SCI entities. The facts and circumstances of each specific SCI event will be different.

Existing SCI entities may incur new costs associated with corrective action for additional systems intrusions scoped in under the expanded definition. The Commission estimates a one-time total cost of approximately $0.5 million for all existing SCI entities to update their procedures to account for additional types of systems intrusions.[779]

To the extent new SCI entities currently undertake correction action consistent with the Rule 1002(a) requirements, they could incur lower PRA costs to comply with the requirements of Rule 1002(a) than entities without such existing requirements. Similarly, to the extent many existing SCI entities currently undertake corrective action consistent with the expanded definition of systems intrusion, they could incur lower PRA costs to comply with the amended requirements of Rule 1002(a) than entities without such existing requirements.

*Notification of SCI Events (Rule 1002(b)).* The compliance costs associated with Rule 1002(b) are attributed to the paperwork burden of Commission notifications of SCI events, including recordkeeping and submission of quarterly reports with respect to de minimis SCI events, as applicable. For new SCI entities, these costs include costs to comply with the notification requirements, as amended, for the first time. Existing SCI entities would incur costs complying with the amendment to Rule 1002(b)(5) as well as the costs associated with notification for new events scoped in under the expanded definition of systems intrusions. These are discussed in detail in section IV.

For Rule 1002(b)(1), the Commission estimates approximately $0.1 million in initial and annual costs for existing and new SCI entities alike.[780] For Rule 1002(b)(2), the Commission estimates approximately $1.3 million in initial and annual costs for existing SCI entities and $1.5 million in initial and annual costs for new SCI entities.[781] For Rule 1002(b)(3), the Commission estimates approximately $0.2 million in initial and annual costs for existing SCI entities and $0.2 million in initial and annual costs for new SCI entities.[782] For Rule 1002(b)(4), the Commission estimates approximately $2.0 million in initial and annual costs for existing SCI entities and $2.3 million in initial and annual costs for new SCI entities.[783] Finally, for Rule 1002(b)(5), the Commission estimates a savings for existing SCI entities, as noted above, and approximately $1.2 million in initial and annual costs for new SCI entities.[784]

To the extent new SCI entities currently provide notification consistent with the Rule 1002(b) requirements, they could incur lower PRA costs to comply with the requirements of Rule 1002(b) than entities without such existing practices.

*Information Dissemination (Rule 1002(c)).* While some new SCI entities currently provide their members or participants and, in some cases, market

[777] *See* sections III.A.2.a.ii, III.A.2.b.ii, III.A.2.c.i., V.B.1.a.ii, V.B.1.b.ii, and V.B.1.c.ii.

[778] *See* section IV.D.7. For purposes of this Economic Analysis, there are two fewer entities than under the PRA analysis, lowering these estimated costs. *See supra* note 700.

[779] *See* section IV.D.2.b, IV.D.7.

[780] *See* section IV.D.7; *see also supra* note 700.

[781] *See id.*

[782] *Id.*

[783] *Id.*

[784] *Id.*

participants or the public more generally, with notices of certain systems issues (*e.g.,* system outages), Rule 1002(c) may impose new requirements that they have not currently implemented. As such, the requirements of Rule 1002(c) will impose costs—which are attributed to paperwork burdens—on new SCI entities with respect to preparing, drafting, reviewing, and making the information available to members or participants, or, in the case of an SCI broker-dealer, customers. For new SCI entities the Commission estimates approximately $1.3 million in costs, initially and annually, for disseminating information about SCI events and systems affected, as required by Rule 1002(c)(1).[785] For new entities, the Commission also estimates approximately $1.6 million in initial costs and $0.4 million in annual costs to develop processes to identify the nature of a critical system, major SCI event, or a *de minimis* SCI event for purposes of disseminating this information.[786]

Existing SCI entities may incur new costs associated with information dissemination for additional systems intrusions scoped in under the expanded definition. The Commission estimates approximately $0.7 million in initial and annual PRA costs for existing SCI entities, and $0.4 million in initial and annual costs for new SCI entities, for disseminating information about system intrusions as required by the proposed revisions to Rule 1002(c)(2).[787] These costs are discussed in more detail in section IV.

To the extent new SCI entities currently disseminate information consistent with the Rule 1002(c) requirements, they could incur lower PRA costs to comply with the requirements of Rule 1002(c) than entities without such existing requirements. Similarly, to the extent many existing SCI entities currently disseminate information consistent with the expanded definition of systems intrusion, they could incur lower PRA costs to comply with the amended requirements of Rule 1002(c) than entities without such existing practices.

*Identification of Nature of System or Event.* To comply with the requirements of Rule 1002, SCI entities need to identify certain types of events and systems issues, including whether the event is de minimis. Current SCI entities would already have such processes in place to comply with the existing requirements of Regulation SCI. The Commission understands that many new SCI entities likely already have some internal procedures for determining the severity of a systems issue.

As a new SCI entity must determine whether an SCI event has occurred and whether it is a de minimis SCI event, Rule 1002 may impose one-time implementation costs on new SCI entities associated with developing a process or modifying its existing process to ensure that they are able to quickly and correctly make such determinations, as well as ongoing costs in reviewing the adopted process. As explained in detail in section IV, we estimate new SCI entities would incur an initial PRA cost of $1,641,024 and an ongoing annual PRA cost of $362,418 to develop these processes.

To the extent new SCI entities currently have a process in place for identifying certain types of events and system issues consistent with the relevant Rule 1002 requirements, they could incur lower PRA costs to comply with the relevant requirements of Rule 1002 than entities without such existing requirements.

c. Rule 1003—Material Systems Changes and SCI Review

i. Reports to the Commission (Rule 1003(a))

Rule 1003(a)(1) requires an SCI entity to provide quarterly reports to the Commission describing completed, ongoing, and planned material systems changes to its SCI systems and the security of indirect SCI systems, during the prior, current, and subsequent calendar quarters. Rule 1003(a)(1) also requires an SCI entity to establish reasonable written criteria for identifying a change to its SCI systems and the security of its indirect SCI systems as material. Rule 1003(a)(2) requires an SCI entity to promptly submit a supplemental report to notify the Commission of a material error in or material omission from a previously submitted report. These requirements remain unchanged. New SCI entities, however, will become subject to them for the first time. We discuss the benefits and costs of applying these provisions to new SCI entities below.

(1) Benefits

The notification requirement would be beneficial because it permits the Commission and its staff to have up-to-date information regarding an SCI entity's systems development progress and plans, to aid in understanding the operations and functionality of the systems, and any material changes thereto, without requiring SCI entities to submit a notification to the Commission for each material systems change.[788]

The Commission recognizes that some of the new SCI entities are currently subject to other material systems change notification requirements and that most, if not all, new SCI entities have some internal processes for documenting systems changes as discussed in detail above.[789] Accordingly, the Commission notification requirements in Rule 1003(a) would be new for most but not all of the new SCI entities.

The benefits from the policy and procedure requirements in Rule 1003(a) for the new SCI entities (and the costs, as discussed below), will therefore depend on the extent to which their current operations already align with the rule's requirements, given both existing regulation and current practice.

While some of the existing regulations that apply to the proposed new SCI entities may be consistent with or similar to the policy and procedure requirements of Regulation SCI discussed in this section, the Commission believes it is nevertheless appropriate to apply these policy and procedure requirements to the new SCI entities and doing so would benefit participants in the securities markets in which these entities operate. Overall, applying the specific and comprehensive requirements set forth in Rule 1003(a) of Regulation SCI to the new SCI entities would complement any existing requirements and enhance any reporting of material systems changes already in place for these entities.

Costs

The compliance costs of Rule 1003(a) primarily entail costs associated with preparing and submitting Form SCI in accordance with the instructions thereto. The initial and ongoing PRA cost estimates associated with preparing and submitting Form SCI with regard to material systems changes under Rule 1003(a)(1) and (2) are discussed in detail in section V. The Commission does not expect Rule 1003(a) would impose significant costs on SCI entities other than those discussed in section IV. For new SCI entities, the Commission estimates approximately $1.0 million in initial PRA costs and $0.3 million in annual PRA costs to establish

[785] *See* section IV.D.7. For purposes of this Economic Analysis, there are two fewer entities than under the PRA analysis, lowering these estimated costs. *See supra* note 700.

[786] *See* section IV.D.2.d, IV.D.7; s*ee also supra* note 700.

[787] *See* section IV.D.7; *supra* note 700.

[788] *See* SCI Adopting Release, *supra* note 1, at 72337–38.

[789] *See* sections III.A.2.a.ii, III.A.2.b.ii, III.A.2.c.i., V.B.1.a.ii, V.B.1.b.ii, and V.B.1.c.ii.

reasonable written criteria for identifying material changes to SCI systems and to the security of indirect SCI systems.[790] For new SCI entities, the Commission also estimates approximately $3.6 million initially and annually in PRA costs associated with material system change notices.[791] The Commission acknowledges that the actual cost for each new entity may differ depending on their existing processes for documenting system changes and whether the necessary information is readily available. The Commission does not expect Rule 1003(a) to impose significant costs on new SCI entities besides the costs discussed here. To the extent new SCI entities are currently subject to other material systems change notification regulatory requirements and have existing processes for documenting systems changes that align with the Rule 1003(a) requirements, they could incur lower costs to comply with the requirements of Rule 1003(a) than entities without such existing requirements.

ii. Annual SCI Review (Rules 1000 and 1003(b))

Rule 1003(b) requires SCI entities to conduct an annual SCI review and works in conjunction with the definition of ''SCI review'' from Rule 1000. Under the current definition, SCI review includes ''(1) A risk assessment with respect to such systems of an SCI entity; and (2) An assessment of internal control design and effectiveness of its SCI systems and indirect SCI systems to include logical and physical security controls, development processes, and information technology governance, consistent with industry standards.'' [792] Rule 1003(b)(1) then requires an annual SCI review, ''provided, however, that (i) Penetration test reviews . . . shall be conducted at a frequency of not less than once every three years; and (ii) Assessment of SCI systems directly supporting market regulation or market surveillance shall be conducted at a frequency based upon the risk assessment conducted as part of the SCI review, but in no case less than once every three years.'' [793] Rule 1003(b)(2) and (3) require each SCI entity to submit its annual SCI review report to, respectively, ''senior management of the SCI entity for review'' and ''to the Commission and to the board of director of the SCI entity, or the equivalent of such board'' within specified time frames.[794]

The Commission proposes to make changes to the definition of ''SCI review.'' Specifically, under the proposed amendment, ''SCI review'' would include, for both SCI systems and indirect SCI systems, an annual assessment, using appropriate risk management methodology, of risks related to capacity, integrity, resiliency, availability, and security, and internal control design and operating effectiveness, and annual penetration test reviews (increased from at least one review every three years), and a review of third-party provider management risks and controls. Rule 1003(b) would also be amended to require more specific information to be included in the SCI review report, including a list of the controls reviewed and a description of each such control; the findings of the SCI review, including, at a minimum, assessments of the risks described above; a summary, including the scope of testing and resulting action plan, of each penetration test review; and a description of each deficiency and weakness identified by the SCI review. In addition, the revisions would make mandatory that a response from senior management to the report is included when it is submitted to the Commission and board, whereas previously the language appeared permissive.

(1) Benefits

The SCI review requirement would have SCI entities assess the relative strengths and weaknesses of their systems which may help, in turn, improve systems and reduce the number of SCI events. The reduction in occurrence of SCI events could reduce interruptions in the price discovery process and liquidity flows, as discussed above. In addition, the efficiency of the Commission's oversight (*e.g.,* inspection) of SCI entities' systems would be enhanced.

The proposed increase in the frequency of penetration testing reviews, which applies to both new and existing SCI entities, should better prepare SCI entities against cyber threats, which are increasing in numbers and becoming more sophisticated. For this reason, the proposed amendment is expected to further strengthen the security, integrity, and resilience of all SCI entities. Having an annual penetration testing requirement can help SCI entities reduce the likelihood of costly data breaches.[795] For instance, according to one industry source, RSI Security, a penetration test ''can measure [the entity's] system's strengths and weaknesses in a controlled environment before [the entity has] to pay the cost of an extremely damaging data breach.'' [796]

The requirement to review third-party provider management risks and controls will work in conjunction with the proposed amendment to Rule 1001(a)(2) requiring inclusion of a third-party provider management. The additional benefit of requiring an annual review of third-party provider management risks and controls is to ensure the benefits provided by the amendment to Rule 1001(a)(2) are properly realized and further increasing the likelihood that third-party providers provide functionality, support or services that are consistent with the requirements of Regulation SCI.

The Commission understands that many existing SCI entities have already adopted practices that may align with some of the provisions of the proposed amendment to Rule 1003(b).

The Commission also understands that many new SCI entities currently undertake annual systems reviews and that senior management and/or the board of directors or a committee thereof reviews reports of such reviews as discussed in detail above.[797] However, the scope of the systems reviews, and the level of senior management and/or board involvement in such reviews, can vary.

The benefits from the policy and procedure requirements in Rule 1003(b) for the new SCI entities (and the costs, as discussed below) and the benefits from the amended policy and procedure requirements in Rule 1003(b) for the existing SCI entities, will therefore depend on the extent to which their current operations already align with the rule's requirements, given both existing regulation and current practice.

For example, with respect to broker-dealers, prior Commission and FINRA exam results indicate that many if not most large broker-dealers conduct risk assessments of internal control design and effectiveness. Additionally, some

[790] *See* section IV.D.7. For purposes of this Economic Analysis, there are two fewer entities than under the PRA analysis, lowering these estimated costs. *See supra* note 700.

[791] *Id.*

[792] 17 CFR 242.1000.

[793] 17 CFR 242.1003(b)(1).

[794] 17 CFR 242.1003(b)(2) and (3).

[795] *See, e.g.,* Mirza Asrar Baig, *How Often Should You Pentest?, Forbes.com* (Jan. 22, 2021), *available at https://www.forbes.com/sites/forbestechcouncil/2021/01/22/how-often-should-you-pentest/?sh=b667999573c6.*

[796] RSI Security, *What is the Average Cost of Penetration Testing?,* RSI Security Blog (Mar. 5, 2020), *available at https://blog.rsisecurity.com/what-is-the-average-cost-of-penetration-testing/#:~:text=Penetration%20testing%20can%20cost%20anywhere,that%20of%20a%20large%20company.*

[797] *See* sections III.A.2.a.ii, III.A.2.b.ii, III.A.2.c.i., V.B.1.a.ii, V.B.1.b.ii, and V.B.1.c.ii.

broker-dealers provide annual cybersecurity reports to the board. The Commission understands that nearly all large broker-dealers conduct penetration testing [798] of systems considered critical although not all firms conduct such testing annually. Many of these current market practices align with the policy and procedure requirements of Regulation SCI discussed in this section.

While some of the existing regulations that apply to the proposed new SCI entities or current market practices may be consistent with or similar to some of the policy and procedure requirements of Regulation SCI discussed in this section, the Commission believes it is nevertheless appropriate to apply these policy and procedure requirements to the new SCI entities and that doing so would benefit participants in the securities markets in which these entities operate.

Overall, applying the specific and comprehensive requirements set forth in Rule 1003(b) of Regulation SCI to the new SCI entities would enhance and build on any existing policies and procedures, thereby furthering the goals of Regulation SCI to strengthen the technology infrastructure of the U.S. securities markets and improve its resilience.

(2) Costs

New SCI entities will incur costs to comply with the review requirements for the first time, and existing SCI entities will incur costs to comply with the amended provisions. The initial and ongoing paperwork burden associated with conducting an SCI review, submitting a report of the SCI review to senior management of the SCI entity for review, and submitting a report of the SCI review and the response by senior management to the Commission and to the board of directors of the SCI entity or the equivalent of such board is discussed in detail in section IV. For existing SCI entities, the Commission estimates approximately $7.4 million in initial and annual costs, while for new SCI entities the Commission estimates approximately $9.6 million in initial and annual costs.[799] The paperwork burden estimates provided here for new SCI entities include the costs of complying with the proposed amended versions of the Rule, namely the proposed additional requirements for conducting the SCI review, the requirement that SCI entities include more specific information in their SCI review reports, and related recordkeeping.[800]

To the extent new SCI entities currently undertake annual systems reviews and that senior management and/or the board of directors or a committee thereof reviews reports of such reviews consistent with the Rule 1003(a) requirements, they could incur lower PRA costs to comply with the requirements of Rule 1003(a) than entities without such existing practices. Similarly, to the extent many existing SCI entities have already adopted practices that are consistent with some of the provisions of the proposed amendment to Rule 1003(b), they could incur lower PRA costs to comply with the requirements of Rule 1003(a) than entities without such existing practices.

With respect to the increased frequency for the penetration test review, this requirement will impose non-paperwork compliance costs in addition to those captured by the PRA estimates for both new and existing SCI entities. For example, RSI Security explains that penetration testing ''can cost anywhere from $4,000–$100,000,'' and ''[o]n average, a high quality, professional [penetration testing] can cost from $10,000–$30,000.'' [801] RSI Security, however, was clear that the magnitudes of these costs can vary with size, complexity, scope, methodology, types, experience, and remediation measures.[802] Another source estimates a ''high-quality, professional [penetration testing to cost] between $15,000–$30,000,'' while emphasizing that ''cost varies quite a bit based on a set of variables.'' [803] This is in line with a third source, which states that ''[a] true penetration test will likely cost a minimum of $25,000.'' [804] The Commission preliminarily believes that the cost of penetration testing will range between $25,000 and $100,000 for new and existing SCI entities, in light of the complexity and scope required, although the costs may be somewhat lower depending on the frequency with which such testing and review are currently conducted by new and existing SCI entities. The Commission acknowledges the non-paperwork costs of the proposed increase in the frequency of a penetration test review, and seeks feedback on these costs.

Request for Comment

118. For current and proposed SCI entities, how often do you (already) perform penetration testing and how much does it cost?

d. Rule 1004—Business Continuity and Disaster Recovery Plan Testing

Rule 1004(b) requires the testing of an SCI entity's business continuity and disaster recovery plans at least once every 12 months. Rule 1004(a) and (b) require participation in such testing by those members or participants that an SCI entity reasonably determines are, taken as a whole, the minimum number necessary for the maintenance of fair and orderly markets in the event of the activation of its BC/DR plans. Rule 1004(c) requires an SCI entity to coordinate such testing on an industry- or sector-wide basis with other SCI entities.[805] The Commission is proposing to amend Rule 1004 to require that third-party providers also participate in such testing. Therefore, for current SCI entities, the difference is to include third-party providers in its testing. For new SCI entities, the entire provision is a new obligation. We discuss below the benefits and costs of applying this provision, including the proposed amendments, to new and existing SCI entities.

i. Benefits

As discussed above, requiring the new SCI entities to test their BC/DR plans would likely improve backup infrastructure and lead to fewer market-wide shutdowns, which should help facilitate continuous liquidity flows in markets, reduce pricing errors, and thus improve the quality of the price discovery process.[806] Moreover, Rule 1004 would help ensure fair and orderly markets in the event of the activation of BC/DR plans.

In addition, for both new and existing SCI entities, the proposed requirement to establish standards for the

[798] *Supra* note 619. According to FINRA's 2018 RCA, 100% of higher revenue firms include penetration testing as a component in their overall cybersecurity program. Other factors these firms consider in evaluating the relevance of penetration testing include the degree to which they manage or store confidential or critical data such as trading strategies, customer PII, information about mergers and acquisitions or confidential information from other entities (for example, in the case of clearing firms).

[799] *See* section IV.D.7. For purposes of this Economic Analysis, there are two fewer entities than under the PRA analysis, lowering these estimated costs. *See supra* note 700.

[800] *See* section IV.D.3.

[801] *See* RSI Security, *supra* note 796.

[802] *See id.*

[803] Gary Glover, *How Much Does a Pentest Cost?,* Securitymetrics Blog (Nov. 15, 2022, 8:36 a.m.), *available at https://www.securitymetrics.com/blog/how-much-does-pentest-cost.*

[804] Mitnick Security, *What Should You Budget for a Penetration Test? The True Cost,* Mitnick Security Blog, (Jan. 29, 2021, 5:13 a.m.), *available at https://www.mitnicksecurity.com/blog/what-should-you-budget-for-a-penetration-test-the-true-cost.*

[805] One avenue for coordinating such testing is through SIFMA's voluntary Industry-Wide Business Continuity Test. *See* SIFMA, *Industry-Wide Business Continuity Test* (Oct. 15, 2022), *available at https://www.sifma.org/resources/general/industry-wide-business-continuity-test/.*

[806] *See* sec. V.C.1.; *see also* SCI Adopting Release, *supra* note 1, at 72429.

designation of third-party providers and their participation in the currently scheduled functional and performance testing of the operation of BC/DR plans will help those SCI entities ensure that their efforts to develop effective BC/DR plans are not undermined by a lack of participation by third-party providers that the SCI entity believes are necessary to the successful activation of such plans.

Although the Commission finds it impracticable to quantify these benefits in dollar terms,[807] the Commission believes it would be helpful to consider the cost of an unplanned outage. For example, the Commission considers a reduced occurrence of a potential outage as a benefit of complying with Regulation SCI. As discussed above, one source of cost estimates for an unplanned outage is the Ponemon Institute's 2016 Cost of Data Center Outages report.[808] According to the report, the total cost per minute of an unplanned outage was $8,851 for the average data center the Institute surveyed in 2016.[809] This implies a cost of $531,060 per hour of an unplanned outage at the time.[810] Moreover, outages themselves can also last far longer than one hour. For example, natural disasters, such as hurricanes, can often lead to lengthy outages lasting 200 to 400 hours.[811] Taken together, this data suggests potentially significant benefits to having an adequate policy and procedure in place to ensure business continuity and disaster relief plans for SCI entities.

The benefits from the BC/DR requirements in Rule 1004 for the current and new SCI entities (and the costs, as discussed below) will depend on the extent to which their current operations already align with the rule's requirements, given both existing regulation and current practice. Based on discussion with industry participants, the Commission understands that some existing SCI entities already require third-party service provider participation in testing despite not being required to do so currently under Regulation SCI. For these SCI entities, there may be incremental benefits from making the third-party service provider participation a requirement under the Regulation and ensuring that they continue to include these parties in such testing going forward.

Some new SCI entities, either due to existing regulatory requirements or on their own volition, also already require some of their members or participants, as well as third-party providers, to participate in performance testing of BC/DR plans or offer the opportunity to do so on a voluntary basis, although such participation may be limited in nature (*e.g.,* testing for connectivity to backup systems). However, existing requirements for the new SCI entities may differ from the requirements of Rule 1004. For example, FINRA Rule 4370 does not require the functional and performance testing and coordination of industry or sector-testing of such plans.

With respect to SBSDRs, the requirements of Regulation SCI are more specific and comprehensive in terms of testing business continuity and disaster recovery plans than the principles-based requirements of Rule 13n-6. The requirements of Regulation SCI would thus exist and operate in conjunction with Rule 13n-6 and help ensure that SBSDR market systems are robust, resilient, and secure and enhance Commission oversight of these systems. Moreover, to the extent the systems of SBSDRs that relate to the securities-based swap markets function separately (or could function separately in the future) from the systems of SDRs that relate to the swaps markets, applying Rule 1004 to these entities would help to ensure effective testing of BC/DR plans for the specific systems relevant to the securities markets and would subject these systems to enhanced Commission oversight.

Similarly, the Commission recognizes that exempt clearing agencies that this rule proposal would newly scope into Regulation SCI are currently required to have BC/DR plans and test them at least annually with the participation of customers, critical utilities, critical service providers, other clearing agencies, other market infrastructures, and any other institution with which interdependencies have been identified in the business continuity policy. Overall, applying the specific and comprehensive requirements set forth in Rule 1004 would complement existing requirements and enhance the BC/DR plans tests already in place for these entities.

ii. Costs

The mandatory testing of SCI entity BC/DR plans, including backup systems, as required under amended Rule 1004, will result in costs to SCI entities. For current SCI entities, the increase in the cost would come from the requirement to include designated third-party providers in when testing their BC/DR plans—to the extent they have not been doing so. In addition, because the proposed requirements of Rule 1004 would require participation by various other parties, including designated members, participants, and other third parties, these parties may also bear costs of Rule 1004. We discuss these various costs below.

*Costs to New and Existing SCI Entities.* It is the Commission's understanding that some new SCI entities already engage with their members, participants or customers, as applicable, or third-party providers when testing BC/DR plans. Furthermore, as mentioned above, market participants, including new SCI entities, already coordinate certain BC/DR plans testing to an extent. However, Rule 1004 mandates participation in testing for new SCI entities that do not currently participate, requires coordination when testing BC/DR plans, and requires their members, market participants, or their third-party providers participate.

In particular, Rule 1004 requires SCI entities to designate their members, participants, or third-party providers to participate in BC/DR plans testing and to coordinate such testing with other SCI entities on an industry- or sector-wide basis. The requirement of member, participant, or third-party provider designation in BC/DR plans testing under Rule 1004 may impose new costs even for those that currently have BC/DR plan testing, as an SCI would have to allocate resources towards initially establishing and later updating standards for the designation of its members and participants and third-party providers for testing. For example, systems reconfiguration for functional and performance testing and establishing an effective coordinated test script could be a complex process and result in additional costs, but it is an important first step in establishing robust and effective BC/DR plans testing. Furthermore, the requirement to coordinate industry- or sector-wide testing would impose additional administrative costs because an SCI entity would be required to notify its members, participants, or third-party providers and also organize, schedule, and manage the coordinated testing.

Many of the costs associated with Rule 1004 are costs estimated in the PRA in section IV. For existing SCI entities the Commission estimates approximately $1.4 million in initial costs and $0.5 million in annual costs,

[807] As discussed in section V.D.1. multiple factors would affect the harm to the overall economy from an unplanned outage at an SCI entity.

[808] *See supra* note 696.

[809] *Id.* at 14.

[810] The report also showed that this figure was increasing over time. The same figure was $5,617/min in 2010 and $7,908/min in 2013. *See id.*

[811] *See* Data Foundry, *How Much Should You Spend On Business Continuity and Disaster Recovery* (Dec. 12, 2019), *available at https://www.datafoundry.com/blog/much-spend-business-continuity-disaster-recovery.*

while for new SCI entities the Commission estimates approximately $3.2 million in initial costs and $1.1 million in annual costs.[812] In addition to the PRA costs, the Commission believes that new SCI entity's may incur non-paperwork costs associated with the mandatory testing of BC/DR plans, including backup systems; however, the Commission finds it impracticable to provide a quantified estimate of these specific non-paperwork costs for new SCI entities because the Commission does not have detailed information regarding the current level of engagement by members or participants in BC/DR testing and the associated costs, or the details of the BC/DR testing that new SCI entities would implement pursuant to Rule 1004.

In addition, both new and existing SCI entities may incur costs beyond the PRA costs to comply with the requirement that third-party providers be included in the testing requirement. The Commission acknowledges that there will be significant variations in incremental cost for new and existing SCI entities beyond the costs of complying with the rest of the testing requirements, depending on the relationship of each SCI entity with the third-party provider and the need to revise any contractual agreement between them. But in any situation where a third-party provider is already required to provide a continuous service plan (such as 24/7 connectivity), the incremental cost of having the third-party provider participate in the BC/DR testing should be modest. To the extent existing and new SCI entities already have BC/DR plan testing that align with the Rule 1004 requirements, they could incur lower costs to comply with the requirements of Rule 1004 than entities without such existing BC/DR plan testing.

*Costs to SCI Entity Members, Participants, and Third-Party Providers.* Rule 1004 will also impose costs on SCI entity designated members, participants and third-party providers. Although members, participants, and third-party providers will incur costs as a result of Rule 1004, those that are likely to be designated to participate in business continuity and disaster recovery plans testing are those that conduct a high level of activity with the SCI entity or those that play an important role for the SCI entity and who are more likely to have already established connections to the SCI entity's backup site. It is the Commission's understanding that most of the larger members, participants, and third-party providers already have established connectivity with the SCI entity's backup site and already monitor and maintain such connectivity, and thus the additional connectivity costs imposed by Rule 1004 would be modest to these members or participants.[813] The Commission, however, finds it impracticable to provide a quantified estimate of the specific costs for SCI entity members, participants or third-party providers associated with the mandatory testing required by Rule 1004 as such data or information is not required to be provided by SCI entities to the Commission under Regulation SCI. Nevertheless, the Commission preliminarily believes, for similar reasons as provided in the section discussing non-paperwork burden estimates for Rule 1001(a) and (b), that the figures from 2014 remain reasonable approximations for new SCI entities in 2023, after adjusting for inflation since 2014.[814]

Because SCI entities have an incentive to limit the imposition of the cost and burden associated with testing to the minimum necessary to comply with the rule, given the option, most SCI entities would likely, in the exercise of reasonable discretion, prefer to designate the fewest number of members, participants, or third-party providers to participate in testing and meet the requirements of the rule, than to designate more.

The Commission believes that the cost associated with Rule 1004 is unlikely to induce the designated members or participants to reduce the number of SCI entities through which they trade and adversely affect price competitiveness in markets. As noted above, the Commission also recognizes that costs to some SCI entity members, participants, or third-party providers associated with Rule 1004 could vary depending on the BC/DR plans being tested, and to the extent they participate. Based on industry sources, the Commission understands that most of the larger members or participants of SCI entities already maintain connectivity with the backup systems of SCI entities.[815] However, the Commission understands that there is a lower incidence of smaller members or participants maintaining connectivity with the backup sites of SCI entities. As such, the Commission believes that the compliance costs associated with Rule 1004 would be higher for those members, participants, or third-party providers that are designated for testing by SCI entities who would need to invest in additional infrastructure to participate in such testing.[816]

As discussed above, Rule 1001(a) does not require backup facilities of SCI entities fully duplicate the features of primary facilities.[817] Further as discussed in section IV.B.6, SCI entity members, participants, or third-party providers are not required by Regulation SCI to maintain the same level of connectivity with the backup sites of an SCI entity as they do with the primary sites. In the event of a wide-scale disruption in the securities markets, the Commission acknowledges that SCI entities and their members, participants, or third-party providers may not be able to provide the same level of service as on a normal trading day. However, when BC/DR plans are in effect due to a wide-scale disruption in the securities markets, the requirements of Rule 1004 should help ensure adequate levels of service and pricing efficiency, to facilitate trading and maintain fair and orderly markets without imposing excessive costs on SCI entities and market participants by requiring them to maintain the same connectivity with the backup systems as with the primary sites.[818]

Request for Comment

119. If you are a current or proposed SCI entity and you currently require any of your service providers to participate in your scheduled business continuity or disaster recovery testing, how does your activity differ from the requirements of the rule proposal? What have been the benefits and costs of this activity?

120. If you are a current or proposed SCI entity and your business continuity or disaster recovery plans address the unavailability of your third-party providers, how does your activity differ from the requirements of the rule proposal? What have been the benefits and costs of this activity?

e. Rules 1005 Through 1007—Recordkeeping and Electronic Filing

Rules 1005 through 1007 relate to recordkeeping requirements, filing and submission requirements, and

[812] *See* section IV.D.4. For purposes of this Economic Analysis, there are two fewer entities than under the PRA analysis, lowering these estimated costs. *See supra* note 700.

[813] *See* SCI Adopting Release, *supra* note 1, at 72430.

[814] After adjusting for inflation since 2014, the cost of BD/DR plan testing ranges from approximately $31,000 to $76,000 per year, per member or participant. The aggregate annual cost for designated members and participants to participate in BC/DR testing is approximately $84.0 million after adjusting for inflation since 2014.

[815] SCI Adopting Release, *supra* note 1, at 72430.

[816] *Id.*

[817] SCI Adopting Release, *supra* note 1, at 72353.

[818] *See id.*

requirements for service bureaus. SCI entities are required by Rule 1005 of Regulation SCI to make, keep, and preserve certain records related to their compliance with Regulation SCI.[819] Rule 1006 of Regulation SCI provides for certain requirements relating to the electronic filing on Form SCI, of any notification, review, description, analysis, or report to the Commission required to be submitted under Regulation SCI.[820] Rule 1007 of Regulation SCI requires a written undertaking when records are required to be filed or kept by an SCI entity under Regulation SCI, or are prepared or maintained by a service bureau or other recordkeeping service on behalf of the SCI entity.[821]

Rule 1005(c) currently requires that the recordkeeping period survives even if an SCI entity ceases to do business or ceases to be registered under the Exchange Act. The Commission proposes to amend Rule 1005(c) so that this record retention provision also applies to an SCI entity that remains in business as a registered entity but ''otherwise [ceases] to be an SCI entity.'' Therefore, for existing SCI entities, this is the only difference from the current recordkeeping requirement in Rule 1005(c). For new SCI entities, all of the requirements in Rules 1005 through 1007 are new obligations. We discuss below the benefits and costs of applying these provisions to new and existing SCI entities.

i. Benefits

The Commission believes that Rules 1005 and 1007 would allow Commission staff to inspect and examine the new SCI entities for their compliance with Regulation SCI, and would increase the likelihood that Commission staff can identify conduct inconsistent with Regulation SCI. Preserved information should provide the Commission with an additional source to help determine the causes and consequences of one or more SCI events and better understand how such events may have impacted trade execution, price discovery, liquidity, and investor participation. Consequently, the Commission believes that the requirements of Rules 1005 and 1007 would help ensure compliance of the new SCI entities with Regulation SCI and help realize the potential benefits (*e.g.,* better pricing efficiency, price discovery, and liquidity flows) of the regulation.

Rule 1006 requires SCI entities to electronically file all written information to the Commission on Form SCI.[822] Rule 1006 would provide a uniform manner in which the Commission receives—and SCI entities provide—written notifications, reviews, descriptions, analyses, or reports required by Regulation SCI. Rule 1006 should add efficiency for the new SCI entities in drafting and submitting the required reports, and for the Commission in reviewing, analyzing, and responding to the information provided.

The Commission recognizes that all of the new SCI entities are currently subject to the Commission and other regulatory recordkeeping requirements.[823] However, records relating to Regulation SCI may not be specifically addressed in the recordkeeping requirements of certain rules. The benefits from the recordkeeping requirements in Rules 1005 and 1007 for the new SCI entities (and the costs, as discussed below), will therefore depend on the extent to which their current operations already align with the rule's requirements, given both existing regulation and current practice.

The proposed amendment to Rule 1005(c) will apply to new and existing SCI entities. Although many SCI events may be resolved in a short time frame, there may be other SCI events that may not be discovered for an extended period of time after their occurrences, or may take significant periods of time to fully resolve. In such cases, having an SCI entity's records available after it has ceased to be an SCI entity or be registered under the Exchange Act would add to the scope of historical records available for review in the event of an SCI event. This is a particular issue for entities whose coverage under the rule might vary over time, depending on when the entities—or their systems—meet the rule's coverage thresholds. For these entities, uniform record retention periods will also facilitate comparative review of risk and compliance trends. These benefits will be limited if entities and systems of entities tend to continue meeting coverage requirements over time, without a break in coverage.

ii. Costs

The recordkeeping requirements of Rules 1005 and 1007 will impose additional costs, including a one-time cost to set up or modify an existing recordkeeping system to comply with Rules 1005 and 1007. The initial and ongoing compliance costs associated with the recordkeeping requirements are attributed to paperwork burdens, which are discussed in section IV above.[824]

With respect to Rule 1006, all costs associated with Form SCI are attributed to the paperwork burdens discussed in section IV. For existing SCI entities the Commission estimates approximately $21.0 million in initial costs and $12.0 million in annual costs, while for new SCI entities the Commission estimates approximately $41.7 million in initial costs and $25.8 million in annual costs.[825]

Every new SCI entity will be required to have the ability to electronically submit Form SCI through the EFFS system, and every person designated to sign Form SCI will be required to have an electronic signature and a digital ID. The Commission believes that this requirement will not impose an additional burden on new SCI entities, as these entities likely already prepare documents in an electronic format that is text searchable or can readily be converted into a format that is text searchable.

The Commission also believes that many new SCI entities currently have the ability to access the EFFS system and electronically submit Form SCI, such that the requirement to submit Form SCI electronically will not impose significant new implementation or ongoing costs.[826] The Commission also believes that some of the persons who will be designated to sign Form SCI already have digital IDs and the ability to provide an electronic signature. To the extent that some persons do not have digital IDs, the additional cost to obtain and maintain digital IDs is accounted for in the paperwork burden, discussed in section IV above.[827]

[819] *See* 17 CFR 242.1005. Rule 1005(a) of Regulation SCI relates to recordkeeping provisions for SCI SROs, whereas Rule 1005(b) relates to the recordkeeping provision for SCI entities other than SCI SROs.

[820] *See* 17 CFR 242.1006.

[821] *See* 17 CFR 242.1007.

[822] Except for notifications submitted pursuant to Rule 1002(b)(1) and (3).

[823] *See, e.g.,* 17 CFR 240.17a–3 and 240.17a–4, applicable to broker-dealers.

[824] When monetized, the paperwork burden associated with all recordkeeping requirements would result in approximately $278,460 initially and $40,950 annually for all new SCI entities in the aggregate. The Commission estimates that a New SCI Entity other than an SCI SRO will incur a one-time cost of $900 for information technology costs for purchasing recordkeeping software, for a total of $18,900. *See* section IV.D.7. For purposes of this Economic Analysis, there is two fewer entities than under the PRA analysis, lowering these estimated costs. *See supra* note 700.

[825] *See* section IV.D.7; *supra* note 700.

[826] The initial and ongoing costs associated with various electronic submissions of Form SCI for the new SCI entities are discussed in the Paperwork Reduction Act section above. *See supra* section IV.D.6.

[827] *See id.*

*D. Efficiency, Competition, and Capital Formation Analysis*

As previously discussed in section C, the proposed amendments to Regulation SCI would reduce the impact of market disruptions arising as a result of natural disasters, third-party provider service outages, cybersecurity events, hardware or software malfunctions. We expect that the proposed amendments will reduce the frequency, severity, and duration of systems issues that occur in the context of these events, and will thus decrease the number of trading interruptions. The proposed amendments will thus improve market efficiency, price discovery, and liquidity, because trading interruptions interfere with the process through which information gets incorporated into security prices. In addition, by reducing trading interruptions, the proposed amendments will have beneficial effects across markets, because of the interconnectedness of securities markets. For example, an interruption in the market for equity securities could harm the price discovery process in the options markets, reducing the flow of liquidity across markets. As a result, we expect the proposed amendments, if adopted, would improve price efficiency in securities markets.[828]

Prices that accurately convey information about fundamental value improve the efficiency with which capital is allocated across projects and firms, thus promoting capital formation. In addition, we expect the proposed amendments to encourage capital formation by reinforcing investors' confidence in market transactions.

The proposed amendments to Regulation SCI could affect competition among SCI entities because the compliance costs could differ among SCI entities. For example, current SCI entities are expected to face smaller incremental compliance costs than new SCI entities. New SCI entities that have been subject to similar regulations could also face smaller incremental compliance costs than those who have not. Even among new SCI entities, certain provisions can be more costly for some than others. For example, the initial compliance costs of the systems resumption requirements could differ among new SCI entities. Specifically, as mentioned above, Rule 1004's BC/DR testing requirements may require greater incremental costs for smaller SCI entities that have not already been engaged in BC/DR testing. Lastly, some of the new SCI entities may already have practices that are aligned with at least some of the requirements under amended Regulation SCI compared to the baseline, reducing their incremental compliance costs.

In addition to competition among SCI entities, the compliance costs imposed by the proposed amendments to Regulation SCI could have an effect on competition where SCI entities and non-SCI entities compete, such as in the markets for trading services (*e.g.,* broker-dealers). Specifically, since non-SCI entities do not have to incur the compliance costs associated with Regulation SCI, SCI entities could find it difficult to pass on their own compliance costs to investors or customers without losing investors or customers to non-SCI entities. This would adversely affect the profits of SCI entities. That said, by expanding the set of SCI entities, the proposed amendments would ensure that, where there is currently competition between existing SCI entities and the new entities under this proposed rule then these competing entities are subject to similar SCI compliance requirements.

The proposed threshold-based tests for scoping a broker-dealer into Regulation SCI could bring about a potential unintended effect of deterring growth among broker-dealers and discouraging potential benefits of scale economies. For example, to the extent a certain broker-dealer may take otherwise-unwanted steps to keep its trading volumes or asset level low, or spin off entities and not realize scale economies, all for the purpose of avoiding being subject to regulation, this can be inefficient for the economy. Likewise, the proposal to apply regulation SCI to all exempt clearing agencies would mean that any entity that seeks to become a clearing agency will automatically be subject to Regulation SCI and will thus bear the associated compliance cost.

The compliance costs associated with Rule 1004 could raise barriers to entry and affect competition among members or participants of SCI entities. Specifically, to the extent that members or participants could be subject to designation in BC/DR plan testing and could incur additional compliance costs, the member or participant designation requirement of Rule 1004 could raise barriers to entry. In addition, as discussed above, the compliance costs of the rule will likely be higher for smaller members or participants of SCI entities compared to larger members or participants of SCI entities. The adverse effect on competition may be mitigated to some extent, as the most likely members or participants to be designated for testing are larger members or participants who already maintain connectivity with an SCI entity's backup systems. Further, the adverse effect on competition for smaller members or participants could be partially mitigated to the extent that larger firms, which are members of multiple SCI entities, could incur additional compliance costs as these larger member firms could be subject to multiple designations for business continuity and disaster recovery plan testing.[829]

*E. Reasonable Alternatives*

In formulating our proposal, we have considered various alternatives. Those alternatives are discussed below and we have also requested comments on certain of these alternatives.

1. Limiting the Scope of the Regulation SCI Provisions for New SCI Entities

The Commission has considered whether all of the obligations set forth in Regulation SCI should apply to the new SCI entities or whether only certain requirements should be imposed, such as those requiring written policies and procedures, notification of systems problems, business continuity and disaster recovery testing, and penetration testing.[830] For example, the Commission has considered if SBSDRs should be subject to full Regulation SCI requirements, similar to SCI plan processors, or should be subject to only some of the Regulation SCI requirements, given differing levels of automation and stages of regulatory development of the SBS market.

The Commission believes that these alternatives would reduce some of the benefits as well as some of the costs compared to the proposed rules. The lower costs from limiting the Regulation SCI requirements, such as periodic reviews of policies and procedures or Commission notification, for some new entities could result in lower barriers to entry and could increase competition in the relevant markets compared to the proposed rules. However, taking into consideration the large size of the new SCI entities and, therefore, their externalities on some other SCI entities in case of system failure, the Commission believes these effects on the competition may not be significant enough to warrant forgoing benefits

[828] *See* sections V.D.1 and V.D.3.

[829] *Id.* at 72433.

[830] Such an approach is similar to that taken regarding the competing consolidators in Market Data Consolidator rule. The Market Data Consolidator rule subjects competing consolidators that do not meet the earning thresholds to some, but not all, obligations that apply to competing consolidators. 17 CFR 242.614.

(such as timely notifications to the Commission) in addition to the reduced effectiveness of the regulation. Moreover, not requiring specific SCI requirements for certain new SCI entities would likely result in less uniform treatment across current and new SCI entities performing similar functions.[831]

2. Mandating Compliance With Current SCI Industry Standards

The Commission has considered the alternative of mandating compliance with current SCI industry standards. This alternative would require that the policies and procedures of SCI entities required under Rule 1001(a) comply with ''current SCI industry standards'' rather than simply making such compliance a safe harbor under Rule 1001(a)(4).[832] This alternative would ensure that an SCI entity have policies and procedures consistent with current SCI industry standards. These standards likely have the advantage of economy of scale as several entities in that industry adopted the standards and thus the standards benefit from more innovative efficiencies than in-house standards. Moreover, mapping policies and procedures to the industry standard would help facilitate the Commission's inspection and enforcement capabilities.

Based on Commission staff experience, however, this alternative would not be an appropriate solution for all SCI entities. One reason is that given the differences exhibited by various SCI entities and the complexity of each SCI entity's operations, it may not be suitable for each one to find a current SCI industry standard that suits its needs without substantial modification and customization. To this extent, the Commission sees a great value in allowing each SCI entity to customize its policies and procedures to address the specific operational risks it faces. It is the Commission's understanding that a number of current SCI entities have developed and implemented policies and procedures largely based on industry standards, but they have also customized them based on the size, risks, and unique characteristics of SCI entities. For this reason, mandating compliance with a current SCI industry standard may be an inefficient approach. For the larger and more complex-structured SCI entities, losing flexibility to design systems or develop policies and procedures by mandating the industry standards could also result in less effective policies and procedures or adversely affect integrity, resiliency, availability, or security of SCI systems.

3. Requiring Diversity of Back-Up Plan Resources

With respect to critical SCI systems, the Commission has considered mandating multi-vendor backups. This alternative would require that SCI entities that utilize third-party providers to operate critical SCI systems have geographically diverse backup systems that are operated by a different third-party provider (*e.g.,* multi-cloud). As previously discussed, there can be significant advantages for an entity moving its systems from an on-premises, internally run data center to cloud service providers (CSPs), which may include cost efficiencies, automation, increased security, and resiliency, and the ability to leverage the opportunity to reengineer or otherwise update their systems and applications to run more efficiently.[833]

However, each SCI entity is obligated to satisfy the requirements of Regulation SCI for systems operated on behalf the SCI entity by a third party. This necessarily requires an individualized assessment of the costs and risks associated with managing the CSP relationship, and determining that the CSPs' backup and recovery capabilities are sufficiently resilient, geographically diverse, and reasonably designed to achieve timely recovery following a wide-scale disruption.[834] Further, while reducing the risk of over-reliance on a single vendor and the chance of system failures–for example, due to the same vulnerabilities within a vendor—a multi-cloud strategy would add additional costs including negotiation, contract, deployment, and management costs; and it is the Commission's understanding that multi-cloud architecture could introduce more complexity and, accordingly, operational and cybersecurity risks into the SCI back-up systems.[835] In place of a prescriptive alternative of mandating multi-vendor backups, the Commission is proposing, in Rule 1001(a)(2)(v) and (ix), a more flexible approach under which each SCI entity must consider CSPs and other third-party providers as part of a risk-based assessment of the providers' criticality and their role in the entity's business continuity and disaster recovery planning.

4. Penetration Testing Frequency

With respect to the penetration testing frequency, the Commission has considered requiring longer (*e.g.,* every 2 years) or shorter (quarterly, every 6 months) frequencies for penetration testing, rather than the currently proposed annual (a reduction from the current rule of every three years). When the Commission adopted Regulation SCI in 2014, the Commission decided to require penetration test reviews ''not less than once every three years in recognition of the potentially significant costs that may be associated with the performance of such tests.'' [836] Nevertheless, as mentioned above, markets have changed since the adoption of Regulation SCI. In particular, cybersecurity has become a more pervasive concern for all types of businesses, including SCI entities. In addition, the Commission understands that industry practices with respect to penetration testing has evolved such that tests occur on a much more frequent basis, as businesses confront the threat of cybersecurity events on a wider scale. To this extent, the Commission has considered whether penetration testing should be conducted at least once quarterly, every 6 months, or every 2 years.

The Commission understands industry practices generally tend to recommend at least one penetration test review a year. Requiring penetration test reviews more frequently could further strengthen security and reduce cybersecurity events at SCI entities. Nevertheless, the Commission believes that requiring all SCI entities to conduct such reviews more than once every year may be too much of a drain on the institution's resources, due to the estimated cost of $10,000 to $30,000 per test,[837] and given the wide scope of annual testing to be conducted as part of an annual review under proposed Rule 1003(b).[838] Moreover, while some entities may need to perform multiple tests each year on different components of their environment, for other entities a requirement for multiple tests may be counterproductive, if the testing cycle

[831] *See supra* section III.A.2.

[832] Proposed Rule 1000(a)(4) defines ''current SCI industry standards'' as ''information technology practices that are widely available to information technology professionals in the financial sector and issued by an authoritative body that is a U.S. governmental entity or agency, association of U.S. governmental entities or agencies, or widely recognized organization.''

[833] *See* section III.C.2.

[834] *See id.*

[835] For example, security breach possibilities could increase because of the interconnection of SCI systems between multi cloud providers.

[836] SCI Adopting Release, *supra* note 1, at 72344.

[837] *See* section V.D.3.c.

[838] *See* proposed Rules 1000, 1001(a)(2)(iv) (penetration testing as part of an annual review under Rule 1003(b) must include testing of ''network, firewalls, and production systems, including of any vulnerabilities of . . . SCI systems and indirect SCI systems,'' including vulnerabilities ''pertaining to internal and external threats, physical hazards, and natural or manmade disasters'').

does not provide time to implement security investments.

5. Attestation for Critical SCI System Vendors

Given the importance of critical SCI systems and SCI entities' increasing reliance on third-party providers, the Commission has considered requiring attestation (such as by an SCI entity's chief executive officer or general counsel) that contracts with third-party providers for critical SCI systems comply with the SCI entity's obligations under Regulation SCI. Such an attestation requirement would further ensure that SCI entities are negotiating contract terms with third-party providers for critical SCI systems in a manner that is consistent with Regulation SCI's requirements. However, an attestation requirement for each such contract may have limited value, and may be overly time-consuming and resource-intensive, relative to the value of the attestation requirement.

The value of an attestation requirement will be limited, given that proposed Rule 1001(a)(2)(ix) would require each SCI entity to have a program to manage and oversee third-party providers, or to the extent that they already provide attestations to their customers (which, in turn, may vary to the degree that they are in competition with like entities). At the same time, an attestation requirement may have significant costs.

For SCI entities these costs may include the direct costs of updating their oversight processes in order to ensure that their attestations are accurate and in compliance; training their in-house personnel on the third-party service provider's methods for operating critical IT systems; and conducting oversight of the service provider's subcontractors as well as oversight of the service provider itself. SCI entities may also incur costs if they move critical system functions in-house or consolidate vendors to reduce the risk or burden of the attestation requirement, which could result in lower-quality or less efficient services. Furthermore, requiring the attestation by SCI entity's senior officers could increase the due diligence cost of the attestation requirement. Senior officers making attestations may require additional liability insurance, higher compensation or lower incentive pay as a share of overall compensation. Finally, the service providers themselves may face increased costs as part of their efforts to help the SCI entity make the relevant attestation, including contract renegotiation costs, upgrading operations, and responding to information requests from the SCI entity. These costs, in turn, might be passed to the SCI entity and ultimately to its participants, members, or customers.

The Commission believes the additional costs could be disproportionate to the benefits of an attestation requirement. For these reasons, the Commission has decided against including an attestation requirement.

6. Transaction Activity Threshold for SCI Broker-Dealers

With respect to the transaction activity threshold used to scope broker-dealers within Regulation SCI as discussed in section III.A.2.b, the Commission has considered as an alternative whether to set a higher (more limited) or lower (more expansive) threshold than the proposed 10% threshold. For example, the Commission has considered if only broker-dealers with transaction activity thresholds above 15% should be included as SCI broker-dealers [839] but determined that this would fail to scope within Regulation SCI some of the largest and most significant broker-dealers that pose technological vulnerabilities and risks to the maintenance of fair and orderly markets. This would have the effect of decreasing costs moderately for broker-dealers no longer within the scope of Regulation SCI at the expense of a significant decrease in benefits otherwise associated with the improvements to fair and orderly markets, as described above.

Similarly, the Commission has also considered whether all broker-dealers with transaction activity thresholds above 5% should be included as SCI broker-dealers,[840] but determined that this would scope within Regulation SCI several broker-dealers that are not among the most significant broker-dealers that pose technological vulnerabilities and risks to the maintenance of fair and orderly markets. This would have the effect of increasing costs for marginal firms without a comparable increase in benefits associated with an improvement of fair and orderly markets.

In addition, with respect to the transaction activity threshold used to scope broker-dealers within Regulation SCI as discussed in section III.A.2.b, the Commission has also considered as an alternative whether to apply the proposed 10% threshold to principal trades only, rather than all transactions. Accordingly, the Commission considered whether to include as an SCI entity any registered broker-dealer that, irrespective of the size of its balance sheet, consistently trades for its own account at a substantially high level in certain enumerated asset classes, scaled as a percentage of total average daily dollar volume, as reported by applicable reporting organizations. Under the alternative, ten broker-dealer firms [841] would have been scoped in as ''SCI broker-dealers,'' which are among the 17 ''SCI broker-dealers'' subject to the proposed Regulation SCI.

This alternative approach to the transaction activity threshold would identify those broker-dealers that

[839] The Commission believes that the proposed threshold of 5% of total assets is a reasonable approach to identifying the largest broker-dealers. *See* section III.A.2.b.iii (discussing proposed thresholds for an ''SCI broker-dealer''). The Commission has considered as an alternative to further scope in the broker-dealers with transaction activity thresholds above 15%. Regulation SCI would only be applicable to an estimated ten broker-dealers based on the analysis of data which include broker-dealer FOCUS Report Form X–17A–5 Schedule II filings from Q4 2021 to Q3 2022. Also for additional detail on the calculation of total assets of all security broker-dealers, *see supra* note 127. Data also include Consolidated Audit Trail (CAT) data from Jan. 2022 to June 2022, the plan processors (SIPs) of the CTA/CQ Plans and Nasdaq UTP Plan. CTA Plan, *available at https://www.ctaplan.com*; Nasdaq UTP Plan, *available at https://www.utpplan.com*, Options Price Reporting Authority (OPRA) data, TRACE for Treasury Securities data from Jan. 2022 to June 2022, regulatory TRACE data from Jan. 2022 to June 2022, and FINRA TRACE.

[840] The Commission believes that the proposed threshold of 5% of total assets is a reasonable approach to identifying the largest broker-dealers. *See* section III.A.2.b.iii (discussing proposed thresholds for an ''SCI broker-dealer''). The Commission has considered as an alternative to further scope in the broker-dealers with transaction activity thresholds above 5%. Regulation SCI would only be applicable to an estimated 29 broker-dealers based on the analysis of data which include broker-dealer FOCUS Report Form X–17A–5 Schedule II filings from Q4 2021 to Q3 2022. Also for additional detail on the calculation of total assets of all security broker-dealers, *see supra* note 127. Data also include Consolidated Audit Trail (CAT) data from Jan. 2022 to June 2022, the plan processors (SIPs) of the CTA/CQ Plans and Nasdaq UTP Plan. CTA Plan, *available at https://www.ctaplan.com*; Nasdaq UTP Plan, *available at https://www.utpplan.com*, Options Price Reporting Authority (OPRA) data, TRACE for Treasury Securities data from Jan. 2022 to June 2022, regulatory TRACE data from Jan. 2022 to June 2022, and FINRA TRACE.

[841] The estimated ten broker-dealer firms are based on the analysis of data which include broker-dealer FOCUS Report Form X–17A–5 Schedule II filings from Q4 2021 to Q3 2022. Also for additional detail on the calculation of total assets of all security broker-dealers, *see supra* note 127. Data also include Consolidated Audit Trail (CAT) data from Apr. 2022 to Sept. 2022, the plan processors (SIPs) of the CTA/CQ Plans and Nasdaq UTP Plan. CTA Plan, *available at https://www.ctaplan.com*; Nasdaq UTP Plan, *available at https://www.utpplan.com*, Options Price Reporting Authority (OPRA) data, TRACE for Treasury Securities data from Apr. 2022 to Sept. 2022, regulatory TRACE data from Apr. 2022 to Sept. 2022, and FINRA TRACE.

generate significant liquidity in specified types of securities markets and could also be considered a proxy for those that also engage in substantial agency trading and other business. Because the alternative would also scope in fewer broker-dealers as SCI entities, this alternative would also impose fewer total costs compared to the proposed approach.

However, the Commission preliminarily believes that limiting the extension of Regulation SCI to broker-dealers that engage in significant trading activity for their own account in one or more of the enumerated asset classes and generate significant liquidity on which fair and orderly markets rely would fail to acknowledge the substantial role that executing brokers acting as agents also play in the markets. Accordingly, the alternative approach would fail to scope within Regulation SCI some of the largest and most significant broker-dealers that pose technological vulnerabilities and risks to the maintenance of fair and orderly markets. In the Commission's view, using all transaction activity rather than limiting the analysis to principal trades is a more appropriate measure for estimating the significance of a broker-dealer's footprint in the markets and the effect that its sudden unavailability could have on the fair and orderly market functioning.

Thus, while the alternative would likely scope in fewer broker-dealers as SCI entities, and thus reduce the aggregate costs of extending Regulation SCI, compared to the proposal, it would also limit the extensive benefits, discussed above, associated with applying Regulation SCI to additional broker-dealers that play a critical role in the market.

7. Limitation on Definition of ''SCI Systems'' for SCI Broker-Dealers

Additionally, the Commission considered leaving the original definition of ''SCI systems'' unrevised such that any broker-dealer that were to only meet or exceed the trading activity threshold of 10% for any asset class would have been subject to Regulation SCI requirements for all of its systems, not only those systems with respect to the type of securities for which an SCI broker-dealer satisfies the trading activity threshold. Leaving the definition unrevised would scope in SCI broker-dealer systems with respect to classes of securities with a lower volume of trading, for which system unavailability is less likely to pose a risk to the maintenance of fair and orderly markets. This would have the effect of increasing costs for SCI broker-dealers with limited trading activity in one or more other cases of securities, while yielding a potential benefit in terms of risk reduction with respect to the maintenance of fair and orderly markets.

## VI. Regulatory Flexibility Act Certification

The Regulatory Flexibility Act (''RFA'')[842] requires Federal agencies, in promulgating rules, to consider the impact of those rules on small entities. Section 603(a)[843] of the Administrative Procedures Act,[844] as amended by the RFA, generally requires the Commission to undertake a regulatory flexibility analysis of all proposed rules, or proposed rule amendments, to determine the impact of such rulemaking on ''small entities.''[845] Section 605(b) of the RFA states that this requirement shall not apply to any proposed rule or proposed rule amendment which, if adopted, would not have a significant economic impact on a substantial number of small entities.[846]

### *A. ''Small Entity'' Definitions*

For purposes of Commission rulemaking in connection with the RFA, a small entity includes an exchange that has been exempt from the reporting requirements of Rule 601 under Regulation NMS, and is not affiliated with any person (other than a natural person) that is not a small business or small organization. A small entity also includes 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) (''Rule 17a–5(d)'' under the Exchange Act),[847] 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. Furthermore, a small entity includes a securities information processor that: (1) had gross revenues of less than $10 million during the preceding fiscal year (or in the time it has been in business, if shorter); (2) provided service to fewer than 100 interrogation devices or moving tickers at all times during the preceding fiscal year (or in the time that it has been in business, if shorter); and (3) is not affiliated with any person (other than a natural person) that is not a small business or small organization under 17 CFR 240.0–10.[848] A small entity additionally includes a clearing agency that (1) Compared, cleared and settled less than $500 million in securities transactions during the preceding fiscal year (or in the time that it has been in business, if shorter); (2) had less than $200 million of funds and securities in its custody or control at all times during the preceding fiscal year (or in the time that it has been in business, if shorter); and (3) is not affiliated with any person (other than a natural person) that is not a small business or small organization as defined in 17 CFR 240.0–10.[849]

### *B. Current SCI Entities*

Currently, SCI entities comprise SCI SROs, SCI ATSs, plan processors, SCI competing consolidators, and certain exempt clearing agencies. The Commission believes that none of these entities would be considered small entities for purposes of the RFA.

1. SCI SROs

As discussed in section II.B.1 above, Regulation SCI currently applies to SCI SROs, which is defined as any national securities exchange, registered securities association, or registered clearing agency, or the Municipal Securities Rulemaking Board; *provided however,* that for purposes of 17 CFR 242.1000, the term SCI self-regulatory organization shall not include an exchange that is notice registered with the Commission pursuant to 15 U.S.C. 78f(g) or a limited purpose national securities association registered with the Commission pursuant to 15 U.S.C. 78*o*–3(k).[850] Currently, there are 35 SCI SROs.

Based on the Commission's existing information about the entities that are subject to proposed Regulation SCI, the Commission believes that SCI SROs would not fall within the definition of ''small entity'' as described above.

As stated, the Commission has defined a ''small entity'' as an exchange that has been exempt from the reporting requirements of Rule 601 of Regulation NMS and is not affiliated with any

[842] 5 U.S.C. 601 *et seq.*

[843] 5 U.S.C. 603(a).

[844] 5 U.S.C. 551 *et seq.*

[845] Although section 601(b) of the RFA defines the term ''small entity,'' the statute permits agencies to formulate their own definitions. The Commission has adopted definitions for the term ''small entity'' for purposes of Commission rulemaking in accordance with the RFA. Those definitions, as relevant to this proposed rulemaking, are set forth in 17 CFR 240.0–10 (''Rule 0–10'').

[846] *See* 5 U.S.C. 605(b).

[847] 17 CFR 240.17a–5(d).

[848] 17 CFR 240.0–10(g).

[849] 17 CFR 240.0–10(d).

[850] *See* 17 CFR 242.1000.

person (other than a natural person) that is not a small business or small organization.[851] None of the national securities exchanges registered under section 6 of the Exchange Act that would be subject to the proposed rule and form is a ''small entity'' for purposes of the RFA.

There is only one national securities association (FINRA), and the Commission has previously stated that it is not a small entity as defined by 13 CFR 121.201.[852]

As stated, a small entity includes, when used with reference to a clearing agency, a clearing agency that: (1) compared, cleared, and settled less than $500 million in securities transactions during the preceding fiscal year; (2) had less than $200 million of funds and securities in its custody or control at all times during the preceding fiscal year (or at any time that it has been in business, if shorter); and (3) is not affiliated with any person (other than a natural person) that is not a small business or small organization.[853]

Based on the Commission's existing information about the clearing agencies currently registered with the Commission, the Commission preliminarily believes that such entities exceed the thresholds defining ''small entities'' set out above. While other clearing agencies may emerge and seek to register as clearing agencies, the Commission preliminarily does not believe that any such entities would be ''small entities'' as defined in Exchange Act Rule 0–10.

2. The MSRB

The Commission's rules do not define ''small business'' or ''small organization'' for purposes of entities like the MSRB. The MSRB does not fit into one of the categories listed under the Commission rule that provides guidelines for a defined group of entities to qualify as a small entity for purposes of Commission rulemaking under the RFA.[854] The RFA in turn, refers to the Small Business Administration (''SBA'') in providing that the term ''small business'' is defined as having the same meaning as the term ''small business concern'' under section 3 of the Small Business Act.[855] The SBA provides a comprehensive list of categories with accompanying size standards that outline how large a business concern can be and still qualify as a small business.[856] The industry categorization that appears to best fit the MSRB under the SBA table is Professional Organization. The SBA defines a Professional Organization as an entity having average annual receipts of less than $15 million. Within the MSRB's 2021 Annual Report the organization reported total revenue exceeding $35 million for fiscal year 2021.[857] The Report also stated that the organization's total revenue for fiscal year 2020 exceeded $47 million.[858] The Commission is using the SBA's definition of small business to define the MSRB for purposes of the RFA and has concluded that the MSRB is not a ''small entity.''

3. SCI ATSs

As discussed in section II.B.1 above, Regulation SCI currently applies to SCI ATSs (which are required to be registered as broker-dealers) that during at least four of the preceding six calendar months: (1) Had with respect to NMS stocks: (i) Five percent (5%) or more in any single NMS stock, and one-quarter percent (0.25%) or more in all NMS stocks, of the average daily dollar volume reported by applicable transaction reporting plans, which represents the sum of all reported bought and all reported sold dollar volumes; or (ii) One percent (1%) or more in all NMS stocks of the average daily dollar volume reported by applicable transaction reporting plans, which represents the sum of all reported bought and all reported sold dollar volumes; or (2) Had with respect to equity securities that are not NMS stocks and for which transactions are reported to a self-regulatory organization, five percent (5%) or more of the average daily dollar volume as calculated by the self-regulatory organization to which such transactions are reported. All NMS stock and non-NMS stock ATSs are required to register as broker-dealers.

There are seven SCI ATS currently. As stated, a small entity also includes 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 Rule 17a–5(d) under the Exchange Act,[859] 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. Applying this test for broker-dealers, the Commission believes that none of the SCI ATSs currently trading were operated by a broker-dealer that is a ''small entity.''

Plan Processors

As discussed in section II.B.1 above, Regulation SCI currently applies to plan processors, which are ''any self-regulatory organization or securities information processor acting as an exclusive processor in connection with the development, implementation and/or operation of any facility contemplated by an effective national market system plan.'' [860] Currently, there are two plan processors subject to Regulation SCI.

The current plan processors are SIAC a subsidiary of NYSE Group, Inc., and Nasdaq Stock Market LLC, a subsidiary of Nasdaq, Inc. In addition, even if other entities do become plan processors, the Commission preliminarily believes that most, if not all, plan processors would be large business entities or subsidiaries of large business entities, and that every plan processor (or its parent entity) would have gross revenues in excess of $10 million and provide service to 100 or more interrogation devices or moving tickers. Therefore, the Commission preliminarily believes that none of the current plan processors or potential plan processors would be considered small entities.

SCI Competing Consolidators

As discussed in section II.B.1 above, Regulation SCI currently applies to SCI competing consolidators. While no SCI competing consolidators have yet to register, as discussed in the adopting release for the Market Data Infrastructure rule, the Commission estimates, and continues to estimate, that up to 10 entities will register as competing consolidators.[861]

As discussed in the Market Data Infrastructure final rule, ''based on the Commission's information about the 10 potential entities the Commission

[851] *See* paragraph (e) of Rule 0–10.

[852] *See, e.g.,* Securities Exchange Act Release No. 62174 (May 26, 2010), 75 FR 32556, 32605 n.416 (June 8, 2010) (''FINRA is not a small entity as defined by 13 CFR 121.201.'').

[853] *See* paragraph (d) of Rule 0–10.

[854] *See* Rule 0–10.

[855] *See* 5 U.S.C. 601(3).

[856] *See* 13 CFR 121.201. *See also* SBA, Table of Small Business Size Standards Marched to North American Industry Classification System Codes, *available at https://www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf* (outlining the list of small business size standards within 13 CFR 121.201).

[857] *See* MSRB, 2021 Annual Report, 16, *available at https://msrb.org/-/media/Files/Resources/MSRB-2021-Annual-Report.ashx*.

[858] *Id.*

[859] 17 CFR 240.17a–5(d).

[860] *See* 17 CFR 242.1000; 17 CFR 242.600(b)(67).

[861] *See* Market Data Infrastructure Adopting Release, *supra* note 24, at 18808.

estimates may become competing consolidators, the Commission believes that all such entities will exceed the thresholds defining 'small entities' set out above.'' [862] The Commission continues to believe this analysis is accurate, and that ''[c]ompeting consolidators will be participating in a sophisticated business that requires significant resources to compete effectively.'' [863] Accordingly, the Commission believes that any such registered competing consolidators will exceed the thresholds for ''small entities'' set forth in 17 CFR 240.0–10.

Exempt Clearing Agencies

As discussed in section II.B.1 above, Regulation SCI currently applies to certain clearing agencies, specifically, exempt clearing agencies subject to ARP. There are currently 3 exempt clearing agencies subject to Regulation SCI, and the Commission estimates that Regulation SCI will apply to two more if the proposed rules are finalized. The Commission believes that all the clearing agencies, both those to which Regulation SCI currently applies and those to which it will, exceed the thresholds defining 'small entities' set out above.

*C. Proposed SCI Entities*

The proposed expansion of the definition of the term ''SCI entity'' would include SBSDRs and SCI broker-dealers, as well as additional clearing agencies exempted from registration. The Commission preliminarily believes that none of these would be considered small entities for purposes of the RFA.

1. SBSDRs

As discussed in section III.A.2.a above, in 2015, the Commission established a regulatory framework for SBSDRs, under which SBSDRs are registered securities information processors and disseminators of market data in the SBS market. There are currently two registered SBSDRs that would be subject to Regulation SCI.

The two currently registered SBSDRs are subsidiaries of large business entities.[864] In addition, even if other entities do register as SBSDRs, for purposes of Commission rulemaking, the Commission believes that none of the SBSDRs will be considered small entities.[865]

2. SCI Broker-dealers

As discussed in section III.A.2.b above, the proposed definition of an SCI broker-dealer would be a broker or dealer registered with the Commission pursuant to section 15(b) of the Exchange Act which: (1) in at least two of the four preceding calendar quarters, ending March 31, June 30, September 30, and December 31, reported to the Commission, on Form X–17A–5 (§ 249.617), total assets in an amount that equals five percent (5%) or more of the total assets of all security brokers and dealers; or (2) during at least four of the preceding six calendar months: (i) with respect to transactions in NMS stocks, transacted average daily dollar volume in an amount that equals ten percent (10%) or more of the average daily dollar volume reported by or pursuant to applicable effective transaction reporting plans, provided, however, that for purposes of calculating its activity in transactions effected otherwise than on a national securities exchange or on an alternative trading system, the broker-dealer shall exclude transactions for which it was not the executing party; or (ii) with respect to transactions in exchange-listed options contracts, transacted average daily dollar volume in an amount that equals ten percent (10%) or more of the average daily dollar volume reported by an applicable effective national market system plan; or (iii) with respect to transactions in U.S. Treasury Securities, transacted average daily dollar volume in an amount that equals ten percent (10%) or more of the total average daily dollar volume made available by the self-regulatory organizations to which such transactions are reported; or (iv) with respect to transactions in Agency securities, transacted average daily dollar volume in an amount that equals ten percent (10%) or more of the total average daily dollar volume made available by the self-regulatory organizations to which such transactions are reported.[866]

The Commission preliminarily estimates that 17 entities would satisfy one or more of these thresholds. Applying the test for broker-dealers stated above, the Commission believes that none of the potential SCI broker-dealers would be considered small entities.

3. Exempt Clearing Agencies

For the purposes of Commission rulemaking, a small entity includes, when used with reference to a clearing agency, a clearing agency that: (1) compared, cleared, and settled less than $500 million in securities transactions during the preceding fiscal year; (2) had less than $200 million of funds and securities in its custody or control at all times during the preceding fiscal year (or at any time that it has been in business, if shorter); and (3) is not affiliated with any person (other than a natural person) that is not a small business or small organization.[867]

Based on the Commission's existing information about the clearing agencies currently exempted from registration with the Commission, the Commission preliminarily believes that such entities exceed the thresholds defining ''small entities'' set out above. While other clearing agencies may emerge and seek to register as clearing agencies, the Commission preliminarily does not believe that any such entities would be ''small entities'' as defined in Exchange Act Rule 0–10.

*D. Certification*

For the foregoing reasons, the Commission certifies that the proposed amendments to Rules 1000, 1001, 1002, 1003, 1004, and 1005, and Form SCI if adopted, would not have a significant economic impact on a substantial number of small entities for purposes of the RFA.

The Commission invites commenters to address whether the proposed rules would have a significant economic impact on a substantial number of small entities, and, if so, what would be the nature of any impact on small entities. The Commission requests that commenters provide empirical data to support the extent of such impact.

Statutory Authority

Pursuant to the Exchange Act, 15 U.S.C. 78a *et seq.,* and particularly, sections 2, 3, 5, 6, 11A, 13, 15, 15A, 17,

[862] *Id.*

[863] *Id.* at 18808–09.

[864] *See supra* note 111.

[865] *See* SBSDR Adopting Release, *supra* note 96, 80 FR 14548–49 (providing that in the Proposing Release, the Commission stated that it did not believe that any persons that would register as SBSDRs would be considered small entities. The Commission stated that it believed that most, if not all, SBSDRs would be part of large business entities with assets in excess of $5 million and total capital in excess of $500,000. As a result, the Commission certified that the proposed rules would not have a significant impact on a substantial number of small entities and requested comments on this certification. The Commission did not receive any comments that specifically addressed whether 17 CFR 240.13n–1 through 240.13n–12 (''Rules 13n–1 through 13n–12'') and Form SBSDR would have a significant economic impact on small entities. Therefore, the Commission continues to believe that Rules 13n–1 through 13n–12 and Form SBSDR will not have a significant economic impact on a substantial number of small entities. Accordingly, the Commission hereby certifies that, pursuant to 5 U.S.C. 605(b), Rules 13n–1 through 13n–12, Form SBSDR will not have a significant economic impact on a substantial number of small entities.).

[866] Such broker-dealer would not be required to comply with the requirements of Regulation SCI until six months after the SCI broker-dealer satisfied either threshold for the first time.

[867] *See* paragraph (d) of Rule 0–10.

17A, and 23(a) thereof (15 U.S.C. 78b, 78c, 78e, 78f, 78k–1, 78m, 78o, 78o–3, 78q, 78q–1, and 78w(a)), the Commission proposes amendments to Regulation SCI under the Exchange Act and Form SCI under the Exchange Act, and to amend Regulation ATS under the Exchange Act, and 17 CFR parts 242 and 249.

**List of Subjects in 17 CFR Parts 242 and 249**

Brokers, Reporting and recordkeeping requirements, Securities.

For the reasons stated in the preamble, title 17, chapter II of the Code of Federal Regulations is proposed to be amended as follows:

## PART 242—REGULATIONS M, SHO, ATS, AC, NMS, AND SBSR AND CUSTOMER MARGIN REQUIREMENTS FOR SECURITY FUTURES

■ 1. The authority citation for part 242 continues to read as follows:

**Authority:** 15 U.S.C. 77g, 77q(a), 77s(a), 78b, 78c, 78g(c)(2), 78i(a), 78j, 78k–1(c), 78l, 78m, 78n, 78o(b), 78o(c), 78o(g), 78q(a), 78q(b), 78q(h), 78w(a), 78dd–1, 78mm, 80a–23, 80a–29, and 80a–37.

■ 2. Amend § 242.1000 by:

■ a. Adding in alphabetical order the definitions of ''Agency Security'' and ''Exempt clearing agency'';

■ b. Removing the definition of ''Exempt clearing agency subject to ARP'';

■ c. Adding in alphabetical order the definitions of ''Registered security-based swap data repository'' and ''SCI broker-dealer'';

■ d. Revising the definitions of ''SCI entity'', ''SCI review'', ''SCI systems'', and ''Systems intrusion''; and

■ e. Adding in alphabetical order the definition of ''U.S. Treasury Security''.

The additions and revisions read as follows:

**§ 242.1000 Definitions.**

* * * * *

*Agency Security* means a debt security issued or guaranteed by a U.S. executive agency, as defined in 5 U.S.C. 105, or government-sponsored enterprise, as defined in 2 U.S.C. 622(8).

* * * * *

*Exempt clearing agency* means an entity that has received from the Commission an exemption from registration as a clearing agency under section 17A of the Exchange Act.

* * * * *

*Registered security-based swap data repository* means any security-based swap data repository, as defined in 15 U.S.C. 78c(a)(75), that is registered with the Commission pursuant to 15 U.S.C. 78m(n) and § 240.13n–1 of this chapter.

* * * * *

*SCI broker-dealer* means a broker or dealer registered with the Commission pursuant to section 15(b) of the Exchange Act, which:

(1) In at least two of the four preceding calendar quarters, ending March 31, June 30, September 30, and December 31, reported to the Commission, on Form X–17A–5 (§ 249.617 of this chapter), total assets in an amount that equals five percent (5%) or more of the total assets of all security brokers and dealers. For purposes of this paragraph (1), *total assets of all security brokers and dealers* shall mean the total assets, as calculated and made publicly available by the Board of Governors of the Federal Reserve, or any subsequent provider of such information, for the associated preceding calendar quarter; or

(2) During at least four of the preceding six calendar months:

(i) With respect to transactions in NMS stocks, transacted average daily dollar volume in an amount that equals ten percent (10%) or more of the average daily dollar volume reported by or pursuant to applicable effective transaction reporting plans, provided, however, that for purposes of calculating its activity in transactions effected otherwise than on a national securities exchange or on an alternative trading system, the broker-dealer shall exclude transactions for which it was not the executing party;

(ii) With respect to transactions in exchange-listed options contracts, transacted average daily dollar volume in an amount that equals ten percent (10%) or more of the average daily dollar volume reported by an applicable effective national market system plan;

(iii) With respect to transactions in U.S. Treasury Securities, transacted average daily dollar volume in an amount that equals ten percent (10%) or more of the total average daily dollar volume made available by the self-regulatory organizations to which such transactions are reported; or

(iv) With respect to transactions in Agency Securities, transacted average daily dollar volume in an amount that equals ten percent (10%) or more of the total average daily dollar volume made available by the self-regulatory organizations to which such transactions are reported.

(3) Provided, however, that such SCI broker-dealer shall not be required to comply with the requirements of Regulation SCI until six months after the end of the quarter in which the SCI broker-dealer satisfied paragraph (1) of this definition for the first time or six months after the end of the month in which the SCI broker-dealer satisfied paragraph (2) of this definition for the first time.

* * * * *

*SCI entity* means an SCI self-regulatory organization, SCI alternative trading system, plan processor, exempt clearing agency, SCI competing consolidator, SCI broker-dealer, or registered security-based swap data repository.

* * * * *

*SCI review* means a review, following established and documented procedures and standards, that is performed by objective personnel having appropriate experience to conduct reviews of SCI systems and indirect SCI systems, and which review, using appropriate risk management methodology, contains:

(1) With respect to each SCI system and indirect SCI system of the SCI entity, assessments performed by objective personnel of:

(i) The risks related to the capacity, integrity, resiliency, availability, and security;

(ii) Internal control design and operating effectiveness, to include logical and physical security controls, development processes, systems capacity and availability, information technology service continuity, and information technology governance, consistent with industry standards; and

(iii) Third-party provider management risks and controls; and

(2) Penetration test reviews performed by objective personnel of the network, firewalls, and production systems, including of any vulnerabilities of its SCI systems and indirect SCI systems identified pursuant to § 242.1001(a)(2)(iv);

(3) *Provided, however,* that assessments of SCI systems directly supporting market regulation or market surveillance shall be conducted at a frequency based upon the risk assessment conducted as part of the SCI review, but in no case less than once every three years.

* * * * *

*SCI systems* means all computer, network, electronic, technical, automated, or similar systems of, or operated by or on behalf of, an SCI entity that, with respect to securities, directly support trading, clearance and settlement, order routing, market data, market regulation, or market surveillance; *provided, however,* that with respect to an SCI broker-dealer that satisfies only the requirements of paragraph (2) of the definition of ''SCI

broker-dealer,'' such systems shall include only those systems with respect to the type of securities for which an SCI broker-dealer satisfies the requirements of paragraph (2) of the definition.

* * * * *

*Systems intrusion* means any:

(1) Unauthorized entry into the SCI systems or indirect SCI systems of an SCI entity;

(2) Cybersecurity event that disrupts, or significantly degrades, the normal operation of an SCI system; or

(3) Significant attempted unauthorized entry into the SCI systems or indirect SCI systems of an SCI entity, as determined by the SCI entity pursuant to established reasonable written criteria.

*U.S. Treasury Security* means a security issued by the U.S. Department of the Treasury.

■ 3. Amend § 242.1001 by revising paragraph (a) to read as follows:

**§ 242.1001 Obligations related to policies and procedures of SCI entities.**

(a) *Capacity, integrity, resiliency, availability, and security.* (1) Each SCI entity shall establish, maintain, and enforce written policies and procedures reasonably designed to ensure that its SCI systems and, for purposes of security standards, indirect SCI systems, have levels of capacity, integrity, resiliency, availability, and security, adequate to maintain the SCI entity's operational capability and promote the maintenance of fair and orderly markets.

(2) Policies and procedures required by paragraph (a)(1) of this section shall include, at a minimum:

(i) The establishment of reasonable current and future technological infrastructure capacity planning estimates;

(ii) Periodic capacity stress tests of such systems to determine their ability to process transactions in an accurate, timely, and efficient manner;

(iii) A program to review and keep current systems development and testing methodology for such systems;

(iv) Regular reviews and testing, as applicable, of such systems, including backup systems, to identify vulnerabilities pertaining to internal and external threats, physical hazards, and natural or manmade disasters;

(v) Business continuity and disaster recovery plans that include maintaining backup and recovery capabilities sufficiently resilient and geographically diverse and that are reasonably designed to achieve next business day resumption of trading and two-hour resumption of critical SCI systems following a wide-scale disruption; and that are reasonably designed to address the unavailability of any third-party provider that provides functionality, support, or service to the SCI entity without which there would be a material impact on any of its critical SCI systems;

(vi) Standards that result in such systems being designed, developed, tested, maintained, operated, and surveilled in a manner that facilitates the successful collection, processing, and dissemination of market data;

(vii) Monitoring of such systems to identify potential SCI events;

(viii) The maintenance of a written inventory and classification of all SCI systems, critical SCI systems, and indirect SCI systems as such, and a program with respect to the lifecycle management of such systems, including the acquisition, integration, support, refresh, and disposal of such systems, as applicable;

(ix) A program to manage and oversee third-party providers that provide functionality, support or service, directly or indirectly, for any such systems, including: initial and periodic review of contracts with such third-party providers for consistency with the SCI entity's obligations under Regulation SCI; and a risk-based assessment of each third-party provider's criticality to the SCI entity, including analyses of third-party provider concentration, of key dependencies if the third-party provider's functionality, support, or service were to become unavailable or materially impaired, and of any potential security, including cybersecurity, risks posed;

(x) A program to prevent the unauthorized access to such systems and information residing therein; and

(xi) An identification of the current SCI industry standard(s) with which each such policy and procedure is consistent, if any.

(3) Each SCI entity shall periodically review the effectiveness of the policies and procedures required by this paragraph (a), and take prompt action to remedy deficiencies in such policies and procedures.

(4) For purposes of this paragraph (a), such policies and procedures shall be deemed to be reasonably designed if they are consistent with current SCI industry standards, which shall be composed of information technology practices that are widely available to information technology professionals in the financial sector and issued by an authoritative body that is a U.S. governmental entity or agency, association of U.S. governmental entities or agencies, or widely recognized organization. Compliance with such current SCI industry standards as a safe harbor, however, shall not be the exclusive means to comply with the requirements of paragraph (a) of this section.

* * * * *

■ 4. Amend § 242.1002 by:

■ a. In paragraph (b)(4)(ii)(B), removing the words ''or participants'' and adding in their place ''participants, or, in the case of an SCI broker-dealer, customers'';

■ b. Revising paragraph (b)(5) and (c)(3);

■ c. In paragraph (c)(4)(i), removing the ''or'' after the semicolon;

■ d. In paragraph (c)(4)(ii), removing the period and adding in its place ''; or''; and

■ e. Adding paragraph (c)(4)(iii).

The revision and additions read as follows:

**§ 242.1002 Obligations related to SCI events.**

* * * * *

(b) * * *

(5) The requirements of paragraphs (b)(1) through (4) of this section shall not apply to any systems disruption or systems compliance issue that has had, or the SCI entity reasonably estimates would have, no or a de minimis impact on the SCI entity's operations or on market participants. For such events, each SCI entity shall:

(i) Make, keep, and preserve records relating to all such systems disruptions or systems compliance issues; and

(ii) Submit to the Commission a report, within 30 calendar days after the end of each calendar quarter, containing a summary description of such systems disruptions, including the SCI systems affected by such systems disruptions during the applicable calendar quarter.

(c) * * *

(3) The information required to be disseminated under paragraphs (c)(1) and (2) of this section promptly after any responsible SCI personnel has a reasonable basis to conclude that an SCI event has occurred, shall be promptly disseminated by the SCI entity to those members, participants, or, in the case of an SCI broker-dealer, customers of the SCI entity that any responsible SCI personnel has reasonably estimated may have been affected by the SCI event, and promptly disseminated to any additional members, participants, or, in the case of an SCI broker-dealer, customers that any responsible SCI personnel subsequently reasonably estimates may have been affected by the SCI event; *provided, however,* that for major SCI events, the information required to be disseminated under paragraphs (c)(1) and (2) of this section shall be promptly disseminated by the

SCI entity to all of its members, participants, or, in the case of an SCI broker-dealer, customers.

(4) * * *

(iii) A systems intrusion that is a significant attempted unauthorized entry into the SCI systems or indirect SCI systems of an SCI entity.

■ 5. Amend § 242.1003 by revising paragraph (b) to read as follows:

**§ 242.1003 Obligations related to systems changes; SCI review.**

* * * * *

(b) *SCI review.* Each SCI entity shall:

(1) Conduct an SCI review of the SCI entity's compliance with Regulation SCI not less than once each calendar year for each calendar year during which it was an SCI entity for any part of such calendar year;

(2) Submit a report of the SCI review required by paragraph (b)(1) of this section to senior management of the SCI entity for review no more than 30 calendar days after completion of such SCI review. Such report of the SCI review shall include:

(i) The dates the SCI review was conducted and the date of completion;

(ii) The entity or business unit of the SCI entity performing the review;

(iii) A list of the controls reviewed and a description of each such control;

(iv) The findings of the SCI review with respect to each SCI system and indirect SCI system, which shall include assessments of: the risks related to the capacity, integrity, resiliency, availability, and security; internal control design and operating effectiveness; and an assessment of third-party provider management risks and controls;

(v) A summary, including the scope of testing and resulting action plan, of each penetration test review conducted as part of the SCI review; and

(vi) A description of each deficiency and weakness identified by the SCI review; and

(3) Submit to the Commission, and to the board of directors of the SCI entity or the equivalent of such board, the report of the SCI review required by paragraph (b)(2) of this section, together with the date the report was submitted to senior management and the response of senior management to such report, within 60 calendar days after its submission to senior management of the SCI entity.

**§ 242.1004 [Amended]**

■ 6. Amend § 242.1004 by:

■ a. In the section heading, adding '', and third-party providers'' to the end of the heading;

■ b. In paragraph (a), after the word ''participants'', adding '', and third-party providers''; and

■ c. In paragraph (b), after both instances of the word ''participants'' adding '', and third-party providers''.

**§ 242.1005 [Amended]**

■ 7. Amend § 242.1005 in paragraph (c) by:

■ a. Between ''business'' and ''ceasing,'' removing the ''or'' and adding a comma in its place; and

■ b. Immediately before ''an SCI entity'' adding ''or otherwise ceasing to be an SCI entity,''.

## PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

■ 8. The general authority citation for part 249 continues to read as follows:

**Authority:** 15 U.S.C. 78a *et seq.* and 7201 *et seq.;* 12 U.S.C. 5461 *et seq.;* 18 U.S.C. 1350; Sec. 953(b) Pub. L. 111–203, 124 Stat. 1904; Sec. 102(a)(3) Pub. L. 112–106, 126 Stat. 309 (2012), Sec. 107 Pub. L. 112–106, 126 Stat. 313 (2012), Sec. 72001 Pub. L. 114–94, 129 Stat. 1312 (2015), and secs. 2 and 3 Pub. L. 116–222, 134 Stat. 1063 (2020), unless otherwise noted.

* * * * *

■ 9. Revise Form SCI (referenced in § 249.1900).

**Note:** Form SCI is attached as Appendix A to this document. Form SCI will not appear in the Code of Federal Regulations.

By the Commission.

Dated: March 15, 2023.

**J. Matthew DeLesDernier,**

*Deputy Secretary.*

### Appendix A—Form SCI

**Securities and Exchange Commission**

Washington, DC 20549

**Form SCI**

Page 1 of _____

File No. SCI-{name}-YYYY-###

SCI Notification and Reporting by: {SCI entity name}

Pursuant to Rules 1002 and 1003 of Regulation SCI under the Securities Exchange Act of 1934

☐ Initial

☐ Withdrawal

**Section I: Rule 1002—Commission Notification of SCI Event**

A. Submission Type (select one only)

☐ Rule 1002(b)(1) Initial Notification of SCI event

☐ Rule 1002(b)(2) Notification of SCI event

☐ Rule 1002(b)(3) Update of SCI event: ####

☐ Rule 1002(b)(4) Final Report of SCI event

☐ Rule 1002(b)(4) Interim Status Report of SCI event

If filing a Rule 1002(b)(1) or Rule 1002(b)(3) submission, please provide a brief description:

_____

_____

_____

B. SCI Event Type(s) (select all that apply)

☐ Systems compliance issue;

☐ Systems disruption

☐ Systems intrusion

C. General Information Required for (b)(2) filings.

(1) Has the Commission previously been notified of the SCI event pursuant to 1002(b)(1)? *yes/no*

(2) Date/time SCI event occurred: *mm/dd/yyyy hh:mm am/pm*

(3) Duration of SCI event: *hh:mm,* or *days*

(4) Please provide the date and time when a responsible SCI personnel had reasonable basis to conclude the SCI event occurred: *mm/dd/yyyy hh:mm am/pm*

(5) Has the SCI event been resolved? *yes/no*

(a) If yes, provide date and time of resolution: *mm/dd/yyyy hh:mm am/pm*

(6) Is the investigation of the SCI event closed? *yes/no*

(a) If yes, provide date of closure: *mm/dd/yyyy*

(7) Estimated number of market participants potentially affected by the SCI event: ####

(8) Is the SCI event a major SCI event (as defined in Rule 1000)? *yes/no*

D. Information about impacted systems:

Name(s) of system(s):

_____

_____

_____

Type(s) of system(s) impacted by the SCI event (check all that apply):

☐ Trading

☐ Clearance and settlement

☐ Order routing

☐ Market data

☐ Market regulation

☐ Market surveillance

☐ Indirect SCI systems (please describe):

_____

_____

_____

Are any critical SCI systems impacted by the SCI event (check all that apply)? Yes/No

(1) Systems that directly support functionality relating to:

☐ Clearance and settlement systems of clearing agencies

☐ Openings, reopenings, and closings on the primary listing market

☐ Trading halts

☐ Initial public offerings

☐ The provision of consolidated market data

☐ Exclusively-listed securities

(2) ☐ Systems that provide functionality to the securities markets for which the availability of alternatives is significantly limited or nonexistent and without which there would be a material impact on fair and orderly markets (please describe):

_____

_____

_____

**Section II: Periodic Reporting (select one only)**

A. Quarterly Reports: For the quarter ended: mm/dd/yyyy

☐ Rule 1002(b)(5)(ii): Quarterly report of systems disruptions with no or a de minimis impact.

☐ Rule 1003(a)(1): Quarterly report of material systems changes
☐ Rule 1003(a)(2): Supplemental report of material systems changes

B. SCI Review Reports
☐ Rule 1003(b)(3): Report of SCI review, together with the response of senior management
Date of completion of SCI review: *mm/dd/yyyy*
Date of submission of SCI review to senior management: *mm/dd/yyyy*

**Section III: Contact Information**

Provide the following information of the person at the {SCI entity name} prepared to respond to questions for this submission:

First Name:
Last Name:
Title:
E-Mail:
Telephone:
Fax:

Additional Contacts (Optional)
First Name:
Last Name:
Title:
E-Mail:
Telephone:
Fax:
First Name:
Last Name:
Title:
E-Mail:
Telephone:
Fax:

**Section IV: Signature**

Confidential treatment is requested pursuant to Rule 24b–2(g). Additionally, pursuant to the requirements of the Securities Exchange Act of 1934, {SCI Entity name} has duly caused this {notification} {report} to be signed on its behalf by the undersigned duly authorized officer:

Date:
By (Name)
Title (_____)
''Digitally Sign and Lock Form''

| | |
|---|---|
| Exhibit 1: Rule 1002(b)(2) Notification of SCI Event. Add/Remove/View. | Within 24 hours of any responsible SCI personnel having a reasonable basis to conclude that the SCI event has occurred, the SCI entity shall submit a written notification pertaining to such SCI event to the Commission, which shall be made on a good faith, best efforts basis and include:<br>(a) a description of the SCI event, including the system(s) affected; and<br>(b) to the extent available as of the time of the notification: the SCI entity's current assessment of the types and number of market participants potentially affected by the SCI event; the potential impact of the SCI event on the market; a description of the steps the SCI entity has taken, is taking, or plans to take, with respect to the SCI event; the time the SCI event was resolved or timeframe within which the SCI event is expected to be resolved; and any other pertinent information known by the SCI entity about the SCI event. |
| Exhibit 2: Rule 1002(b)(4) Final or Interim Report of SCI Event. Add/Remove/View. | When submitting a final report pursuant to either Rule 1002(b)(4)(i)(A) or Rule 1002(b)(4)(i)(B)(*2*), the SCI entity shall include:<br>(a) a detailed description of: the SCI entity's assessment of the types and number of market participants affected by the SCI event; the SCI entity's assessment of the impact of the SCI event on the market; the steps the SCI entity has taken, is taking, or plans to take, with respect to the SCI event; the time the SCI event was resolved; the SCI entity's rule(s) and/or governing document(s), as applicable, that relate to the SCI event; and any other pertinent information known by the SCI entity about the SCI event;<br>(b) a copy of any information disseminated pursuant to Rule 1002(c) by the SCI entity to date regarding the SCI event to any of its members, participants, or, in the case of an SCI broker-dealer, customers; and<br>(c) an analysis of parties that may have experienced a loss, whether monetary or otherwise, due to the SCI event, the number of such parties, and an estimate of the aggregate amount of such loss.<br>When submitting an interim report pursuant to Rule 1002(b)(4)(i)(B)(*1*), the SCI entity shall include such information to the extent known at the time. |
| Exhibit 3: Rule 1002(b)(5)(ii) Quarterly Report of DeMinimis SCI Events. Add/Remove/View. | The SCI entity shall submit a report, within 30 calendar days after the end of each calendar quarter, containing a summary description of systems disruptions that have had, or the SCI entity reasonably estimates would have, no or a de minimis impact on the SCI entity's operations or on market participants, including the SCI systems affected by such systems disruptions during the applicable calendar quarter. |
| Exhibit 4: Rule 1003 (a) Quarterly Report of Systems Changes. Add/Remove/View. | When submitting a report pursuant to Rule 1003(a)(1), the SCI entity shall provide a report, within 30 calendar days after the end of each calendar quarter, describing completed, ongoing, and planned material changes to its SCI systems and the security of indirect SCI systems, during the prior, current, and subsequent calendar quarters, including the dates or expected dates of commencement and completion. An SCI entity shall establish reasonable written criteria for identifying a change to its SCI systems and the security of indirect SCI systems as material and report such changes in accordance with such criteria.<br>When submitting a report pursuant to Rule 1003(a)(2), the SCI entity shall provide a supplemental report of a material error in or material omission from a report previously submitted under Rule 1003(a)(1). |
| Exhibit 5: Rule 1003(b)(3) Report of SCI review. Add/Remove/View. | The SCI entity shall provide the report of the SCI review, together with the date the report was submitted to senior management and the response of senior management to such report, within 60 calendar days after its submission to senior management of the SCI entity. |
| Exhibit 6: Optional Attachments. Add/Remove/View .... | This exhibit may be used in order to attach other documents that the SCI entity may wish to submit as part of a Rule 1002(b)(1) initial notification submission or Rule 1002(b)(3) update submission. |

**General Instructions for Form SCI**

*A. Use of the Form*

Except with respect to notifications to the Commission made pursuant to Rule 1002(b)(1) or updates to the Commission made pursuant to Rule 1002(b)(3), any notification, review, description, analysis, or report required to be submitted pursuant to Regulation SCI under the Securities Exchange Act of 1934 (''Act'') shall be filed in an electronic format through an electronic form filing system (''EFFS''), a secure website operated by the Securities and Exchange Commission (''Commission''). Documents attached as exhibits filed through the EFFS system must be in a text-searchable format without the use of optical character recognition. If, however, a portion of a Form SCI submission (*e.g.,* an image or diagram) cannot be made available in a text-searchable format, such portion may be submitted in a non-text searchable format.

*B. Need for Careful Preparation of the Completed Form, Including Exhibits*

This form, including the exhibits, is intended to elicit information necessary for Commission staff to work with SCI entities to ensure the capacity, integrity, resiliency, availability, security, and compliance of their automated systems. An SCI entity must provide all the information required by the form, including the exhibits, and must present the information in a clear and comprehensible manner. A filing that is incomplete or similarly deficient may be returned to the SCI entity. Any filing so returned shall for all purposes be deemed not to have been filed with the Commission. *See also* Rule 0–3 under the Act (17 CFR 240.0–3).

*C. When To Use the Form*

Form SCI is comprised of six types of required submissions to the Commission pursuant to Rules 1002 and 1003. In addition, Form SCI permits SCI entities to submit to the Commission two additional types of submissions pursuant to Rules 1002(b)(1) and 1002(b)(3); however, SCI entities are not required to use Form SCI for these two types of submissions to the Commission. In filling out Form SCI, an SCI

entity shall select the type of filing and provide all information required by Regulation SCI specific to that type of filing.

The first two types of required submissions relate to Commission notification of certain SCI events:

(1) ''Rule 1002(b)(2) Notification of SCI Event'' submissions for notifications regarding systems disruptions, systems compliance issues, or systems intrusions (collectively, ''SCI events''), other than any systems disruption or systems compliance issue that has had, or the SCI entity reasonably estimates would have, no or a de minimis impact on the SCI entity's operations or on market participants; and

(2) ''Rule 1002(b)(4) Final or Interim Report of SCI Event'' submissions, of which there are two kinds (a final report under Rule 1002(b)(4)(i)(A) or Rule 1002(b)(4)(i)(B)(*2*); or an interim status report under Rule 1002(b)(4)(i)(B)(*1*)).

The other four types of required submissions are periodic reports, and include:

(1) ''Rule 1002(b)(5)(ii)'' submissions for quarterly reports of systems disruptions which have had, or the SCI entity reasonably estimates would have, no or a de minimis impact on the SCI entity's operations or on market participants;

(2) ''Rule 1003(a)(1)'' submissions for quarterly reports of material systems changes;

(3) ''Rule 1003(a)(2)'' submissions for supplemental reports of material systems changes; and

(4) ''Rule 1003(b)(3)'' submissions for reports of SCI reviews.

Required Submissions for SCI Events

For 1002(b)(2) submissions, an SCI entity must notify the Commission using Form SCI by selecting the appropriate box in Section I and filling out all information required by the form, including Exhibit 1. 1002(b)(2) submissions must be submitted within 24 hours of any responsible SCI personnel having a reasonable basis to conclude that an SCI event has occurred.

For 1002(b)(4) submissions, if an SCI event is resolved and the SCI entity's investigation of the SCI event is closed within 30 calendar days of the occurrence of the SCI event, an SCI entity must file a final report under Rule 1002(b)(4)(i)(A) within five business days after the resolution of the SCI event and closure of the investigation regarding the SCI event. However, if an SCI event is not resolved or the SCI entity's investigation of the SCI event is not closed within 30 calendar days of the occurrence of the SCI event, an SCI entity must file an interim status report under Rule 1002(b)(4)(i)(B)(*1*) within 30 calendar days after the occurrence of the SCI event. For SCI events in which an interim status report is required to be filed, an SCI entity must file a final report under Rule 1002(b)(4)(i)(B)(*2*) within five business days after the resolution of the SCI event and closure of the investigation regarding the SCI event. For 1002(b)(4) submissions, an SCI entity must notify the Commission using Form SCI by selecting the appropriate box in Section I and filling out all information required by the form, including Exhibit 2.

Required Submissions for Periodic Reporting

For 1002(b)(5)(ii) submissions, an SCI entity must submit quarterly reports of systems disruptions which have had, or the SCI entity reasonably estimates would have, no or a de minimis impact on the SCI entity's operations or on market participants. The SCI entity must select the appropriate box in Section II and fill out all information required by the form, including Exhibit 3.

For 1003(a)(1) submissions, an SCI entity must submit its quarterly report of material systems changes to the Commission using Form SCI. The SCI entity must select the appropriate box in Section II and fill out all information required by the form, including Exhibit 4.

Filings made pursuant to Rule 1002(b)(5)(ii) and Rule 1003(a)(1) must be submitted to the Commission within 30 calendar days after the end of each calendar quarter (*i.e.,* March 31st, June 30th, September 30th and December 31st) of each year.

For 1003(a)(2) submissions, an SCI entity must submit a supplemental report notifying the Commission of a material error in or material omission from a report previously submitted under Rule 1003(a). The SCI entity must select the appropriate box in Section II and fill out all information required by the form, including Exhibit 4.

For 1003(b)(3) submissions, an SCI entity must submit its report of its SCI review, together with the date the report was submitted to senior management and the response of senior management to such report, to the Commission using Form SCI. A 1003(b)(3) submission is required within 60 calendar days after the report of the SCI review has been submitted to senior management of the SCI entity. The SCI entity must select the appropriate box in Section II and fill out all information required by the form, including Exhibit 5.

Optional Submissions

An SCI entity may, but is not required to, use Form SCI to submit a notification pursuant to Rule 1002(b)(1). If the SCI entity uses Form SCI to submit a notification pursuant to Rule 1002(b)(1), it must select the appropriate box in Section I and provide a short description of the SCI event. Documents may also be attached as Exhibit 6 if the SCI entity chooses to do so. An SCI entity may, but is not required to, use Form SCI to submit an update pursuant to Rule 1002(b)(3). Rule 1002(b)(3) requires an SCI entity to, until such time as the SCI event is resolved and the SCI entity's investigation of the SCI event is closed, provide updates pertaining to such SCI event to the Commission on a regular basis, or at such frequency as reasonably requested by a representative of the Commission, to correct any materially incorrect information previously provided, or when new material information is discovered, including but not limited to, any of the information listed in Rule 1002(b)(2)(ii). If the SCI entity uses Form SCI to submit an update pursuant to Rule 1002(b)(3), it must select the appropriate box in Section I and provide a short description of the SCI event. Documents may also be attached as Exhibit 6 if the SCI entity chooses to do so.

*D. Documents Comprising the Completed Form*

The completed form filed with the Commission shall consist of Form SCI, responses to all applicable items, and any exhibits required in connection with the filing. Each filing shall be marked on Form SCI with the initials of the SCI entity, the four-digit year, and the number of the filing for the year (*e.g.,* SCI Name-YYYY-XXX).

*E. Contact Information; Signature; and Filing of the Completed Form*

Each time an SCI entity submits a filing to the Commission on Form SCI, the SCI entity must provide the contact information required by Section III of Form SCI. Space for additional contact information, if appropriate, is also provided.

All notifications and reports required to be submitted through Form SCI shall be filed through the EFFS. In order to file Form SCI through the EFFS, SCI entities must request access to the Commission's External Application Server by completing a request for an external account user ID and password. Initial requests will be received by contacting (202) 551–5777. An email will be sent to the requestor that will provide a link to a secure website where basic profile information will be requested. A duly authorized individual of the SCI entity shall electronically sign the completed Form SCI as indicated in Section IV of the form. In addition, a duly authorized individual of the SCI entity shall manually sign one copy of the completed Form SCI, and the manually signed signature page shall be preserved pursuant to the requirements of Rule 1005.

*F. Withdrawals of Commission Notifications and Periodic Reports*

If an SCI entity determines to withdraw a Form SCI, it must complete Page 1 of the Form SCI and indicate by selecting the appropriate check box to withdraw the submission.

*G. Paperwork Reduction Act Disclosure*

This collection of information will be reviewed by the Office of Management and Budget in accordance with the clearance requirements of 44 U.S.C. 3507. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number. The Commission estimates that the average burden to respond to Form SCI will be between one and 125 hours, depending upon the purpose for which the form is being filed. Any member of the public may direct to the Commission any comments concerning the accuracy of this burden estimate and any suggestions for reducing this burden.

Except with respect to notifications to the Commission made pursuant to Rule 1002(b)(1) or updates to the Commission made pursuant to Rule 1002(b)(3), it is mandatory that an SCI entity file all notifications, reviews, descriptions, analyses, and reports required by Regulation SCI using Form SCI. The Commission will keep the information collected pursuant to Form SCI confidential to the extent permitted by law. Subject to the provisions of the Freedom of

Information Act, 5 U.S.C. 522 (''FOIA''), and the Commission's rules thereunder (17 CFR 200.80(b)(4)(iii)), the Commission does not generally publish or make available information contained in any reports, summaries, analyses, letters, or memoranda arising out of, in anticipation of, or in connection with an examination or inspection of the books and records of any person or any other investigation.

*H. Exhibits*

List of exhibits to be filed, as applicable:

*Exhibit 1: Rule 1002(b)(2)—Notification of SCI Event.* Within 24 hours of any responsible SCI personnel having a reasonable basis to conclude that the SCI event has occurred, the SCI entity shall submit a written notification pertaining to such SCI event to the Commission, which shall be made on a good faith, best efforts basis and include: (a) a description of the SCI event, including the system(s) affected; and (b) to the extent available as of the time of the notification: the SCI entity's current assessment of the types and number of market participants potentially affected by the SCI event; the potential impact of the SCI event on the market; a description of the steps the SCI entity has taken, is taking, or plans to take, with respect to the SCI event; the time the SCI event was resolved or timeframe within which the SCI event is expected to be resolved; and any other pertinent information known by the SCI entity about the SCI event.

*Exhibit 2: Rule 1002(b)(4)—Final or Interim Report of SCI Event.* When submitting a final report pursuant to either Rule 1002(b)(4)(i)(A) or Rule 1002(b)(4)(i)(B)(*2*), the SCI entity shall include: (a) a detailed description of: the SCI entity's assessment of the types and number of market participants affected by the SCI event; the SCI entity's assessment of the impact of the SCI event on the market; the steps the SCI entity has taken, is taking, or plans to take, with respect to the SCI event; the time the SCI event was resolved; the SCI entity's rule(s) and/or governing document(s), as applicable, that relate to the SCI event; and any other pertinent information known by the SCI entity about the SCI event; (b) a copy of any information disseminated pursuant to Rule 1002(c) by the SCI entity to date regarding the SCI event to any of its members, participants, or, in the case of an SCI broker-dealer, customers; and (c) an analysis of parties that may have experienced a loss, whether monetary or otherwise, due to the SCI event, the number of such parties, and an estimate of the aggregate amount of such loss. When submitting an interim report pursuant to Rule 1002(b)(4)(i)(B)(*1*), the SCI entity shall include such information to the extent known at the time.

*Exhibit 3: Rule 1002(b)(5)(ii)—Quarterly Report of De Minimis SCI Events.* The SCI entity shall submit a report, within 30 calendar days after the end of each calendar quarter, containing a summary description of systems disruptions that have had, or the SCI entity reasonably estimates would have, no or a de minimis impact on the SCI entity's operations or on market participants, including the SCI systems affected by such SCI events during the applicable calendar quarter.

*Exhibit 4: Rule 1003(a)—Quarterly Report of Systems Changes.* When submitting a report pursuant to Rule 1003(a)(1), the SCI entity shall provide a report, within 30 calendar days after the end of each calendar quarter, describing completed, ongoing, and planned material changes to its SCI systems and the security of indirect SCI systems, during the prior, current, and subsequent calendar quarters, including the dates or expected dates of commencement and completion. An SCI entity shall establish reasonable written criteria for identifying a change to its SCI systems and the security of indirect SCI systems as material and report such changes in accordance with such criteria. When submitting a report pursuant to Rule 1003(a)(2), the SCI entity shall provide a supplemental report of a material error in or material omission from a report previously submitted under Rule 1003(a); provided, however, that a supplemental report is not required if information regarding a material systems change is or will be provided as part of a notification made pursuant to Rule 1002(b).

*Exhibit 5: Rule 1003(b)(3)—Report of SCI Review.* The SCI entity shall provide the report of the SCI review, together with the date the report was submitted to senior management and the response of senior management to such report, within 60 calendar days after its submission to senior management of the SCI entity.

*Exhibit 6: Optional Attachments.* This exhibit may be used in order to attach other documents that the SCI entity may wish to submit as part of a Rule 1002(b)(1) initial notification submission or Rule 1002(b)(3) update submission.

**I. Explanation of Terms**

Critical SCI systems means any SCI systems of, or operated by or on behalf of, an SCI entity that: (1) directly support functionality relating to: (i) clearance and settlement systems of clearing agencies; (ii) openings, reopenings, and closings on the primary listing market; (iii) trading halts; (iv) initial public offerings; (v) the provision of market data by a plan processor; or (vi) exclusively-listed securities; or (2) provide functionality to the securities markets for which the availability of alternatives is significantly limited or nonexistent and without which there would be a material impact on fair and orderly markets.

Indirect SCI systems means any systems of, or operated by or on behalf of, an SCI entity that, if breached, would be reasonably likely to pose a security threat to SCI systems.

Major SCI event means an SCI event that has had, or the SCI entity reasonably estimates would have: (1) any impact on a critical SCI system; or (2) a significant impact on the SCI entity's operations or on market participants.

Responsible SCI personnel means, for a particular SCI system or indirect SCI system impacted by an SCI event, such senior manager(s) of the SCI entity having responsibility for such system, and their designee(s).

SCI entity means an SCI self-regulatory organization, SCI alternative trading system, plan processor, exempt clearing agency, SCI competing consolidator, SCI broker-dealer, or registered security-based swap data repository.

SCI event means an event at an SCI entity that constitutes: (1) a systems disruption; (2) a systems compliance issue; or (3) a systems intrusion.

SCI review means a review, following established and documented procedures and standards, that is performed by objective personnel having appropriate experience to conduct reviews of SCI systems and indirect SCI systems, and which review, using appropriate risk management methodology, contains: (1) with respect to each SCI system and indirect SCI system of the SCI entity, assessments performed by objective personnel of: (A) the risks related to capacity, integrity, resiliency, availability, and security; (B) internal control design and operating effectiveness, to include logical and physical security controls, development processes, systems capacity and availability, information technology service continuity, and information technology governance, consistent with industry standards; and (C) third party provider management risks and controls; and (2) penetration test reviews performed by objective personnel of the network, firewalls, and production systems, including of any vulnerabilities of its SCI systems and indirect SCI systems identified pursuant to paragraph § 242.1001(a)(2)(iv); (3) *provided, however,* that assessments of SCI systems directly supporting market regulation or market surveillance shall be conducted at a frequency based upon the risk assessment conducted as part of the SCI review, but in no case less than once every three years.

SCI systems means all computer, network, electronic, technical, automated, or similar systems of, or operated by or on behalf of, an SCI entity that, with respect to securities, directly support trading, clearance and settlement, order routing, market data, market regulation, or market surveillance; *provided, however,* that with respect to an SCI broker-dealer that satisfies only the requirements of paragraph (2) of the definition of ''SCI broker-dealer,'' such systems shall include only those systems with respect to the type of securities for which an SCI broker-dealer satisfies the requirements of paragraph (2) of the definition.

Systems Compliance Issue means an event at an SCI entity that has caused any SCI system of such entity to operate in a manner that does not comply with the Act and the rules and regulations thereunder or the entity's rules or governing documents, as applicable.

Systems Disruption means an event in an SCI entity's SCI systems that disrupts, or significantly degrades, the normal operation of an SCI system.

Systems Intrusion means any: (1) unauthorized entry into the SCI systems or indirect SCI systems of an SCI entity; (2) cybersecurity event that disrupts, or significantly degrades, the normal operation of an SCI system; or (3) significant attempted unauthorized entry into the SCI systems or indirect SCI systems of an SCI entity, as determined by the SCI entity pursuant to established reasonable written criteria.

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Part III

## Department of Transportation

National Highway Traffic Safety Administration

49 CFR Part 513
Implementing the Whistleblower Provisions of the Vehicle Safety Act; Proposed Rule

**DEPARTMENT OF TRANSPORTATION**

**National Highway Traffic Safety Administration**

**49 CFR Part 513**

**[Docket No. NHTSA–2023–0014]**

**RIN 2127–AL85**

## Implementing the Whistleblower Provisions of the Vehicle Safety Act

**AGENCY:** National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** Whistleblowers are an important source of information on motor vehicle safety, as Congress recognized in enacting the Motor Vehicle Safety Whistleblower Act (Whistleblower Act). NHTSA is proposing rules, including forms, to implement the Whistleblower Act and seeking comment from interested stakeholders. The Whistleblower Act authorizes the Secretary of Transportation to pay an award, subject to certain limitations, to eligible whistleblowers who voluntarily provide original information relating to any motor vehicle defect, noncompliance, or any violation or alleged violation of any notification or reporting requirement, which is likely to cause unreasonable risk of death or serious physical injury, if the information provided leads to the successful resolution of a covered action. The Whistleblower Act also contains protections relating to the whistleblower's identity. This proposed rule will help to facilitate the Agency's identification of information provided by whistleblowers to ensure that whistleblowers receive the protections afforded under the statute. It also describes those limited situations where information that could reasonably be expected to reveal the identity of a whistleblower may be disclosed.

**DATES:** All comments should be submitted early enough to ensure that the Department of Transportation Docket Management receives them not later than June 13, 2023. In compliance with the Paperwork Reduction Act, NHTSA is also seeking comment on a proposed information collection. See the Paperwork Reduction Act section under Regulatory Analyses and Notices below. Please submit all comments relating to the information collection requirements to NHTSA and to the Office of Management and Budget (OMB) at the address listed in the **ADDRESSES** section. Comments to OMB are most useful if submitted within 30 days of publication. See the Regulatory Analysis and Notices portion of this document for DOT's Privacy Act Statement regarding documents submitted to the Agency's dockets.

**ADDRESSES:** Interested parties may submit comments to the docket number identified in the heading of this document by any of the following methods:

- *Federal eRulemaking Portal:* go to *https://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building Ground Floor, Room W12–140, Washington, DC 20590.
- *Hand Delivery or Courier:* Docket Management Facility, U.S. Department of Transportation, West Building Ground Floor, Rm. W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590 between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays. To be sure someone is there to help you, please call (202) 366–9826 before coming.
- *Fax:* (202) 493–2251.

Comments on the proposed information collection requirements should be submitted to: Office of Management and Budget at *www.reginfo.gov/public/do/PRAMain.* To find this particular information collection, select ''Currently under Review—Open for Public Comment'' or use the search function. NHTSA also requests that comments sent to the OMB also be sent to the NHTSA rulemaking docket identified in the heading of this document.

*Instructions:* All submissions received must include the Agency name and docket number or Regulatory Identification Number (RIN) for this rulemaking. All documents received will be posted without change to *https://www.regulations.gov,* including any personal information provided. For detailed instructions on submitting comments and additional information on the rulemaking process, see the Public Participation heading of the **SUPPLEMENTARY INFORMATION** section of this document.

*Docket:* For access to the docket to read background documents or comments received, please visit *http://www.regulations.gov,* or the Docket Management Facility at the street address listed above. Follow the online instructions for accessing the dockets via internet.

*Privacy Act:* Please see the Privacy Act heading under Regulatory Analyses and Notices.

*Confidential Business Information:* If you wish to submit any information under a claim of confidentiality, you should submit your complete submission, including the information you claim to be confidential business information (CBI), to NHTSA's Office of the Chief Counsel. When you send a comment containing CBI, you should include a cover letter setting forth the information specified in our CBI regulation.[1] In addition, you should submit a copy from which you have deleted the claimed CBI to the docket by one of the methods set forth above. NHTSA is currently treating electronic submission as an acceptable method for submitting CBI to NHTSA under 49 CFR part 512. If you wish to send CBI via email, please contact the attorney in the Office of the Chief Counsel at the address given below under **FOR FURTHER INFORMATION CONTACT**. Likewise, for CBI submissions via a secure file transfer application, an attorney in the Office of the Chief Counsel must be set to receive a notification when files are submitted and have access to retrieve the submitted files. If you wish to send CBI via a secure file transfer, please contact the attorney identified in the **FOR FURTHER INFORMATION CONTACT** section. At this time, regulated entities should not send a duplicate hardcopy of their electronic CBI submissions to DOT headquarters. If you have any questions about CBI or the procedures for claiming CBI, please consult the person identified in the **FOR FURTHER INFORMATION CONTACT** section.

**FOR FURTHER INFORMATION CONTACT:** Kerry Kolodziej, Office of the Chief Counsel, NCC–100, National Highway Traffic Safety Administration (telephone: 202–366–5263), email: *Kerry.Kolodziej@dot.gov.*

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## I. Background

NHTSA relies on a wide variety of sources of information to identify potential safety issues and violations of law. Whistleblowers from the motor vehicle industry have particularized knowledge and access to information and can identify issues that otherwise may not come to light. Such whistleblowers can and have provided critical assistance to the Agency in understanding and investigating safety issues.

The Fixing America's Surface Transportation (FAST) Act, Public Law 114–94, established important protections and incentives for motor vehicle safety whistleblowers. The Motor Vehicle Safety Whistleblower Act (Whistleblower Act), sections 24351–25352 of the FAST Act, amended the National Traffic and Motor Vehicle Safety Act of 1966 (the Safety Act) to authorize the Secretary of Transportation (the Secretary) to pay an award, subject to certain limitations, to eligible whistleblowers who voluntarily provide original information relating to any motor vehicle defect, noncompliance, or any violation or alleged violation of any notification or reporting requirement of 49 U.S.C. chapter 301, which is likely to cause unreasonable risk of death or serious physical injury, if that information leads to the successful resolution of a covered action. Public Law 114–94, sections 24351–52, 129 Stat. 1716 (2015) (codifying ''Whistleblower incentives and protections'' at 49 U.S.C. 30172). The terms ''successful resolution'' and ''covered action'' are defined by statute. The FAST Act also contains provisions designed to protect a whistleblower's identity. 129 Stat. at 1718–19.[2]

Since the FAST Act was signed into law on December 4, 2015, NHTSA has received more than 150 whistleblower submissions. The information NHTSA has learned from whistleblowers has helped the Agency identify and investigate safety issues and violations of law. In one instance, a whistleblower's critical assistance to the Agency resulted in two consent orders with civil penalties totaling $210 million.[3] Pursuant to the incentives established by the FAST Act, NHTSA granted the whistleblower the maximum award authorized under statute for the significant contributions leading to that enforcement action.[4]

In addition to the statutory whistleblower protections and incentives added by the FAST Act, Congress required NHTSA to promulgate whistleblower regulations.[5] This proposal effectuates that requirement and is informed by the Agency's experience working with whistleblowers over the last several years. While the Agency has provided certain information to prospective whistleblowers on its website,[6] the Agency believes this proposed rule will provide helpful guidance to whistleblowers and other interested stakeholders on the interpretation and application of the statutory provisions. This proposed rule will also help ensure the Agency receives whistleblower information in a manner that is most useful to its safety mission and that helps it carry out the legal protections afforded to whistleblowers.

NHTSA is proposing to add a new part to its regulations, 49 CFR part 513, to further implement the whistleblower program established by the Whistleblower Act and codified at 49 U.S.C. 30172. As described in detail below, the proposal defines certain terms critical to the operation of the whistleblower program, outlines the procedures for submitting original information to NHTSA and applying for awards, discusses the Agency's procedures for making decisions on award applications, and generally explains the scope of the whistleblower program to the public and potential whistleblowers. The proposed rule would help to facilitate the Agency's identification of information provided by whistleblowers to ensure that whistleblowers receive the protections accorded under the statute and to inform the public of those limited circumstances where information that could reasonably be expected to reveal the identity of the whistleblower may be disclosed. The Agency requests comment on all aspects of the proposed rule, as well as comment on the specific provisions and issues highlighted in the discussion below.

The provisions that later became part of the Whistleblower Act appeared in a bill that was introduced in the 113th Congress as S. 2949 on November 20, 2014, the same day that the Senate Committee on Commerce, Science, and Transportation held a hearing to examine the Takata air bag recalls.[7] The then-Chairman discussed in his opening remarks at the Takata hearing that record fines had been levied against Toyota, GM, and Hyundai, and that ''with the latest news of problems with Takata air bags, we are again faced with examining an apparent failure with serious safety consequences.''[8] The then-Chairman stated his belief that whistleblowers could help identify problems before injuries or deaths occurred.[9] The proposed legislation was modeled in part on other ''existing statutory whistleblower protections that encourage individuals to share information with the Internal Revenue Service and the Securities and Exchange Commission.''[10]

[2] Additional protections for whistleblowers are found in 49 U.S.C. 30171. That program is administered by the Department of Labor. *See* 29 CFR part 1988. Specifically, the Department of Labor, Occupational Safety and Health Administration (OSHA) administers the whistleblower protection program under 49 U.S.C. 30171. Additional information can be found at *https://www.whistleblowers.gov.* Among other things, those provisions prohibit an employer from discharging or otherwise discriminating against an employee for providing information relating to any motor vehicle defect, noncompliance, or any violation or alleged violation of the Safety Act to NHTSA. This rulemaking is not intended to implement or otherwise affect 49 U.S.C. 30171.

[3] *https://www.nhtsa.gov/press-releases/nhtsa-announces-consent-orders-hyundai-and-kia-over-theta-ii-recall.*

[4] *https://www.nhtsa.gov/press-releases/first-whistleblower-award.*

[5] *See* 49 U.S.C. 30172(i).

[6] *https://www.nhtsa.gov/laws-regulations/whistleblower-program.*

[7] *See* S. Rep. 114–13, Motor Vehicle Safety Whistleblower Act, Report of the Committee on Commerce, Science, and Transportation at 3 (2015).

[8] *Thune Opening Statement at Commerce Hearing on Takata Air Bag Defects, available at https://www.commerce.senate.gov/public/index.cfm/2014/11/thune-opening-statement-at-commerce-hearing-on-takata-air-bag-defects.*

[9] *Id. See also Thune, Nelson Introduce Legislation to Help Prevent Auto Injuries, Deaths From Faulty Parts by Incentivizing Whistleblowers, available at https://www.commerce.senate.gov/public/index.cfm/2014/11/thune-nelson-introduce-legislation-to-help-prevent-auto-injuries-deaths-from-faulty-parts-by-incentivizing-whistleblowers.*

[10] *Thune, Nelson Introduce Legislation to Help Prevent Auto Injuries, Deaths From Faulty Parts by Incentivizing Whistleblowers, available at https://www.commerce.senate.gov/public/index.cfm/2014/11/thune-nelson-introduce-legislation-to-help-prevent-auto-injuries-deaths-from-faulty-parts-by-incentivizing-whistleblowers. See also* The Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*), Sec. 21F.

In proposing these rules, NHTSA has considered other Federal whistleblower programs, including the Securities and Exchange Commission's (SEC) rules to implement section 21F of the Securities Exchange Act of 1934 at 17 CFR 240.21F–1 through 240.21F–17 [11] and the Commodities Future Trading Commission's (CFTC) rules to implement section 23 of the Commodity Exchange Act at 17 CFR part 165.[12] NHTSA has also reviewed certain amendments to those rules, including recent amendments to the SEC's Whistleblower Program Rules [13] and 2017 amendments to the CFTC's whistleblower process [14] and has had discussions with Commission staffs regarding their whistleblower programs.[15]

The Agency has reviewed the U.S. Department of the Treasury's Internal Revenue Service (IRS) program for awards for information relating to detecting underpayments of tax or violations of the Internal Revenue laws.[16] The Agency also had discussions with the U.S. Department of Justice, Civil Division, Fraud Section staff regarding *qui tam* proceedings.[17]

These whistleblower program examples have informed NHTSA's proposal; however, there are also several important distinctions between the statutory authority and scope of these programs as compared to the statutory authority and scope of NHTSA's whistleblower program. As such, NHTSA's proposed rules are tailored to its statutory authority and programmatic considerations. The following examples of the differences between other whistleblower programs and NHTSA's authority for its whistleblower program are intended to be illustrative and not exhaustive.

One major difference is that the statutory definition of a ''whistleblower'' is narrower under the Whistleblower Act than in some other contexts. Under 49 U.S.C. 30172(a)(6), a whistleblower must be an employee or contractor of a motor vehicle manufacturer, part supplier, or dealership, whereas the definition of a whistleblower under the Securities and Exchange Commission (SEC) and the Commodity Futures Trading Commission (CTFC) programs includes ''any individual.'' [18]

Furthermore, under the Whistleblower Act, the whistleblower must provide ''original information relating to any motor vehicle defect, noncompliance, or violation or alleged violation of any notification or reporting requirement of [Chapter 301], which is likely to cause unreasonable risk of death or serious physical injury,'' [19] whereas a whistleblower under the SEC authority is an individual who provides ''information relating to a violation of the securities laws . . . .'' [20]

Additionally, 49 U.S.C. 30172 requires reporting to the company's internal reporting mechanism (if the company has one), except in certain circumstances, to be eligible for an award, whereas internal reporting is not required by statute under the SEC and CFTC's programs. Rather, the rulemakings by both the CFTC and SEC appear to consider such reporting in other ways.[21] [22]

While this rulemaking is in progress, it is important to make clear that the whistleblower protection and award provisions are statutory and not contingent on a rule being in place. NHTSA has an active, ongoing whistleblower program. During the pendency of this rulemaking, the Agency encourages whistleblowers to continue to submit information to the Agency, and notes that whistleblowers are afforded the protections contained in 49 U.S.C. 30172(f). Furthermore, a whistleblower may receive an award prior to the promulgation of the regulations, and the Agency has already issued one such award as noted above. A copy of the Agency's decision granting the award and additional information on NHTSA's whistleblower program is available on the Agency's website at *https://www.nhtsa.gov/laws-regulations/whistleblower-program*.

Since enactment of the statutory whistleblower provisions, the Agency has received inquiries from interested persons regarding the statute and how to submit whistleblower information or an award request. Prior to issuing a final rule, NHTSA has explained that there is no required form of submission. In the absence of rules, NHTSA has advised potential whistleblowers that any submission should consider the statutory provisions and that they may submit materials to NHTSA's Office of the Chief Counsel. NHTSA's Office of the Chief Counsel coordinates the Agency's whistleblower program. NHTSA has specifically encouraged

[11] *See* Proposed Rules for Implementing the Whistleblower Provisions of Section 21 F of the Securities Exchange Act of 1934, 75 FR 70488 (Nov. 17, 2010) *and* Securities Whistleblower Incentives and Protections, 76 FR 34300 (June 13, 2011).

[12] *See* Implementing the Whistleblower Provisions of Section 23 of the Commodity Exchange Act, 75 FR 75728 (Dec. 6, 2010) *and* Whistleblower Incentives and Protection, 76 FR 53172 (Aug. 25, 2011).

[13] *See* Whistleblower Program Rules, 85 FR 70898 (Nov. 5, 2020).

[14] *See* Whistleblower Awards Process, 82 FR 24487 (May 30, 2017).

[15] More information regarding the SEC's Whistleblower Program may be found at *https://www.sec.gov/whistleblower.* More information regarding the CFTC's whistleblower program may be found at *https://www.whistleblower.gov/.*

[16] *See* Awards for Information Relating to Detecting Underpayments of Tax or Violations of the Internal Revenue Laws, 77 FR 74758 (Dec. 18, 2012) and Awards for Information Relating to Detecting Underpayments of Tax or Violations of the Internal Revenue Laws, 79 FR 47246 (Aug. 12, 2014). For more information on the IRS whistleblower program, please see *https://www.irs.gov/compliance/whistleblower-office.*

[17] *Qui tam* actions are filed under the False Claims Act, 31 U.S.C. 3729 to 3733. Relators in successful actions are entitled to receive a percentage of any settlement or judgment the government recovers. Award percentage ranges depend on whether the government participated in the action. *See* 31 U.S.C. 3730(d). If the government intervenes, the relator generally receives ''at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action.'' 31 U.S.C. 3730(d)(1). If the government does not intervene, generally ''the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds.'' 31 U.S.C. 3730(d)(2).

[18] *See* 7 U.S.C. 26(a)(7), Securities Exchange Act of 1934, 15 U.S.C. 78u–6(a)(6). *See also Final Rule, Awards for Information Relating to Detecting Underpayments of Tax or Violations of the Internal Revenue Service Laws,* 79 FR 47246, 47248 (Aug. 12, 2014) (discussing how in some instances the final regulation uses the word individual instead of whistleblower to mimic the statute).

[19] 49 U.S.C. 30172(a)(6).

[20] Securities Exchange Act of 1934, 15 U.S.C. 78u–6(a)(6).

[21] *See, e.g.,* Securities Whistleblower Incentives and Protections, 76 FR 34360 (''The final rules provide that a whistleblower who reports internally can collect a whistleblower award from the Commission if his internal report to the company or entity results in a successful covered action. In addition, the final rules provide that when determining the amount of an award, the Commission will consider as a plus-factor the whistleblower's participation in an entity's internal compliance procedures.'').

[22] *See* Whistleblower Incentives and Protections, 76 FR 53173 (''With respect to the criteria for determining the amount of an award, the Final Rules provide that while the amount of an award is within the Commission's discretion, the Commission will consider (i) a whistleblower's report of information internally to an entity's whistleblower, compliance or legal system as a factor that potentially can increase the amount of an award; and (ii) a whistleblower's interference with such internal systems is a factor that can potentially decrease the amount of an award. Rule 165.9(b)(4), (c)(3). A whistleblower may be eligible for an award for reporting original information to an entity's internal compliance and reporting systems if the entity later reports information to the Commission that leads to a successful Commission action or related action. Under this provision, all of the information provided by the entity to the Commission will be attributed to the whistleblower, which means the whistleblower will get credit—and potentially a greater award—for any information provided by the entity to the Commission in addition to the original information reported by the whistleblower. Rule 165.2(i)(3).''

prospective whistleblowers to contact the Agency via *NHTSAWhistleblower@dot.gov*. That email account is monitored by NHTSA's Office of the Chief Counsel and helps the Agency ensure confidentiality and route the submission to the appropriate Agency personnel for consideration. NHTSA intends to follow these same practices until a final rule is issued, which may provide more specific submission requirements as proposed.

The submission requirements contained in this proposal are designed to assist the Agency in effectively administering the whistleblower program. However, the Agency recognizes that there are trade-offs in adopting more formalized submission requirements, particularly for prospective whistleblowers that are not represented by counsel. The Agency specifically invites comments regarding this issue.

Pending the completion of the rulemaking process, NHTSA has been reviewing information provided by whistleblowers and award requests and is taking action as warranted. Much of this proposal is informed by the Agency's experience to date with its whistleblower program. In addition, the Agency received several pre-docket submissions from stakeholders, which NHTSA has taken into consideration in crafting this proposal.

Specifically, the National Whistleblower Center provided a proposal that was modeled on the SEC's and IRS's whistleblower reward laws. A copy of this submission is included in the docket.

The law firm Constantine Cannon LLP also provided submissions related to other governmental whistleblower programs and made recommendations for NHTSA's program, including its views on how to interpret certain provisions of the Whistleblower Act. A copy of these submissions will be included in the docket. Constantine Cannon had a discussion with NHTSA in April 2021 and provided written material in May 2021 regarding its thoughts on NHTSA's whistleblower program. Constantine Cannon emphasized the need for NHTSA's whistleblower program to be carefully conceived and implemented and provided several principles that should guide NHTSA as it develops rules for the program. The first principle is that NHTSA should maximize the pool of people who can be whistleblowers and not impose impediments to award eligibility. Examples of this would include defining both current *and* former employees and contractors under the term ''whistleblower,'' that the whistleblower does not need to be an employee or contractor of the entity against which NHTSA brings an enforcement action, that the rules should consider a whistleblower the ''original source'' of the information if it materially adds to the information that NHTSA possesses, and that monetary sanctions should not be limited to just funds paid to the Treasury. Constantine Cannon also stated that NHTSA should interpret the internal-reporting requirement narrowly and in a manner that reflects practical workplace realities.

The next principle articulated by Constantine Cannon is that NHTSA should articulate a presumption of award entitlement to whistleblowers who meet established requirements and describe the specific circumstances in which that presumption will be overcome.

The final principle stated by Constantine Cannon is that NHTSA and DOT leadership must demonstrate that whistleblowers play a key role in the Agency's enforcement work, including making it simple for potential whistleblowers to make a report, and consider creating a dedicated whistleblower office or at least dedicating staff to the whistleblower program. Constantine Cannon recommended that leadership publicly support the whistleblower program and seek opportunities to publicize the program. Constantine Cannon also stated that NHTSA should rely to the maximum extent possible on the knowledge and resources whistleblowers have to offer, which includes collaborating with the whistleblower in the investigation and prosecution of legal violations. Additionally, Constantine Cannon states that NHTSA should leverage the resources of the specialized whistleblower bar.

In late 2021, NHTSA also met with Hyundai Motor America Inc.'s (Hyundai) counsel and outside counsel, Covington and Burling LLP (Covington) regarding their thoughts on the rulemaking to implement 49 U.S.C. 30172. The stakeholders provided a presentation regarding building an effective whistleblower program. A copy of the presentation will be included in the docket.

The presentation noted that the NHTSA program was modeled on the Dodd-Frank Wall Street and Consumer Protection Act (Dodd-Frank). They noted that while Dodd-Frank is useful, the Whistleblower Act is unique and mentioned some differences between the SEC's program and NHTSA's. They stated that NHTSA must promulgate clear and specific regulations to initiate and implement a successful whistleblower program.

They highlighted that the procedures that the SEC uses for submitting whistleblower award applications and appeared to suggest this as a model for NHTSA to consider. They mentioned that when determining an award, the most important element to consider is if the whistleblower added value. They cautioned that there is a risk that a prospective whistleblower will just utilize information in the public domain to make an award application. They also argued that the term ''voluntary'' should not include people who have been subpoenaed, highlighted that certain terms warrant additional enumeration in the rules and need to be carefully defined, and specifically suggested that that NHTSA should define ''leads to.'' The stakeholders also expressed their position regarding disqualification criteria and suggested that convictions in any tribunal related to the covered action should disqualify a whistleblower from an award. They also indicated that a whistleblower must show by clear and convincing evidence that the company made them commit the alleged violation if that is a defense to disqualification.

Additionally, the stakeholders noted that the internal reporting requirement is critical to the mandatory reporting requirements of the Safety Act, that NHTSA needs to incentivize the whistleblower to report to the company first, and that NHTSA should define the exception to the internal reporting requirement narrowly. Finally, they provided their thoughts that awards should be based only on amounts collected.

While the descriptions above are not exhaustive, we appreciate the engagement from stakeholders on this important issue and look forward to receiving additional public input on this proposal.

## II. Description of the Proposed Rules

### Part 513—Whistleblower Program

This proposal would establish a new part 513, within title 49 of the Code of Federal Regulations, to house NHTSA's whistleblower rules.

#### *A. Proposed Rule § 513.1—General*

Proposed rule § 513.1 provides a general description of NHTSA's whistleblower program. Specifically, it states that part 513 describes the whistleblower program that the Agency has established to implement the Motor Vehicle Safety Whistleblower Act, 49 U.S.C. 30172; explains the procedures

that the potential whistleblower will need to follow to be eligible for an award; and discusses the circumstances under which information that may reasonably be expected to reveal the identity of a whistleblower may be disclosed by NHTSA. Additionally, it cautions potential whistleblowers to read the procedures carefully because failure to take required steps within the time frames described may result in disqualification from receiving an award. The proposed rule provides contact information for NHTSA's Office of the Chief Counsel at *NHTSAWhistleblower@dot.gov*. It also states that, unless expressly provided for in the rules, no person is authorized to make any offer or promise, or otherwise bind the Agency, with respect to the payment of an award or the amount thereof, and makes clear that any such offer or promise will not be honored.

*B. Proposed Rule § 513.2—Definitions*

1. Proposed Rule § 513.2(a) Statutory Definitions

Proposed rule § 513.2(a) proposes that all terms used in this part have the same meaning as those defined in 49 U.S.C. 30102(a) or (b), unless otherwise defined in part 513. For example, a ''manufacturer'' under part 513 would mean those persons manufacturing or assembling motor vehicles or motor vehicle equipment or importing motor vehicles or motor vehicle equipment for resale. *See* 49 U.S.C. 30102(a)(6). NHTSA notes that manufacturers encompass a number of different businesses that often are situated differently. It includes, for example, the original assembler or producer of a motor vehicle, which may be a foreign corporation operating in a foreign country or a domestic corporation. It also includes importers, which may be independent corporations domiciled in the United States or U.S. subsidiaries of foreign companies such as vehicle manufacturers. It also includes registered importers.[23]

2. Proposed Rule § 513.2(b) Other Terms

49 U.S.C. 30172 defines several terms. The Agency has incorporated these definitions in proposed rule § 513.2(b) but has clarified or modified the definitions where necessary to effectuate the purposes of the statute. Proposed rule § 513.2(b) also defines additional terms, described below, that are relevant to understanding the scope of the whistleblower award program and to provide greater clarity about the operation of the program. The Agency requests comment on whether other terms should be defined, and if so, the Agency requests that the commenter provide proposed definitions for such other terms.

a. Proposed Rule § 513.2(b), Administrative Action

The Agency is proposing a definition of administrative action because it is a term used in the statutory definition of ''covered action.'' 49 U.S.C. 30172(a)(1). Proposed rule § 513.2(b) defines the term ''administrative action'' as meaning all or a portion of an action, other than a judicial action, brought by NHTSA or the U.S. Department of Transportation under 49 U.S.C. chapter 301 that may result in civil penalties or other monetary payment paid to and collected by the United States government.[24] It specifically includes settlement agreements and consent orders that are entered into by the Agency.

NHTSA is proposing to include a definition of the term ''administrative action'' because the definition of ''covered action'' contained in 49 U.S.C. 30172 encompasses actions by parties other than the Secretary. The Agency proposes to define such administrative actions to include those actions brought by NHTSA or the U.S. Department of Transportation, which both have jurisdiction to bring administrative actions under the Safety Act. The statutory definition of ''covered action'' contained in section 30172 refers to administrative or judicial actions brought by the Secretary or the Attorney General under 49 U.S.C. chapter 301. The Attorney General would bring judicial actions under 49 U.S.C. chapter 301, but any administrative actions brought under that chapter would be brought by NHTSA or the U.S. Department of Transportation.[25]

Consent orders issued by NHTSA,[26] settlement agreements entered into by the Agency,[27] and other such agreements that the Agency is a party to in order to administratively resolve claims for civil penalties would be considered administrative actions.[28] Administrative actions could also include other final agency actions, such as determination letters that a deferred penalty agreed to under a consent order is due. The Agency believes that this will best effectuate the intent of Congress to incentivize whistleblowers to come forward with information that may lead to an award, as these types of agreements have most often been the basis of civil penalties exceeding $1,000,000.

Furthermore, unlike the SEC,[29] NHTSA does not have administrative law judges who issue initial decisions that include findings of fact and legal conclusions. Therefore, it is NHTSA's belief that Congress did not mean ''administrative action'' in the sense of a formal administrative proceeding, such as a proceeding subject to 5 U.S.C. 554. NHTSA's main method of resolving actions that result in a payment of a civil penalty has been through consent orders and settlement agreements, and thus it makes sense for those actions to be included in the types of actions that may form the basis for a whistleblower award.

b. Proposed Rule § 513.2(b), Agency

Proposed Rule § 513.2(b) defines the term ''Agency'' as referring to NHTSA.

c. Proposed Rule § 513.2(b), Collected Monetary Sanctions

''Monetary sanctions'' is defined in section 30172(a)(2), but whistleblower awards can only be paid from ''collected monetary sanctions'' under section 30172(b)(1). This proposed definition clarifies that the term ''collected monetary sanctions'' means monies, including penalties and interest, ordered or agreed to be paid and that have been collected by the United States pursuant to the authority in 49 U.S.C. 30165 or under the authority of 49

[23] NHTSA authorizes registered importers to import noncompliant vehicles and then bring the vehicles into compliance, repair and open recalls, certify them as compliant and hold them for a mandatory waiting period before releasing them for sale. For more information on registered importers, *see e.g.* 49 U.S.C. 30141 and 49 CFR part 592.

[23] As discussed further below, it is our view that civil penalties, interest, or other monetary payment referenced in the statute only refers to those monies that are payable to the United States and that are actually collected by the United States.

[25] *See* 49 U.S.C. 30163 (focusing on civil actions).

[26] *See, e.g., https://www.nhtsa.gov/press-releases/nhtsa-announces-consent-orders-hyundai-and-kia-over-theta-ii-recall*; *https://www.nhtsa.gov/press-releases/nhtsa-announces-consent-order-daimler-trucks-north-america.*

[27] Although these settlement agreements did not result in collected monetary sanctions of over one million dollars, these are examples of settlement agreements entered into by the Agency recently: *In re Northwest Chrysler Jeep Dodge Ram, AQ17–004 Settlement Agreement, available at https://www.nhtsa.gov/sites/nhtsa.gov/files/2021-11/AQ17-004-Northwest-Settlement-Agreement-08-19-2020-tag.pdf*; and *In Re Navistar Recalls 18V–315, 18V–316 Settlement Agreement, available at https://www.nhtsa.gov/sites/nhtsa.gov/files/documents/navistar_settlement_agreement_2019-12-18.pdf.*

[28] These could encompass such things as amended consent orders requiring additional civil penalties. *See In re FCA US LLC AQ14–003, Amendment to July 25, 2015 Consent Order, available at https://www.nhtsa.gov/sites/nhtsa.gov/files/2021-11/AQ14-003X-FCA-Consent-Order-Amendment-EWR-12-8-2015-tag.pdf.*

[29] *See, e.g., How Investigations Work, available at https://www.sec.gov/enforce/how-investigations-work.html.*

U.S.C. 30170. This is consistent with the express terms of the statute, which provides: ''Any amount payable [to a whistleblower] . . . shall be paid from the monetary sanctions collected, and any monetary sanctions so collected shall be available for such payment.'' 49 U.S.C. 30172(b)(2).

The Agency is aware that some stakeholders have advocated for the position that restitution to parties other than the United States ordered in cases should be considered monetary sanctions. The Agency believes that ''collected monetary sanctions'' cannot reasonably be construed to include such restitution intended to directly compensate victims and other affected third parties (as opposed to penalties paid to the United States).

Likewise, in some of the Agency's settlements, companies agree to pay a certain amount toward performance obligations, such as investing in safety data analytics [30] or development of a testing laboratory.[31] NHTSA does not view these performance obligations as constituting a ''collected'' monetary sanction. In those situations where the agreement allows for collection of the performance obligation amounts in the form of a monetary payment to the United States government as a consequence of the violation of the consent order, and the violating company does pay that sum to the United States, the Agency's view is that if all of these conditions are met, such amount could be considered a collected monetary sanction. Likewise, in those cases where the agreement specifies that if the total performance amount is not spent and the company is liable for a cash payment to NHTSA for the balance of the unspent portion,[32] and the company pays such amount to NHTSA, that could be considered a collected monetary sanction.

NHTSA has also used ''deferred penalties'' or ''abeyance amounts'' in several of its consent orders.[33] These generally are agreed amounts to be paid as a monetary penalty in the event that the company violates the consent order, the Safety Act, or the regulations thereunder. It is NHTSA's view that these sums only become ''collected monetary sanctions'' if and when the deferred penalty or abeyance amount is actually paid to the United States government.

These views are consistent with the statutory requirement that: ''Any amount payable [to a whistleblower] . . . shall be paid from the monetary sanctions collected, and any monetary sanctions so collected shall be available for such payment.'' 49 U.S.C. 30172(b)(2). Penalties allocated to performance obligations and deferred penalties that have not been paid to the United States government are neither ''collected'' nor ''available for [ ] payment.''

The Agency anticipates that in circumstances where deferred amounts or unspent performance obligation balances become due and are collected by the United States, NHTSA will post a notice on its website if such action occurs.

d. Proposed Rule § 513.2(b), Contractor

Consistent with 49 U.S.C. 30172(a)(6), proposed rule § 513.2(b) defines ''contractor'' as an individual presently or formerly providing goods or services to a motor vehicle manufacturer, part supplier, or dealership pursuant to a contract. The Agency believes that the definition must include both present and former contractors to maximize the reach and effectiveness of the whistleblower program. For example, if a contractor were terminated by his or her company after reporting safety issues, it would not serve the purpose of the Whistleblower Act to bar such a contractor from an award simply because he or she no longer works for the company.

e. Proposed Rule § 513.2(b), Covered Action

Under the statute, the term ''covered action'' means ''any administrative or judicial action, including any related administrative or judicial action, brought by the Secretary or the Attorney General under this chapter that in the aggregate results in monetary sanctions exceeding $1,000,000.'' Proposed rule § 513.2(b) is based on the definition of covered action from section 30172(a)(1) and clarifies how the above $1,000,000 threshold can be met.

The Agency tentatively believes that since the statute specifies that the action is brought by the Secretary or Attorney General ''under this chapter,'' the statute is referring solely to 49 U.S.C. chapter 301 and the regulatory obligations promulgated under 49 U.S.C. chapter 301, as the Whistleblower Act was codified as part of 49 U.S.C. chapter 301. The Agency tentatively believes that the plain language of the statute is clear, and that it does not have discretion under the statute to consider actions taken under other statutes (such as separate criminal statutes) as part of a ''covered action,'' even if such actions involve vehicle safety issues and/or are based on facts common to an action taken under 49 U.S.C. chapter 301. One could argue that the phrase ''including any related administrative and judicial action'' could be read as referring to actions outside of chapter 301 of title 49, United States Code. However, the Agency tentatively believes that its proposal to limit ''covered actions'' to chapter 301 or regulations thereunder is compelled by the statute.[34]

''[R]elated action'' under 49 U.S.C. chapter 301 is given effect by considering two actions under 49 U.S.C. chapter 301. For example, if NHTSA pursues two separate enforcement actions for violations of 49 U.S.C. chapter 301, or regulations thereunder, against two different companies (for example, a supplier and a vehicle manufacturer) based on the same facts provided by a whistleblower, in that case, the two separate actions would be related.[35] If the monetary sanctions collected for those two actions exceeded one million dollars in aggregate, the two actions together would be considered a ''covered action.''

The purpose of 49 U.S.C. chapter 301 is ''to reduce traffic accidents and deaths and injuries resulting from traffic accidents.'' 49 U.S.C. 30101. The whistleblower program was designed to reward employees or contractors who ''blow the whistle'' on motor vehicle defects, noncompliance, or violations or alleged violations of any notification or reporting requirement of the chapter which is likely to cause an unreasonable risk of death or serious physical injury, and thus is closely aligned with the purposes of 49 U.S.C. chapter 301.

While section 30172(c)(2)(A) generally provides that no award shall be made to any whistleblower who is

[30] *See In Re Daimler Trucks North America LLC, AQ18–002 Consent Order, Para. 12(c), available at https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/aq18-002_consent_order_executed.pdf.*

[31] *See In re Hyundai Motor America, Inc. RQ17–004, NHTSA Recall No. 15V–568, NHTSA Recall No. 17V–226, Consent Order, Para. 21, available at https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/rq17-004_hyundai_consent_order_executed_11272020.pdf.*

[32] *See In re Kia Motors America, RQ17–003, NHTSA Recall 17V–224, Consent Order, Para. 26, available at https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/rq17-003_kia_consent_order_executed_11272020.pdf.*

[33] *See, e.g., In Re Daimler Trucks North America LLC, AQ18–002 Consent Order, Para. 12(b), available at https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/aq18-002_consent_order_executed.pdf.*

[34] In the event a court found ambiguity in the statute, we believe that our interpretation is the clearest reading of the statute and makes the most sense for the reasons described in this proposal.

[35] In fact, NHTSA's first whistleblower award came in the context of enforcement actions resulting in consent orders with two companies (Hyundai and Kia). *See https://www.nhtsa.gov/sites/nhtsa.gov/files/2022-02/whistleblower-decision-letter-RQ17-003-Kia-RQ17-004-Hyundai_web.pdf.*

convicted of a criminal violation ''related to the covered action'' for which the whistleblower otherwise could receive an award under this section, NHTSA tentatively does not believe that the use of the word ''related'' in that context can be extrapolated to the meaning of ''related'' in 49 U.S.C. 30172(a)(1). That is, it is the Agency's tentative view that the whistleblower cannot be issued an award percentage of monies paid by a company for criminal violations of statutes other than the Safety Act. Such a reading would be inconsistent with the requirement of the statute that the action be brought ''under this chapter.'' For example, a criminal action for wire fraud under 18 U.S.C. 1343 is not an action under the Safety Act (49 U.S.C. chapter 301). However, the Agency tentatively believes a criminal action brought under 49 U.S.C. 30170, the criminal penalties provision of the Safety Act, would be a covered action under the Whistleblower Act.[36]

Unlike the SEC[37] or CFTC,[38] NHTSA does not have a fund set aside from which to pay awards. Rather, it appears that the money to pay whistleblowers was intended to come from the entity that paid the penalty. The FAST Act, section 31202, appropriates to the Highway Trust Fund amounts equivalent to ''covered motor vehicle safety penalty collections.'' The section defines ''covered motor vehicle safety penalty collections'' as any amount collected in connection with a civil penalty under 30165 of title 49, United States Code, *reduced by any award authorized by the Secretary of Transportation to be paid to any person in connection with information provided by such person related to a violation of chapter 301 of such title which is a predicate to such civil penalty* (emphasis added). In addition, 49 U.S.C. 30172(b)(2) explicitly provides: ''Any amount payable [to a whistleblower] . . . shall be paid from the monetary sanctions collected, and any monetary sanctions so collected shall be available for such payment.'' Based on this, it is our view that whistleblowers are paid out of the money collected from the entity that paid a Safety Act penalty or fine.[39] The Agency recognizes that actions under 49 U.S.C. 30170 are not civil penalty actions brought under 49 U.S.C. 30165 and the mechanism for funding whistleblower awards under 49 U.S.C. 30170 does not appear to be defined by statute. The Agency therefore requests comment on its interpretation of including actions under 49 U.S.C. 30170 as an action ''under this chapter.''

As a practical matter, NHTSA also does not have ready access to the information that would be needed to make a decision about an award sought for monies collected from an action brought under a statute other than the Safety Act. For example, NHTSA may be unable to evaluate the significance of the original information provided by the whistleblower to the successful resolution of a criminal action for wire fraud or other statute outside NHTSA's jurisdiction and expertise. Likewise, NHTSA may be unaware of ''the degree of assistance provided by the whistleblower and any legal representative of the whistleblower in'' an action brought under statutes outside NHTSA's jurisdiction. NHTSA may have limited or no involvement in such an action. Therefore, NHTSA's ability to make an award determination may have to rely on the Department of Justice to reveal information regarding its internal processes and other information that it ordinarily keeps confidential, over which release NHTSA does not have control. These practical considerations support the plain language reading of the statute as limited to actions under the Safety Act.

In sum, the Agency tentatively does not believe that a covered action includes any action brought by the U.S. Department of Justice under any statute other than those contained in 49 U.S.C. chapter 301 or regulation issued thereunder. We are cognizant that this issue is of particular interest given the potential implications on the amount of a whistleblower award, or whether any award is available in some cases, and we invite comments on our views.

Additionally, the definition of ''covered action'' in proposed rule § 513.2(b) clarifies that NHTSA can bring an action, since the Secretary's authority under 49 U.S.C. chapter 301 has been delegated to the Administrator of NHTSA. 49 CFR 1.95(a). In practice, civil penalty actions for violations of the Safety Act and regulations thereunder resulting in monetary sanctions exceeding $1,000,000 are generally accomplished by settlement agreements with NHTSA or consent orders issued by the NHTSA Administrator.[40]

The definition of ''covered action'' in proposed rule § 513.2(b) also clarifies that an action under 49 U.S.C. chapter 301 includes actions for violations of regulations promulgated under 49 U.S.C. chapter 301. Including these clarifications in the definition of ''covered action'' would better effectuate the purposes of the Motor Vehicle Safety Whistleblower Act.

The proposed definition of ''covered action'' also clarifies that the over $1,000,000 threshold can be satisfied if the total amount of monetary sanctions paid by multiple defendants or parties and collected by the United States totals more than $1,000,000 in the covered action. That is, the Agency proposes that multiple smaller sanctions paid by different parties in the same action could be added up to exceed the more than $1,000,000 threshold. Similarly, the Agency also believes that multiple smaller sanctions paid by different parties in the related actions (or the same party, such as in the case of an amended consent order that requires payment of additional penalties or later payment of penalties held in abeyance) could be included to exceed the more than $1,000,000 threshold.[41] The Agency does not want to foreclose a whistleblower's eligibility for an award in these situations.

f. Proposed Rule § 513.2(b), Dealership

The Agency is proposing a definition of ''dealership'' because it is a term used in the statutory definition of

[36] Section 30170(a)(1) provides for criminal liability for falsifying or withholding information. It states, ''A person who violates [18 U.S.C. 1001] with respect to the reporting requirements of section 30166, with the specific intention of misleading the Secretary with respect to motor vehicle or motor vehicle equipment safety related defects that have caused death or serious bodily injury to an individual (as defined in section 1365(g)(3)[1] of title 18), shall be subject to criminal penalties of a fine under title 18, or imprisoned for not more than 15 years, or both.''

[37] *See* 15 U.S.C. 78u–6(b)(2) (stating that any whistleblower award shall be paid from the ''Fund'') and 15 U.S.C. 78u–6(a)(2) (defining the ''Fund'' as the Securities and Exchange Commission Investor Protection Fund.'').

[38] *See* 7 U.S.C. 26(g)(2) (establishing a revolving fund to be known as the ''Commodity Futures Trading Commission Customer Protection Fund'').

[39] The Agency's position is also supported by the cost estimate prepared by the Congressional Budget Office included in S. Rep. 114–13, Motor Vehicle Safety Whistleblower Act, Report of the Committee on Commerce, Science, and Transportation, p. 4 (2015), which stated, ''Basis of estimate: S. 304 would authorize the Secretary of Transportation at his discretion, to award to a whistleblower up to 30 percent of any civil penalty that exceeds $1 million and is collected from a company that manufactures motor vehicles or parts with serious defects or that violates certain safety laws.''

[40] *See, e.g., http://www.nhtsa.gov/Laws-&-Regulations/Civil-Penalty-Settlement-Amounts.*

[41] The Agency believes that in order for these amounts to be counted to exceed the more than $1,000,000 threshold, those amounts need to be connected to the original information provided by the whistleblower. For example, if there was a whistleblower who received an award in connection with the initial civil penalty action, it is our tentative view that such whistleblower would not be eligible for an award percentage of any amount collected from the deferred/abeyance amounts, unless the whistleblower provided original information that led to the Agency determining the deferred penalty payment was required.

whistleblower. 49 U.S.C. 30172(a)(6). The term ''dealership'' appears only in 49 U.S.C. 30172 and does not appear in any other provision of 49 U.S.C. chapter 301. Given the purpose of the whistleblower provisions, the Agency proposes to define ''dealership'' using a broader definition than the statutory definition of ''dealer'' found in 49 U.S.C. 30102(a)(2). Under this proposal, a ''dealership'' means a person selling and distributing motor vehicles or motor vehicle equipment primarily to purchasers that in good faith purchase the vehicles or equipment other than for resale. The definition is not limited to a dealership selling new motor vehicles, as is the statutory definition of ''dealer.'' For example, an employee of a used car dealer could identify and bring to the Agency's attention a safety defect in a vehicle that has not been timely recalled. The Agency believes it is appropriate to include used car dealerships within the scope of the whistleblower provisions to best effectuate the incentives and protections of the statute.

g. Proposed Rule § 513.2(b), Employee

The Agency is proposing a definition of ''employee'' because it is a term used in the statutory definition of whistleblower. 49 U.S.C. 30172(a)(6). Proposed rule § 513.2(b) defines ''employee'' as an individual presently or formerly employed by a motor vehicle manufacturer, part supplier, or dealership. The Agency believes that the definition should include both present and former employees to maximize the reach and effectiveness of the whistleblower program. It would not serve the purpose of the Whistleblower Act to bar a former employee from an award simply because he or she no longer works for the motor vehicle manufacturer, part supplier, or dealership.

The Agency requests comment on whether an owner of a motor vehicle manufacturer, part supplier, or dealership should be considered an ''employee'' of such entity, and if so, in what situations it would be appropriate to consider such person as an ''employee.'' Relevant considerations include the ability of an owner to address potential safety issues and violations of law within that entity, and the potential for an owner to have information regarding a different entity. For example, an owner of a dealership may have information regarding safety-related defects or noncompliances with applicable Federal Motor Vehicle Safety Standard (''FMVSS'') in vehicles for vehicles provided to it by a vehicle manufacturer. Another example is that an owner of a registered importer may have information about potential Safety Act violations committed by another registered importer.

h. Proposed Rule § 513.2(b), Independent Knowledge or Analysis

Section 30172(a)(3) contains a definition of original information. Section 30172(a)(3)(A) states that original information is information that ''is derived from independent knowledge or analysis of an individual.''

The Agency considered the definitions of independent knowledge contained in the SEC's and CFTC's whistleblower regulations in crafting its proposed definition.[42] Proposed rule § 513.2(b) defines ''independent knowledge'' as factual information in the potential whistleblower's possession that is not generally known or available to the public and is not already known to NHTSA. Publicly available sources include both sources that are widely disseminated, such as corporate press releases and filings, and media reports, as well as sources that, while not widely disseminated, are generally available to the public, such as court filings and documents obtained through Freedom of Information Act requests.

The proposed definition does not require that a potential whistleblower have direct, first-hand knowledge of potential violations. The proposed definition states that the potential whistleblower may gain independent knowledge from the potential whistleblower's experiences, communications and observations in the potential whistleblower's business or social interactions. Thus, for example, under proposed rule § 513.2(b), a potential whistleblower may have ''independent knowledge'' of information even if that knowledge derives from facts or other information that has been conveyed to the potential whistleblower by third parties. The Agency preliminarily believes that defining ''independent knowledge'' in this way best effectuates the purpose of the Whistleblower Act, as an employee or contractor may learn about potential violations of the Safety Act without being personally involved in the conduct and the information would not otherwise come to NHTSA's attention.

The Agency has also proposed rule § 513.2(b) to define the phrase ''analysis'' to mean the potential whistleblower's examination and evaluation of information that may be generally or publicly available, but which reveals information that is not generally known or available to the public. The proposed definition of ''analysis'' is similar to that used in the SEC's whistleblower regulations as well as the CFTC's whistleblower regulations.[43] This proposed definition recognizes that potential whistleblowers could review publicly available information and, through their individual evaluation and examination, provide assistance to the Agency in uncovering violations of the Safety Act.

In 2020, the SEC issued final interpretive guidance regarding the term ''analysis,'' specifically with respect to publicly available information.[44] The SEC stated, ''the evaluation of publicly available information reveals information that is 'not generally known or available to the public'—and therefore is 'analysis'. . . where ''(1) The whistleblower's conclusion of possible securities violations derives from multiple sources, including sources that, though publicly available are not readily identified and accessed by a member of the public without specialized knowledge, unusual effort, or substantial cost; and (2) these sources collectively raise a strong inference of potential securities law violation that is not reasonably inferable by the Commission from any of the sources individually.''

Like the SEC, NHTSA believes that ''analysis'' requires the potential whistleblower to do more than merely point the Agency to public information assembled by the potential whistleblower. The potential whistleblower must bring forth some additional evaluation, assessment or insight, as the ''analysis'' must reveal information that is not generally known or available to the public. NHTSA may determine that a whistleblower's examination and evaluation of publicly available information reveals information that is ''not generally known or available to the public'' and therefore is ''analysis'' where: (1) The whistleblower's conclusion of any motor vehicle defect, noncompliance, or any violation or alleged violation of any notification or reporting requirement of this chapter, which is likely to cause unreasonable risk of death or serious physical injury, derives from multiple sources, including sources that, although publicly available, are not

[42] *See* 17 CFR 165.2(g) *and* 17 CFR 240.21F–4(b)(2).

[43] *See* 17 CFR 240–21F–4(b)(3) and 17 CFR 165.2(c) (defining analysis as the whistleblower's ''examination and evaluation of information that may be publicly available, but which reveals information that is not generally known or available to the public.'').

[44] *Whistleblower Program Rules,* 85 FR 70898, 70929–31 (Nov. 5, 2020).

readily identified and accessed by a member of the public without specialized knowledge, unusual effort, or substantial cost; and (2) these sources collectively raise a strong inference of an existence of a motor vehicle defect, noncompliance, or any violation of a notification or reporting requirement that is likely to cause unreasonable risk of death or serious physical injury that is not reasonably inferable by the Agency from any of the sources individually.

The proposed rule makes it clear that the analysis must be the potential whistleblower's own analysis, whether done alone or in combination with others.[45] The proposed rule recognizes that analysis is often the product of collaboration among two or more individuals. However, the Agency believes that only those individuals who are employees or contactors of a motor vehicle manufacturer, part supplier, or dealership could be eligible for an award if they meet the other requirements of 49 U.S.C. 30172 and regulations thereunder.

The definition of ''independent knowledge or analysis'' in proposed rule § 513.2(b) further provides that information will not be considered to derive from an individual's ''independent knowledge or analysis'' in some situations. The Agency requests comment on whether these are appropriate exclusions and whether additional exclusions should be added.

The first proposed exclusion is for information that was obtained solely through a communication that is subject to the attorney-client privilege[46] or work product doctrine.[47] The Agency recognizes that the both the SEC and CFTC whistleblower programs would not exclude the disclosure if it was authorized by the applicable Federal or State attorney conduct rules,[48] and requests comment on whether it should include a similar carve-out in its regulations.

The Agency recognizes that there are some exceptions to these various privileges, such as Federal Rule of Civil Procedure 26(b)(3) (providing that materials prepared in anticipation of litigation may be discovered by an adverse party if the party shows ''substantial need'' and ''undue hardship''), and the crime-fraud exception to the attorney-client privilege. However, the Agency has concerns that it will not be able to tell whether an exception would apply at the outset. Furthermore, NHTSA anticipates that attorneys in its Office of the Chief Counsel, in conjunction with engineers or others from the program office, will be reviewing submissions made by potential whistleblowers. The rule as proposed would help implement 49 U.S.C. 30172 in a manner consistent with the State bar ethics rules governing the professional responsibilities of lawyers. At this time, NHTSA has determined that we cannot review materials protected by attorney-client privilege pursuant to the District of Columbia Rules of Professional Conduct. This determination is based on our understanding of the District of Columbia Bar's Ethics Opinion 318: Disclosure of Privileged Material by Third Party.

Additionally, compliance with 49 U.S.C. chapter 301 and regulations thereunder is promoted when individuals, corporate officers, and others consult with counsel about potential issues. This important benefit could be undermined if an employee or contractor was able to disclose the company's attorney-client privileged information or attorney work product to the Agency.

The proposed exclusion is not intended to preclude an individual who has independent knowledge or analysis of potential Safety Act violations from becoming a whistleblower if that person chooses to consult with an attorney or is an attorney. Rather, this exclusion would prohibit an employee or contractor from revealing attorney-client privileged or work product information that they learned of solely through a privileged communication.

The second proposed exclusion is for information that was obtained in a means or manner that is determined by a United States Federal court or State court to violate applicable Federal or State criminal law. The Agency recognizes that it is likely that a violation determination would not yet have been made at the time a whistleblower submits documents or other information to NHTSA, and the Agency specifically requests comment on this proposal. As one measure, the Agency could caution the whistleblower against submission of this information if there is reason to believe that the information might be determined to violate applicable Federal or State criminal law.

One rationale for the exclusion is that a potential whistleblower should not be rewarded for violating a Federal or State criminal law. On the other hand, it is possible that companies could threaten potential whistleblowers with criminal prosecution for theft, blackmail, extortion, or other such actions if the whistleblower provides or attempts to provide information to NHTSA. Threats of criminal prosecution would likely deter a whistleblower from reporting violations to NHTSA and such deterrence may be contrary to public policy.

NHTSA is not proposing to categorically exclude information that may be provided to it in possible violation of judicial or administrative orders, such as protective orders in private litigation. As explained in a NHTSA Enforcement Guidance Bulletin, ''To the extent protective orders, settlement agreements, or other confidentiality provisions prohibit information obtained in private litigation from being transmitted to NHTSA, such limitations are contrary to Rule 26 of the Federal Rules of Civil Procedure, its state corollaries, and sound principles of public policy.''[49] However, potential whistleblowers must exercise caution to avoid violating a legally binding order, and may wish to consult with private counsel before providing NHTSA with information covered by any such order. In the event of uncertainty (such as in the absence of a protective order provision authorizing disclosure to relevant regulatory authorities), NHTSA suggests that potential whistleblowers who are aware of material protected by a protective order not provide the documents subject to the order, but rather disclose the existence of such documents without revealing the substance of the material under the protective order.

The Agency is also aware that companies may try to use confidentiality agreements to prevent whistleblowers from making disclosures to NHTSA, which would also appear to be contrary to public policy.[50] In such

[45] The CFTC has defined ''independent analysis'' in a similar manner, 17 CFR 165.2(h), as has the SEC, 17 CFR 240.21F–4(b)(3).

[46] This term refers to the protection that applicable law provides for confidential attorney-client communications.

[47] This term refers to the protection that applicable law provides for material prepared in anticipation of litigation or for trial.

[48] 17 CFR 240.21F–4(i), (ii) and 17 CFR 165.2(g)(2), (3).

[49] *NHTSA Enforcement Guidance Bulletin 2015–01: Recommended Best Practices for Protective Orders and Settlement Agreements in Civil Litigation,* 81 FR 13026 (Mar. 11, 2016).

[50] NHTSA notes that the SEC's Exchange Act Rule 21F–17(a) prohibits any person from taking any action to prevent an individual from contacting the SEC directly to report a possible securities law violation. The rule states that ''[n]o person may take any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement . . . with respect to such communications.'' According to the SEC's 2021 Report, the Commission has brought 14 enforcement actions or administrative proceedings

situations, the potential whistleblower may wish to consult with private counsel. NHTSA does not believe that a potential violation of a confidentiality agreement by the whistleblower should act as an exclusion under this proposed rule.[51]

NHTSA is requesting comment on whether there should be other proposed exclusions, including exclusions similar to those contained under ''independent knowledge'' and/or ''independent analysis'' in the whistleblower programs of the SEC[52] and CFTC.[53]

For example, it is the Agency's tentative view that it will not exclude potential whistleblowers where the potential whistleblower obtained the information solely because the potential whistleblower was or is an officer, director, trustee or partner of an entity and another person informed the potential whistleblower of allegations relating to any motor vehicle defect, noncompliance, or any violation or alleged violation of any notification or reporting requirement of 49 U.S.C. chapter 301 or regulation thereunder. The SEC and the CFTC have an exception for the exclusion where the person had a reasonable basis to believe that disclosure of the information to the Commission is necessary to prevent the relevant entity from engaging in conduct that is likely to cause substantial injury to the financial interest or property of the entity or investors.[54] For whistleblower disclosures made under the Whistleblower Act, in light of potential risks to safety, the Agency believes that encouraging disclosure to the Agency as soon as possible would be the better course. The Agency recognizes that such individuals may have ready access to significant information relevant to these issues and does not want to discourage would-be whistleblowers from reporting out of concern that this exclusion might apply. We note that a person in such a position often may be able to piece together information in a unique way or provide additional relevant information and may not just simply be a conduit for passing on information obtained from another person.

We are also considering whether there should be an exclusion for situations in which the potential whistleblower learned the information by participating in or observing established processes of the motor vehicle manufacturer, part supplier, or dealership to identify, report, and address possible violations of 49 U.S.C. chapter 301 or a regulation thereunder. The Agency specifically requests comment on this issue.

Unlike the whistleblower programs of the SEC and CFTC, Congress evidenced an intent in the Whistleblower Act for internal reporting to be an important prerequisite to award eligibility, except in circumstances where reporting may not be appropriate.[55] The Agency recognizes that companies may view allowing information learned from participating in or observing established processes to be considered ''independent knowledge or analysis'' as circumventing or undermining the proper operation of the company's internal processes for investigating and responding to potential violations of law. However, it is critical that the Agency learn important safety information as quickly as it can.[56] We also note that a company's efforts to come into future compliance does not negate prior violations of law. We encourage comments on this issue.

i. Proposed Rule § 513.2(b), Motor Vehicle Defect

NHTSA is proposing a definition of ''motor vehicle defect'' because it is a term that is included in the statutory definition of whistleblower. 49 U.S.C. 30172(a)(6). Proposed rule § 513.2(b) defines ''motor vehicle defect'' as a defect in a motor vehicle or item of motor vehicle equipment.

Under proposed rule § 513.2(a), the term ''defect'' would have the same meaning as that contained in 49 U.S.C. 30102(a)(3), which is that a defect includes any defect in performance, construction, a component, or material of a motor vehicle or motor vehicle equipment; ''motor vehicle'' would have the same definition as in 49 U.S.C. 30102(a)(7), which states that a motor vehicle ''means a vehicle driven or drawn by mechanical power and manufactured primarily for use on public streets, roads, and highways, but does not include a vehicle operated only on a rail line;'' and ''motor vehicle equipment'' would have the same meaning as defined in 49 U.S.C. 30102(a)(8), which defines motor vehicle equipment as ''(A) any system, part, or component of a motor vehicle as originally manufactured; (B) any similar part or component manufactured or sold for replacement or improvement of a system, part, or component, or as an accessory or addition to a motor vehicle; or (C) any device or an article or apparel, including a motorcycle helmet and excluding medicine or eyeglasses prescribed by a licensed practitioner, that—(i) is not a system, part, or component of a motor vehicle; and (ii) is manufactured, sold, delivered, or offered to be sold for use on public streets, roads, and highways with the apparent purpose of safeguarding users of motor vehicles against risk of accident, injury, or death.'' The Agency has also proposed this definition to make it clear that the term ''motor vehicle defect'' also encompasses defects in all motor vehicle equipment. NHTSA's authority over motor vehicle equipment, in its many forms, is expressed unequivocally in the Safety Act. 49 U.S.C. 30102(a)–(b).

There are several reasons why the Agency believes the term ''motor vehicle defect'' should be defined as including defects in motor vehicle equipment. First, if the Agency were to interpret the term strictly as a ''defect in a motor vehicle,'' one could argue that ''replacement equipment'' [57] is not covered, since this type of motor vehicle equipment was not installed in or on a motor vehicle at the time of delivery to the first purchaser. We believe that Congress intended to provide whistleblower protection and award eligibility not only to those

involving violations of Rule 21F–17. U.S. Securities and Exchange Commission, 2021 Annual Report to Congress, Whistleblower Program, p. 26, *available at https://www.sec.gov/files/owb-2021-annual-report.pdf. See also SEC* v. *Collector's Coffee, Inc.,* 2021 WL 3082209, *3 (S.D.N.Y. July 21, 2021) (noting that certain contractual confidentiality provisions would be illegal, and therefore unenforceable). The Agency requests comment on whether it should issue a rule similar to that of Rule 21F–17.

[51] The SEC's rationale for Rule 21F–17 was that it was necessary and appropriate because efforts to impede an individual's direct communications with Commission staff about a possible securities law violation would conflict with the statutory purpose of encouraging whistleblowers to report to the Commission. *See Securities Whistleblower Incentives and Protections,* 76 FR 34300, 34252 (June 13, 2011).

[52] 17 CFR 240.21F–4(b)(4).

[53] 17 CFR 165.2(g).

[54] 17 CFR 240.21F–4(b)(4)(v)(A) and 17 CFR 165.2(g)(7)(i).

[55] S. Rep. 114–13, Motor Vehicle Safety Whistleblower Act, Report of the Committee on Commerce, Science, and Transportation at 7 (2015).

[56] Even the SEC and CFTC allow this type of information to be excepted from exclusion if at least 120 days have elapsed since the whistleblower provided the information to the relevant entity's audit committee, chief legal officer, chief compliance officer (or their equivalents), or the whistleblower's supervisor, or since the whistleblower received the information, if the whistleblower received it under circumstances indicating that the entity's audit committee, chief legal officer, chief compliance officer (or their equivalents), or the whistleblower's supervisor was already aware of the information. *See, e.g.,* 17 CFR 240.21F–4(b)(4)(v)(C) and 17 CFR 165.2(g)(7)(iii).

The Agency does not think it prudent to have a 4-month waiting period for this type of information for a whistleblower report to become eligible, especially since the issues under the Whistleblower Act may relate to unreasonable risk of death or serious physical injury.

[57] ''Replacement equipment'' is defined as ''motor vehicle equipment that is not original equipment.'' 49 U.S.C. 30102(b)(1)(D).

whistleblowers who provide original information concerning defects or noncompliances of ''original equipment,'' [58] but also replacement motor vehicle equipment. Congress has provided that a whistleblower can be an employee or contractor of a part supplier, which was defined by the statute as a ''manufacturer of motor vehicle equipment.'' Both original equipment items and replacement equipment items are motor vehicle equipment. It does not seem to follow that a whistleblower's potential eligibility for an award and statutory identity protection depends on where a particular motor vehicle equipment item, such as an air bag, goes. For example, the same defective air bag could be placed in a motor vehicle, or it could be sold as a replacement part. Furthermore, there are other types of motor vehicle equipment, such as motorcycle helmets, that are not systems, parts, or components of motor vehicles, but nevertheless are motor vehicle equipment. For these reasons, the Agency believes that the proposed definition of ''motor vehicle defect,'' which would encompass defects in both motor vehicles and motor vehicle equipment, better effectuates the statute.

j. Proposed Rule § 513.2(b), Noncompliance

We are proposing a definition of ''noncompliance'' as it is a term that is included in the statutory definition of whistleblower. Proposed rule § 513.2(b) states that noncompliance occurs when a motor vehicle or item of motor vehicle equipment does not comply with an applicable motor vehicle safety standard. This definition aligns with the term noncompliance as it is used in sections 30118–30120 of the Safety Act.

k. Proposed Rule § 513.2(b), Original Information

Proposed rule § 513.2(b) begins with the definition of ''original information'' in section 30172(a)(3) but adds the word ''Agency'' for the purposes of clarity. Proposed rule § 513.2(b) defines ''original information'' as information that is derived from the independent knowledge or analysis of an individual, is not known to the Secretary or Agency from any other source, unless the individual is the original source of the information; and is not exclusively derived from an allegation made in a judicial or an administrative action, in a governmental report, a hearing, an audit, or an investigation, or from the news media, unless the individual is a source of the information.

Some definitions of the constituent terms in the definition of original information, such as ''independent knowledge or analysis,'' have been proposed in proposed rule § 513.2(b) so as to further describe when an individual provides ''original information.''

Proposed rule § 513.2(b) also adds the requirement that the original information be provided to the Agency for the first time after December 4, 2015. December 4, 2015 is the date of enactment of the FAST Act. This limitation is based on the rule of construction contained in section 24352(b) of the FAST Act.

Although the FAST Act authorizes the Secretary to pay whistleblower awards on the basis of original information that is submitted to the Secretary prior to the promulgation of rules implementing section 30172 (assuming all other requirements for an award are met),[59] it is our tentative conclusion that section 30172 does not authorize the Secretary to retroactively pay awards based on information submitted before the effective date of the statute. Section 24352(b)(1) of the FAST Act, Public Law 114–94, provides that ''Information submitted to the Secretary of Transportation by a whistleblower in accordance with the requirements of section 30172 of title 49, United States Code, shall not lose its status as original information solely because the whistleblower submitted the information prior to the effective date of the regulations issued under subsection (i) of that section *if that information was submitted after the date of enactment of this Act.*'' (emphasis added). The Agency tentatively construes this language as excluding information that was submitted to the Agency prior to December 5, 2015, from the definition of ''original information'' and has included such exclusion in proposed rule § 513.2(b) for the purposes of clarity.[60] To give meaning to the phrase ''submitted after the date of enactment of this Act,'' it appears that a whistleblower award is not permitted for information submitted prior to that date.[61]

The Agency notes that this proposed approach is similar to that taken by the SEC and affirmed by the Second Circuit. In *Stryker* v. *Securities and Exchange Commission,* 780 F.3d 163 (2d. Cir 2015), the petitioner sought review of an SEC order denying his claim for a whistleblower award. In this case, the petitioner provided information that the SEC relied upon in a successful enforcement action, but the claim was denied because the information was submitted before the enactment of Dodd-Frank. The Court noted that the SEC had adopted a rule that provided that whistleblower awards may be made only for information provided to the Commission for the first time after July 21, 2010, and that the ''sole basis for petitioner's claim is section 21F, which was not enacted until after he took the actions that are the grounds for the award sought. If the purpose of Dodd-Frank was to encourage whistleblower activity, already completed actions would arguably not qualify.'' *Id.* at 166. The Court held, ''We need not, however, decide if Congress clearly intended to bar a whistleblower award to petitioner at *Chevron* Step 1 because even if Dodd-Frank is ambiguous, we defer to the SEC's interpretation of Dodd-Frank at Step 2.'' *Id.* It is the Agency's tentative position that it should follow the SEC's practice and not permit whistleblower awards for provision of information that predated the Whistleblower Act.[62]

[58] ''Original equipment'' means ''motor vehicle equipment (including a tire) installed in or on a motor vehicle at the time of delivery to the first purchaser.'' 49 U.S.C. 30102(b)(1)(C). Under a statutory definition, a defect in original equipment or a noncompliance of original equipment with an applicable motor vehicle safety standard ''is deemed to be a defect or noncompliance of the *motor vehicle* in or on which the equipment was installed at the time of delivery to the first purchaser.'' 49 U.S.C. 30102(b)(1)(F) (emphasis added).

[59] *See* Section 24352(b)(2) of the FAST Act, Public Law 114–94 (stating that a whistleblower may receive an award prior to the Secretary promulgating the regulations under subsection (i)).

[60] However, the statute is clear that a whistleblower may receive an award regardless of whether the violation underlying the covered action occurred prior to the Act's date of enactment. Thus, if a whistleblower has submitted original information after December 5, 2015, about a violation that occurred on or prior to December 5, 2015, the whistleblower may be eligible for an award, assuming that all other conditions are met. These timing provisions are consistent with the purpose of the Whistleblower Act of incentivizing whistleblowers to bring information to the Agency.

[61] This interpretation is consistent with language contained with language contained in Senate Report 114–13. *See* S. Rep. 114–13, Motor Vehicle Safety Whistleblower Act, Report of the Committee on commerce, Science, and Transportation at 7 (2015) (''Nevertheless, since this section this section limits the application of the [Whistleblower] Act to information submitted after the date of enactment, the secretary may not issue an award under this act for information previously submitted or for penalties already assessed prior to the date of enactment.'')

[62] *See also Ross* v. *Securities and Exchange Comm'n,* 34 F.4th 1114, 1122 (D.C. Cir. 2022) (interpreting the provision in 15 U.S.C. 78u–7(b) stating that ''Information provided to the Commission in writing by a whistleblower shall not lose the status of original information (as defined in section 78u–6(a)(3) of this title, as added by this subtitle) solely because the whistleblower provided the information prior to the effective date of the regulations, *if the information is provided by the whistleblower after July 21, 2010*'' as specifically requiring exclusion of this category of submissions

l. Proposed Rule § 513.2(b), Original Information That Leads to a Successful Resolution

Under section 30172(b), a whistleblower's eligibility for an award depends in part on whether the whistleblower's original information ''leads to'' the successful resolution of a covered action. Proposed rule § 513.2(b) defines two situations when the Agency will consider the potential whistleblower to have provided original information that ''leads to'' a successful resolution.

Some of NHTSA's proposal is based on the approach taken by the SEC and the CFTC in their whistleblower regulations.[63] The first situation in which the Agency will consider the potential whistleblower to have provided original information that ''leads to'' a successful resolution is when the potential whistleblower gave the Agency original information that was sufficiently specific, credible and timely to cause the Agency to open an investigation, reopen an investigation that the Agency had closed, continue an investigation the Agency would not have continued but for the information, or to inquire concerning a different potential violation of 49 U.S.C. chapter 301 or a regulation thereunder as part of a current investigation, and the U.S. Department of Transportation, Agency or the Department of Justice brought a successful judicial or administrative action based in whole or in part on conduct that was the subject of the potential whistleblower's original information.

The second situation that the Agency will consider the potential whistleblower to have provided information that ''leads to'' a successful resolution is, under circumstances delineated below, where the potential whistleblower gave the Agency original information about conduct that was already under investigation by the Agency. In these cases, the proposal would find the information to have ''led to'' the successful resolution of the covered action when the potential whistleblower's information significantly contributed to the success of the covered action and the U.S. Department of Transportation, Agency or U.S. Department of Justice brought a successful judicial or administrative action based in whole or in part on conduct that was the subject of the potential whistleblower's original information.

In evaluating whether the information ''significantly contributed'' to the success, the Agency anticipates it will proceed on a case-by-case basis to provide flexibility to address all potential scenarios. The Agency may consider such things as whether the information allowed the Agency to bring a successful action in significantly less time or with significantly fewer resources or whether it was able to bring additional successful claims against additional individuals or entities.

m. Proposed Rule § 513.2(b), Part Supplier

The statutory definition of ''part supplier'' means a ''manufacturer of motor vehicle equipment.'' There is a statutory definition of ''motor vehicle equipment'' found at 49 U.S.C. 30102(a)(8). To avoid confusion, the Agency wants to make it clear that its interpretation covers *all* motor vehicle equipment, regardless of whether it is original equipment or replacement equipment, as those terms are defined in 49 U.S.C. 30102(b)(1)(C) and (D).

n. Proposed Rule § 513.2(b), Potential Whistleblower

Since there is a specific statutory definition of ''whistleblower'' that contains a number of prerequisites that need to be met to fall under the definition, the Agency proposes to use the term ''potential whistleblower'' for the sake of clarity, as the Agency will not be able to determine whether a person is a ''whistleblower'' until, at the very least, that person submits information to the Agency and it is evaluated. Therefore, the Agency proposes that the term ''potential whistleblower'' refer to an employee or contractor of a motor vehicle manufacturer, part supplier, or dealership submitting information to the Agency in accordance with and pursuant to this part.

It is important to note that the Agency will treat potential whistleblowers as subject to the protections in 49 U.S.C. 30172(f).

o. Proposed Rule § 513.2(b), Related Administrative or Judicial Action

The Agency proposes the term ''related administrative or judicial action,'' as used in the definition of covered action, to refer to an action that was brought under 49 U.S.C. chapter 301 by the U.S. Department of Justice, the U.S. Department of Transportation, or the Agency and is based on the original information provided by the whistleblower. For example, under this interpretation, if the whistleblower's submission leads to two separate but related enforcement actions, each with a monetary sanction of $600,000, those two amounts can be added together to overcome the $1,000,000 threshold for a whistleblower award. The Agency believes that under principals of statutory construction ''related actions'' are limited to only those actions brought under 49 U.S.C. chapter 301. The term ''covered action'' is defined in 49 U.S.C. 30172(a)(1) as ''any administrative or judicial action, including any related administrative or judicial action, brought by the Secretary or the Attorney General under this chapter that in the aggregate results in monetary sanctions exceeding $1,000,000.'' The Agency believes that the use of the word ''including'', and the placement of commas makes it clear that ''related'' actions are a subset of any administrative or judicial actions brought under 49 U.S.C. chapter 301, rather than referring to actions brought under other statutes. This would mean that deferred prosecution agreements and the like entered into by the U.S. Department of Justice with companies for violations of criminal laws generally would not be considered a ''related'' action, as those actions are not brought under 49 U.S.C. chapter 301. Thus, any money collected by the government in connection with that deferred prosecution agreement or the like would not be compensable to a whistleblower under 49 U.S.C. 30172.

As discussed elsewhere in this document, this interpretation also makes the most sense with respect to where the money for a whistleblower award would come from. Unlike the SEC and CFTC, the Agency does not have a separate fund to draw from in making award payments. Rather, the Agency anticipates that the ''pot of money'' from which to pay the award will come from penalties and additional monetary sanctions the manufacturer or other entity that violated the Safety Act or the regulations thereunder paid to the United States.

The Agency also wants to clarify ''related action'' as it may pertain to additional actions stemming out of a consent order. For example, several consent orders issued by NHTSA contain clauses for deferred penalties or abeyance amounts. Generally, under these clauses, the company under the consent order stipulates that it will pay a certain monetary amount if there is another violation of the consent order, the Safety Act, or the regulations thereunder by it. These amounts are tied to a yet undetermined violation at the time of the execution of the consent

from being considered ''original information'' such that the Court could conclude that under ''*Chevron* Step 1 that the Congress has indeed spoken directly and unambiguously to the precise question at issue and the SEC followed this directive to the letter.'').

[63] *See* 17 CFR 240.2F–4(c) and 17 CFR 165.2(i).

order. It is the Agency's tentative view that any amounts that come due under a deferred or abeyance amount would not be considered part of the initial civil penalty action that resulted in the consent order, nor would it be considered a ''related'' action. If a whistleblower received an award in connection with the initial civil penalty action, it is our tentative view that such whistleblower would not be eligible for an award percentage of any amount collected from the deferred/abeyance amounts, unless the whistleblower provided original information that led to the Agency determining the deferred penalty payment was required. We request comments on this interpretation.

If a whistleblower provided information that resulted in a deferred penalty or abeyance amount coming due under a consent order, it is our tentative view that this would be a successful resolution. Any determination letter by NHTSA that a penalty was owed could be considered a ''covered action'' if the original information provided by the whistleblower led to the collection of more than $1,000,000 of the deferred penalty or abeyance amounts. It is our tentative view that such whistleblower would be eligible for an award under these circumstances.

In some cases, a performance obligation amount would become due under a consent order if the company did not meet its spending requirements. In that case, the performance obligation amount relates to a fixed expenditure obligation arising out of the initial violation of law that led to the consent order. It is the Agency's view that if any of the performance obligation amounts come due under the consent order as money paid to the United States, a whistleblower that was eligible to receive an award for that consent order may also be eligible for an award of ten (10) to thirty (30) percent of any performance obligation amount collected by the United States.[64]

p. Proposed Rule § 513.2(b), Secretary

Proposed rule § 513.2(b) clarifies that the term Secretary means the Secretary of Transportation.[65]

q. Proposed Rule § 513.2(b), Successful Resolution

The definition of ''successful resolution'' in proposed rule § 513.2(b) provides additional clarification of what a successful resolution includes. Under the proposal, a successful resolution, when referring to any administrative or judicial action brought by the Secretary, Agency or the Attorney General relating to any potential motor vehicle defect, potential noncompliance, or any violation or alleged violation of any notification or reporting requirement under 49 U.S.C. chapter 301 or regulation thereunder, which is likely to cause unreasonable risk of death or serious physical injury, includes any settlement of the action by the U.S. Department of Transportation, the Agency, or the U.S. Department of Justice, or final decision or judgment in whole or in partial favor of the Agency, the U.S. Department of Transportation, or the U.S. Department of Justice.

Under this definition, a successful resolution can include, but is not limited to, a consent order that is issued by the Agency, a decision letter issued by the Agency, a consent decree that is entered by a Court, a settlement agreement, or a judicial order in whole or in part in the Agency's favor.

r. Proposed Rule § 513.2(b), Whistleblower

The term ''whistleblower'' is defined in section 30172(a)(6). The proposed definition tracks the statutory definition of whistleblower, except that the proposed rule uses the term ''Agency'' and clarifies that ''any violation or alleged violation of any notification or reporting requirements of this chapter'' refers to 49 U.S.C. chapter 301 and regulations promulgated thereunder for the purposes of clarity.

Proposed rule § 513.2(b) defines ''whistleblower'' as any employee or contractor of a motor vehicle manufacturer, part supplier, or dealership who voluntarily provides to the Agency original information relating to any motor vehicle defect, noncompliance, or any violation or alleged violation of any notification or reporting requirement of 49 U.S.C. chapter 301 or regulation thereunder, which is likely to cause unreasonable risk of death or serious physical injury.

Because the statute requires that that a whistleblower provide information to the Secretary and that the submission be voluntary, it is the Agency's tentative view that the whistleblower or the whistleblower's legal representative must be the one to directly provide the information to NHTSA. For example, it is the Agency's tentative view that if a whistleblower provides information to an advocacy group, reporter, or some other third-party and that third-party provides the information to NHTSA, such a submission would not comport with the requirement to voluntarily provide original information to the Secretary. To the extent the whistleblower is concerned about revealing their identity, the Agency believes that the proposed anonymous submission procedure should help to mitigate the concerns. When a whistleblower provides information directly to the Agency (including through a legal representative), the Agency has the ability to follow-up and obtain additional information or clarification.

The Agency requests comment on whether it should add the word ''potential'' in front of the term ''motor vehicle defect'' and ''noncompliance'' as the terms ''safety-related defect'' and ''noncompliance'' are understood to have specific meaning in the context of the recall and remedy portions of the Safety Act,[66] and the Agency is careful to use those terms only when it is determined that there is an actual safety-related defect or noncompliance with an applicable FMVSS, not just a potential or apparent safety-related defect or noncompliance.

A manufacturer may file a notice of safety-related defect or noncompliance with the FMVSS pursuant to 49 CFR part 573, or the Agency may follow an administrative process to determine that a safety-related defect or noncompliance with an applicable FMVSS exists. In cases where a manufacturer has not determined that there is a safety-related defect or a noncompliance with an applicable FMVSS in a motor vehicle or item of motor vehicle equipment, the Safety Act and regulations thereunder prescribe a process for the Agency to make such a decision. The steps include the Agency making an initial decision, providing to the manufacturer all information on which the decision was based, having a public meeting on the issue, and making a final decision.[67]

The Agency has provided further clarity to the phrase ''any violation or alleged violation of any notification or reporting requirements of this chapter'' by specifying that the phrase refers to 49 U.S.C. chapter 301 and regulations promulgated thereunder.

The Agency is specifically requesting comment on whether a whistleblower has to provide original information related to the company that employed or

[64] The Agency also anticipates that if the performance obligation spend requirement is collected under the terms of the consent order, any such amount could be added to the amounts already collected by the United States to reach the over one-million-dollar threshold needed to be a ''covered action'' for which an award may be paid.

[65] NHTSA notes that in section 30171, *Protection of employees providing motor vehicle safety information,* the term Secretary generally refers to the Secretary of Labor.

[66] 49 U.S.C. 301118–30120.

[67] 49 U.S.C. 30118(b), 49 CFR 554.10, 554.11.

contracted with the whistleblower or whether the employee or contractor of any motor vehicle manufacturer, part supplier, or dealership can report original information regarding any motor vehicle manufacturer, part supplier or dealership (not just the one that employed them or that they were contractors of).

One view is that because the statute has an emphasis on internal reporting, that Congress may have intended that only employees and contractors providing information on the motor vehicle manufacturer, part supplier, or dealership that employed them or contracted with them could be whistleblowers. However, the statute also provides that the Secretary may have good cause to waive the internal reporting requirement,[68] which provides a statutory way to exclude employees or contractors of other corporate entities (such as competitors) from needing to report to be eligible for an award.

The Agency believes that competitors, partners, employees of another separate corporate entity, and the like often have insight into the automotive market and is proposing to allow them to receive whistleblower awards. The Agency specifically requests comment on whether such employees or contractors of other motor vehicle manufacturers, parts suppliers, or dealerships should be considered potential whistleblowers. The Agency has provided examples below for consideration:

1. Employee of Tire Manufacturer A has original information that Tire Manufacturer B has been falsely certifying its tires as compliant with all applicable FMVSS.

2. Employee of Motor Vehicle Manufacturer C has original information that Motor Vehicle Manufacturer D did not report deaths as required by Early Warning Reporting (''EWR'') requirements.

3. Employee of Dealership E has original information that Dealership F has been selling new vehicles that have open recalls.

4. Employee of Motor Vehicle Manufacturer G has original information that Dealership G has been selling new vehicles that have open recalls.

5. Employee of Motor Vehicle Equipment Manufacturer H has original information that Motor Vehicle Manufacturer I did not timely recall vehicles with a safety-related defect.

6. Employee of parent company Motor Vehicle Manufacturer J has information that subsidiary company Motor Vehicle Manufacturer K did not timely recall vehicles with a safety-related defect.

7. An employee of company L that has served as a subcontractor to Registered Importer M is aware that Registered Importer M submitted false or misleading certificates of conformance to NHTSA.

The Agency is aware that employees and contractors in the motor vehicle industry often have knowledge regarding other corporate entities. This often includes companies with a relationship, such as a motor vehicle manufacturer and its dealers, a parts supplier and the companies that purchase its parts, a related corporate entity (for example, a parent and subsidiary) or a partner company. The Agency also believes that competitors often have valuable insight into their competitors' actions in the market. For example, a company that has been undercut on price because its competitor improperly certifies its products as complying with applicable FMVSS certainly may have valuable information for the Agency and may be further incentivized to inform the Agency if a whistleblower award may be possible. In some cases, competitors may conduct ''tear downs,'' or other investigations of a product as part of their normal business practices, which may lead to their conclusion that the competitor's product may contain a safety-related defect or noncompliance with an applicable FMVSS. NHTSA believes that competitor-provided information could be a rich source of data. However, based on the language of the statute, it appears that the company could not make the claim on its own behalf and be considered a ''whistleblower.'' It does appear that an employee or contractor of the competitor company could make the report and still qualify under the statutory definition of ''whistleblower.'' The Agency requests comment on this interpretation.

The Agency is also requesting comment on whether employees of motor vehicle industry related trade groups could be considered whistleblowers. The Agency's tentative conclusion is that while trade groups themselves cannot be whistleblowers, the employees or contractors with the companies within the trade group's membership can be whistleblowers, provided they fall into the definition of motor vehicle manufacturer, part supplier, or dealership. This best effectuates the purpose of the statute in incentivizing those with access to information on safety issues and violations of law to bring them to the Agency's attention.

The Agency does have some concerns that some unscrupulous actors may anonymously or improperly provide information to the Agency not because they think there is a safety-problem, but rather with the motive to harm the competitor or entity by making false or inaccurate allegations. However, this concern may be mitigated by 49 U.S.C. 30172(g) and proposed rule § 513.8.

Under 49 U.S.C. 30172(c)(2)(E)(iii), the Secretary may, for good cause, waive the requirement to report or attempt to report the information through the internal reporting mechanism. This authority has been delegated to NHTSA. The Agency anticipates making such decisions on a case-by-case basis. However, NHTSA is requesting comment on whether it should consider an interpretation or rule that claims made by employees or contractors of other motor vehicle manufacturers, part suppliers, or dealerships as automatically exempt for good cause from the requirements to report it to the internal reporting mechanism of the motor vehicle manufacturer, part supplier, or dealership about which the whistleblower is providing information or other internal reporting.[69]

### *C. Proposed Rule § 513.3—Representation*

Proposed rule § 513.3 tracks the language of 49 U.S.C. 30172(d), which provides that a whistleblower may be represented by counsel, and also adds the term ''potential whistleblower'' for clarity.

### *D. Proposed Rule § 513.4—Procedures for Submitting Original Information*

The Agency proposes that the potential whistleblower submit information on a standardized form, WB–INFO. A proposed draft of the WB–INFO form is contained in Appendix A to this proposed rule.

In addition to other benefits, the use of a standardized form (WB–INFO) will assist the Agency in managing and tracking the whistleblower information it receives. This will also better enable the Agency to connect whistleblower information to requests for award payment under the whistleblower provisions.

[68] 49 U.S.C. 30172(c)(2)(E)(iii).

[69] The Agency does not think it makes sense to require such employee or contractor to make a report to the internal reporting mechanism of its motor vehicle manufacturer, part supplier, or dealership in those situations where the conduct involved is unrelated to the actions of its employing or contracting entity. The Agency therefore would not require this type of internal reporting should the rule allow for whistleblowers to receive awards for reporting conduct of entities that did not employ or contract with them, as is proposed.

Proposed rule § 513.4(a) proposes that the standard form must be submitted either by email to NHTSA's established account (*NHTSAWhistleblower@dot.gov*), which is monitored by the Office of the Chief Counsel, or by any such method that the Agency may expressly designate on its website.

Proposed rule § 513.4(b) would provide that the potential whistleblower must declare under penalty of perjury at the time the potential whistleblower submits information on the WB–INFO form that the information is true and correct to the best of the potential whistleblower's knowledge and belief. The purpose of requiring a sworn declaration on the WB–INFO form is to help deter the submission of false and misleading information, which undermines the efficient use of the Agency's resources. The requirement may also mitigate the potential harm to companies and individuals that may be caused by false or spurious allegations of wrongdoing.

Proposed rule § 513.4(c) would provide that a potential whistleblower may provide original information to the Agency anonymously through use of a legal representative. The legal representative must submit the information on behalf of the potential whistleblower pursuant to the procedures specified in § 513.4(a). Prior to the legal representative's submission, the potential whistleblower must provide his or her legal representative with a completed WB–INFO form that he or she has signed under the penalty of perjury. When the legal representative makes the submission on behalf of the potential whistleblower, the legal representative must certify that he or she: (1) has verified the potential whistleblower's identity; (2) has verified that the potential whistleblower is an employee or contractor of a motor vehicle manufacturer, part supplier, or dealership; (3) has reviewed the potential whistleblower's signed WB–INFO form for accuracy and that the information contained therein is true and correct to the best of the legal representative's knowledge, information and belief; and (4) has obtained the potential whistleblower's non-waivable consent to provide the Agency with the original WB–INFO form from the potential whistleblower in the event that the Agency requests it.

The Agency requests comments on whether it should allow non-attorneys to submit information on behalf of a potential whistleblower.

Because many potential whistleblowers may wish to provide information anonymously, the Agency believes the proposed rule strikes an appropriate balance between the Agency's interest in deterring false and misleading information while permitting anonymous submissions with certain specified conditions. Anonymous potential whistleblowers will have the same rights and responsibilities as other potential whistleblowers unless expressly exempted. This includes the restrictions on providing false information, as addressed in proposed rule § 513.8.

Finally, proposed rule § 513.4(d) follows section 24352(b) of the FAST Act by providing that if a potential whistleblower submitted original information to the Agency after December 4, 2015 (the date of the enactment of the FAST Act) but before the effective date of these rules, the submission will be deemed to satisfy the requirements set forth in § 513.5(a) and (b).

*E. Proposed Rule § 513.5—Confidentiality*

49 U.S.C. 30172(f) provides for protection of whistleblowers. Consistent with this section, proposed rule § 513.5(a) explains that notwithstanding 49 U.S.C. 30167, the Secretary and any officer or employee of the U.S. Department of Transportation shall not disclose any information, including information provided by a whistleblower to the Secretary, that could reasonably be expected to reveal the identity of a whistleblower, except in accordance with the provisions of 5 U.S.C. 552a unless it falls under one of the circumstances described in the statute.

It is the Agency's view that if an individual is not a whistleblower, as defined by the statute, the Agency is not bound by the limitations contained in 49 U.S.C. 30172(f). However, it is the Agency's intent to afford potential whistleblowers, that is, those persons who submit information to the Agency in accordance with this part, confidential protections indefinitely, unless otherwise waived or permitted.[70] NHTSA recognizes that potential whistleblowers often put themselves at risk of significant consequences, and thus maintaining their confidentiality is of the utmost importance.

An important part of maintaining confidentiality of whistleblowers relates to the Agency's ability to communicate directly with whistleblowers. Therefore, the Agency wants to make it clear that the Agency's staff, including its lawyers, may communicate directly with potential whistleblowers, including directors, officers, members, contractors, or employees of any entity that has counsel, without seeking consent of the entity's counsel. 49 U.S.C. 30172 demonstrates a strong Congressional policy to encourage disclosure to the Agency relating to certain safety information while protecting the identity of those who do so. This policy would be significantly impaired if the Agency were required to seek the consent of the entity's counsel before speaking with an individual who contacts it and who is a director, officer, member, contractor, or employee of any entity that has counsel. The Agency believes that, in accordance with American Bar Association Model Rule 4.2, an attorney on behalf of NHTSA is authorized by law to make these communications.[71] Thus, Agency staff (including its attorneys) could meet with the individual privately, without the consent, knowledge or presence of counsel of the entity. The Agency requests comment on whether it should put this position in a rule, similar to that of the 17 CFR 240.21F–17(b).[72]

As explained in more detail below, the Agency needs to be able to distinguish which information is from a whistleblower or potential whistleblower and which information is from a member of the general public in order to properly follow the whistleblower requirements contained in 49 U.S.C. 30172(f) while not impeding its mission to save lives, prevent injuries and reduce economic costs due to road traffic crashes, through education, research, safety standards and enforcement activity. For example, if the Agency receives a call from a consumer, and that consumer is not an employee or contractor of a motor vehicle manufacturer, part supplier, or dealership, that person is not a whistleblower and is therefore not entitled to the protections under 49 U.S.C. 30172(f).

As another example, even if the individual is an employee or contractor of a motor vehicle manufacturer, if the

[70] For those persons who submit information prior to the effective date of the final rule on this section, it is the Agency's intent to accord them confidential protection, unless otherwise waived or otherwise permitted.

[71] American Bar Association Model Rule 4.2 provides, ''In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.'' *See* Model Rules of Prof'l Conduct, R. 4.2, *Communications with Persons Represented by Counsel, available at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_4_2_communication_with_person_represented_by_counsel.html.*

[72] *See* SEC's Rule 21F–17(b).

information they are disclosing relating to a motor vehicle defect, noncompliance, or violation of notification or reporting requirement is not likely to cause unreasonable risk of death or serious physical injury, then that person is not a whistleblower and is not entitled to the statutory protection contained in 49 U.S.C. 30172.

The provisions in proposed § 513.5(a) are based on the statutory provisions at 49 U.S.C. 30172(f)(1)(A)–(C). Paragraph (a)(1) of proposed rule § 513.5 would authorize disclosure of information that could reasonably be expected to reveal the identity of a whistleblower when disclosure is required to a defendant or respondent in connection with a public proceeding instituted by the Secretary, the Agency or any entity described in proposed rule § 513.5(c), which includes the U.S. Department of Justice and any appropriate department or agency of the Federal Government acting within the scope of its jurisdiction.

Paragraph (a)(2) would authorize disclosure if the whistleblower provides prior written consent for the information to be disclosed. An example of prior written consent would be if the whistleblower gave such consent, such as through the release contained at proposed form WB–RELEASE. Even when a release is signed, the Agency endeavors not to release information that could reasonably be expected to reveal the identity of a whistleblower unless necessary. We believe this practice helps reassure prospective whistleblowers that the Agency takes the protection of whistleblowers seriously.

Paragraph (a)(3) would authorize disclosure when the Secretary or other officer or employee of the U.S. Department of Transportation receives the information through another source, such as during an inspection or investigation under section 30166 and has the authority under other law to release the information.

Proposed rule § 513.5(b) gives effect to 49 U.S.C. 30172(f)(4). It provides that notwithstanding paragraph (a), nothing in this section is intended to limit the ability of the Attorney General to present such evidence to a grand jury or to share such evidence with potential witnesses or defendants in the course of an ongoing criminal investigation.

Proposed rule § 513.5(c) follows 49 U.S.C. 30172(f)(5), but replaces the word Secretary with Administrator, as the Secretary has authorized the NHTSA Administrator to exercise the authority vested in the Secretary under 49 U.S.C. chapter 301. 49 CFR 1.95(a). It provides that notwithstanding paragraph (a) of this section, without the loss of its status as confidential in the hands of the Administrator, all information referred to in paragraph (a) of this section may, in the discretion of the Administrator, when determined by the Administrator to be necessary or appropriate to accomplish the purposes of 49 U.S.C. chapter 301, be made available to the U.S. Department of Justice or an appropriate department or agency of the Federal Government, acting within the scope of its authority, provided that each entity shall maintain information as confidential in accordance with the requirements of paragraph (a).

49 U.S.C. 30172(f)(2) provides that the Secretary, and any officer or employee of the Department of Transportation, shall take reasonable measures to not reveal the identity of the whistleblower when disclosing any information under 49 U.S.C. 30172(f)(1). Since 49 U.S.C. 30172(f)(2) is entitled ''Redaction,'' the Agency is proposing to interpret this provision in Proposed 513.5(d) as meaning that the Secretary and any officer or employee of the U.S. Department of Transportation should take reasonable measures not to reveal the whistleblower's name, and that the whistleblower's name should be redacted when information is disclosed under proposed rule § 513.5(a). 49 U.S.C. 30172(f)(1).

Because 49 U.S.C. 30172(f)(4) and (5) are excepted from the restrictions in 49 U.S.C. 30172(f)(1) and 49 U.S.C. 30172(f)(5) provides that information may be made available to government agencies without losing its status as confidential, our tentative conclusion is that we are not required to redact the whistleblower's name when providing information under those subsections. Those provisions allow information to be disclosed to the U.S. Department of Justice or an appropriate department or agency of the Federal Government acting within the scope of its jurisdiction. It seems incongruous to provide information to the U.S. Department of Justice in support of an investigation, but not be able to provide the Department with the name of the whistleblower, the source of such information. The Agency anticipates that the U.S. Department of Justice would want to speak with the whistleblower to assess the whistleblower's credibility or get further information in support of its investigation or analysis.

Proposed 513.5(e) gives effect to 49 U.S.C. 30172(f)(3). It provides that the identity of the whistleblower and the information provided to the Secretary by the whistleblower shall be considered exempt from disclosure under the provisions of 5 U.S.C. 552 to the fullest extent permitted by law.

Proposed 513.5(f) states that the person should identify himself or herself as a whistleblower at the time he or she first submits original information relating to any potential motor vehicle defect, potential noncompliance, or any violation or alleged violation of any notification or reporting requirements under 49 U.S.C. chapter 301 by submitting a WB–INFO form. If the person is represented by a legal representative, that legal representative should identify his or her client as a whistleblower at the time the legal representative first submits original information relating to any potential motor vehicle defect, potential noncompliance, or any violation or alleged violation of any notification or reporting requirements under 49 U.S.C. chapter 301 on behalf of the legal representative's client in the WB–INFO form.

The Agency specifically requests comment on whether this identification should be mandatory at the outset or be permissive given that certain whistleblowers or their legal representatives may simply be unaware of the WB–INFO form before contacting the Agency, may first reach out with questions before submitting a WB–INFO form, or otherwise may have good cause for not immediately submitting a WB–INFO form.

The reason for this proposed requirement is programmatic. Unlike other entities that have a policy and practice to treat all information obtained during an investigation as confidential and nonpublic,[73] NHTSA generally makes information on safety-related defect investigations for which it has not received a request for confidential treatment under 49 CFR part 512 publicly available. The Agency posts materials such as Information Requests, Special Orders, and answers thereto on its website, *www.nhtsa.gov*.

NHTSA also makes various consumer complaints publicly available, with Personally Identifiable Information (PII) redacted. NHTSA receives consumer complaints through a variety of sources, including calls to its vehicle safety hotline, which are transcribed, and submissions of Vehicle Owner Questionnaires (VOQs) through its website, *www.nhtsa.gov*.

NHTSA relies on information submitted by consumers to assist it in identifying potential safety issues. For

[73] The SEC and CFTC both have this practice. *See, e.g., Final Rule, Securities Whistleblower Incentives and Protections,* 76 FR 34300, 34332 (June 13, 2011); *Final Rule, Whistleblower Incentives and Protection,* 76 FR 53172, 53184 (Aug. 25, 2011).

example, in opening an investigation into a safety-related defect, NHTSA describes the issue being investigated in an ''Opening Resume,'' which includes a failure report summary. Applicable VOQs are identified in the failure report summary under the heading ''ODI Complaints.'' The Opening Resume may include a reference to the identification number(s) of the counted VOQs. NHTSA often discusses the VOQs with manufacturers when it is conducting an investigation.

NHTSA also receives information on potential safety issues through letters, emails, and phone calls. NHTSA may open an investigation based on information provided through any of these sources.

Because NHTSA currently has no required method or form of submission of information by whistleblowers since rules implementing the whistleblower program have not yet been enacted, NHTSA has taken a broad view of what is considered whistleblower information. This information comes from a variety of sources, such as VOQs, and information provided by telephone, letter, or email to the Agency. We have taken this broad view not only to review and track the information submitted, but also to better protect the confidentiality of those who have provided whistleblower information to the Agency. As NHTSA has received information from over 150 potential whistleblowers since enactment of the FAST Act, and as more whistleblowers are expected to come forward, the Agency needs a robust way to identify potential whistleblowers to afford them the protection available in 49 U.S.C. 30172.

Because 49 U.S.C. 30172 requires the U.S. Department of Transportation to afford confidential treatment to information ''which could reasonably be expected to reveal the identity of a whistleblower'' ''[n]otwithstanding section 30167'' [74] it is important to be able to determine whether a person is a ''whistleblower'' at the time he or she submits information to the Agency. When a person submits a VOQ or other complaint to NHTSA, it may not be clear at that point whether the person submitting the information would meet the definition of a ''whistleblower.''

Therefore, to balance the interest of transparency against the whistleblower protection afforded by the statute, the Agency proposes that the person should identify himself or herself as a whistleblower at the time he or she first submits original information relating to any potential motor vehicle defect, potential noncompliance, or any violation or alleged violation of any notification or reporting requirements under 49 U.S.C. chapter 301 or a regulation thereunder. Proposed rule § 513.5(f) also requires that if a person is represented by a legal representative, the person's legal representative should identify the client as a whistleblower at the time the legal representative first submits original information relating to any potential motor vehicle defect, potential noncompliance, or any violation or alleged violation of any notification or reporting requirements under 49 U.S.C. chapter 301 or regulation thereunder on behalf of the legal representative's client.

The most effective and obvious way for whistleblowers to identify themselves to the Agency is for the whistleblower to submit his or her original information on a WB–INFO form. It also may be more beneficial to the whistleblower to submit the information on the WB–INFO form, as failure to do so could make the whistleblower ineligible for an award under proposed rule § 513.6(b). Therefore, the Agency is requesting comment on whether a person must identify themselves as a whistleblower through use of the WB–INFO form. The Agency specifically requests comment on this issue, given the potential impact on whistleblowers that may not be familiar with NHTSA's regulations, but nevertheless could readily be identified as a whistleblower. However, the Agency notes its intention to protect all potential whistleblowers, to the extent they can be identified, regardless of whether they file a WB–INFO form.

Section 30172(f) prohibits disclosure of ''any information, including information provided by a whistleblower to the Secretary, which could reasonably be expected to reveal the identity of the whistleblower'' except in certain situations. The Agency is requesting comments on whether it should define ''any information . . . which could reasonably be expected to reveal the identity of a whistleblower,'' and if so, what the proposed definition should be.

The Agency recognizes that its investigative function may be thwarted if it is not able to follow all lines of inquiry, but a very broad view of ''any information . . . which could reasonably be expected to reveal the identity of a whistleblower,'' could do just that by restricting the Agency's ability to conduct follow-up inquiry. For example, if a whistleblower reveals information known only to a small group within a company, the Agency's attempts to verify that information or obtain related information could lead the company to suspect a particular individual has been in communication with the Agency. Other than asking the whistleblower to sign a consent form for disclosure of information in these cases, NHTSA is requesting comments on how the Agency can most effectively investigate whistleblower allegations while abiding by the statutory requirements of 49 U.S.C. 30172(f). NHTSA notes that it believes it has been able to effectively balance these competing interests in the several years since the FAST Act's enactment, through careful lines of inquiry, by engaging in investigatory activity without revealing the identity of the whistleblower. However, we are also interested in input from stakeholders on this issue.

NHTSA recognizes that there may be a tension between the statutory requirement to deny awards to whistleblowers who fail to report or attempt to report information though an internal reporting mechanism unless an exception applies (49 U.S.C. 30172(c)(2)(E)) and the mandate of 49 U.S.C. 30172(f) for NHTSA to protect any information that could reasonably be expected to reveal the identity of a whistleblower.

In a hypothetical situation, a whistleblower would report the issue to the company through the internal reporting mechanism, and therefore the whistleblower's identity may become known to the company. Even if a company had a process to allow for anonymous reports, a company may be able to glean a whistleblower's identity from the facts and circumstances surrounding the whistleblower's report. If NHTSA were to send an inquiry to the company, even in a general way, about the information provided to it by the whistleblower, the company might be able to discern that the whistleblower also reported the issue to NHTSA. NHTSA would run the risk of violating section 30172(f)(1) if such inquiry was deemed a ''disclosure'' of information that could reasonably be expected to reveal the identity of a whistleblower. NHTSA does not view such a scenario as a ''disclosure'' of information.

Additionally, 49 U.S.C. 30171 put in place protections for employees of motor vehicle manufacturers, part suppliers, and dealerships to protect the employees from discrimination or discharge for, among other things, providing to the employer or the Secretary information relating to any motor vehicle defect, noncompliance, or any violation or alleged violation of any notification or reporting requirement of

[74] 49 U.S.C. 30167 relates to disclosure of information by the Secretary of Transportation.

49 U.S.C. chapter 301. Such employee may file a complaint with the Secretary of Labor alleging such discharge or discrimination. The Secretary of Labor is required to notify in writing the person named in the complaint of the filing of the complaint, of the allegations contained in the complaint, of the substance of evidence supporting the complaint, and of the opportunities that will be afforded to such person. 49 U.S.C. 30171(b). The regulations addressing the procedures under this statute can be found at 29 CFR part 1988.[75] Therefore, under an action brought under 49 U.S.C. 30171, the company should already be aware of the employee's identity. If that employee provided information to NHTSA and NHTSA discussed even generally the basis of the allegations with such company, the company may be able to discern the potential whistleblower's identity. Again, NHTSA does not view such a scenario as a ''disclosure'' of information.

There may be times where, despite receiving information from a potential whistleblower, the Agency will still need data or information from the manufacturer, part supplier, dealership or other entity in order to properly evaluate whether there is a motor vehicle defect, noncompliance, or any violation or alleged violation of any notification or reporting requirement of 49 U.S.C. chapter 301 or a regulation thereunder, which is likely to cause unreasonable risk of death or serious physical injury. As illustrated by the above examples, taking a broad view of ''shall not disclose any information which could reasonably be expected to reveal the identity of a whistleblower'' might impede NHTSA from following up on certain safety information, unless it was able to secure written consent from the whistleblower. We do not believe this is the intended result of the statute. The Agency requests comments on how to effectively investigate whistleblower allegations while abiding by the statutory requirements of 49 U.S.C. 30172(f).

*F. Proposed Rule § 513.6—Prerequisites to the Consideration of an Award*

Proposed rule § 513.6 summarizes the general prerequisites for persons to be considered for the payment of an award, based on the statutory language of 49 U.S.C. 30172(b)(1) and the definition of a whistleblower under 49 U.S.C. 30172(a)(6), but adds the word ''potential'' in front of the terms ''motor vehicle defect'' and ''noncompliance.'' Under proposed rule § 513.6(a), subject to the eligibility requirements in these rules, NHTSA may, but is not required to, authorize payment of an award to one or more persons who provide a voluntary submission to the Agency that contains original information relating to any potential motor vehicle defect, potential noncompliance, or any violation or alleged violation of any notification or reporting requirement of 49 U.S.C. chapter 301 or a regulation thereunder, which is likely to cause unreasonable risk of death or serious physical injury, and the original information in that submission leads to the successful resolution of a covered action.

Paragraph (b) of proposed rule § 513.6 proposes that, to be eligible, the person must have given the Agency original information in the form and manner required by proposed rule § 513.4. The proposed rule also provides that the Agency may waive this requirement for good cause shown. The Agency specifically requests comment on this issue, given the potential impact on whistleblowers that may not be familiar with NHTSA's regulations, but nevertheless could readily be identified as a whistleblower.

For those persons who have submitted original information prior to the effective date of a final rule, proposed rule § 513.4(d) would allow those persons to be eligible for an award because it could deem their submission to satisfy the requirements in proposed rule § 513.4(a) and (b).

The Agency requests comment on whether there should be any other prerequisites to the consideration of an award.

*G. Proposed Rule § 513.7—Whistleblowers Ineligible for an Award*

Proposed rule § 513.7 recites the categories of individuals who are ineligible for an award. The Agency's proposal is based on statutory construction as well as the statutory provisions contained in 49 U.S.C. 30172(c)(2) and (g).

As reflected in proposed rule § 513.7(a), the Agency proposes to construe the statute to mean that if the amount of monetary sanctions collected in a covered action does not exceed $1,000,000, the whistleblower is ineligible for an award. As an example, if the whistleblower provides original information about a violation that has resulted in a civil penalty of $600,000, even if the maximum civil penalty that could have been asserted exceeded $1,000,000, the whistleblower would not be eligible for an award under the statute. We believe this is most in line with the award provision at 49 U.S.C. 30172(b) that says the Secretary may pay an award to a whistleblower ''if the original information that a whistleblower provided to the Secretary *leads to* successful resolution of a covered action.'' (emphasis added). This interpretation is also in line with the statutory definition of ''covered action,'' which includes a reference to ''in the aggregate results in monetary sanctions exceeding $1,000,000'' and ''monetary sanctions,'' which is defined as ''monies, including penalties and interest, ordered or agreed to be paid.''

Another proposed exclusion for whistleblower award eligibility in proposed rule § 513.7 includes any whistleblower who is convicted of a criminal violation related to the covered action for which the whistleblower otherwise could receive an award under this part. Information regarding such convictions is required in the proposed WB–AWARD form. The Agency is also proposing to require in its WB–AWARD form information about whether the whistleblower is currently a subject or target of a criminal investigation in connection with the allegations or conduct the whistleblower submitted to NHTSA. While the Agency understands that a whistleblower may not know if there is an investigation opened into their conduct, it would be beneficial to the Agency to be provided with information that they are aware of. The Agency requests comment on whether it needs to wait to issue a whistleblower award in such situations until the investigation is closed or criminal case otherwise adjudicated.

The Agency also requests comment on whether it should limit the criminal conviction bar to only those cases decided by a U.S. Federal or State court or whether it should consider convictions issued by courts in other countries.

Other proposed exclusions include any whistleblower who, acting without direction from an applicable motor vehicle manufacturer, part supplier, or dealership, or agent thereof, deliberately causes or substantially contributes to the alleged violation of a requirement of 49 U.S.C. chapter 301 or regulation thereunder; any whistleblower who submits information to the Agency that is based on the facts underlying the covered action submitted previously by another whistleblower; any whistleblower who fails to provide the original information to the Agency in the form required by Section 513.4, absent good cause; or any whistleblower who knowingly and intentionally makes any false, fictitious, or fraudulent

[75] More information about the U.S. Department of Labor's whistleblower protection program can be found at *https://www.whistleblowers.gov.*

statement or representation, or who makes or uses any false writing or document knowing the same to contain any false, fictitious, or fraudulent statement or entry.

Additionally, if the applicable motor vehicle manufacturer, parts supplier, or dealership has an internal reporting mechanism in place to protect employees from retaliation, proposed rule § 513.7 provides that no award shall be made to any whistleblower who fails to report or attempt to report the information through such mechanism, unless the whistleblower reasonably believed that such an internal report would have resulted in retaliation, notwithstanding 49 U.S.C. 30171(a), the whistleblower reasonably believed that the information was already internally reported, was already subject to or part of an internal inquiry or investigation; or was otherwise already known to the motor vehicle manufacturer, part supplier, or dealership; or the Agency has good cause to waive this requirement, as discussed in additional detail above.

*H. Proposed Rule § 513.8—Provision of False Information*

Proposed rule § 513.8 tracks the language of 49 U.S.C. 30172(g), which states that a person who knowingly and intentionally makes any false, fictitious, or fraudulent statement or representation, or who makes or uses any false writing or document knowing the same to contain any false, fictitious, or fraudulent statement or entry, shall not be entitled to an award under this section and shall be subject to prosecution under 18 U.S.C. 1001.

*I. Proposed Rule § 513.9—Procedures for Making a Claim for a Whistleblower Award*

Proposed rule § 513.9 describes the steps a whistleblower is required to follow in order to make an application for an award. The proposed process would begin with the Agency posting a ''Notice of Covered Action'' (Notice). The Agency proposes that it publish this Notice on the Agency's website whenever any administrative or judicial action, including any related administrative or judicial action, brought by the U.S. Department of Transportation, Agency, or U.S. Department of Justice under 49 U.S.C. chapter 301 in the aggregate results in collected monetary sanctions exceeding $1,000,000. Such Notice will be published subsequent to a final judgment, order, or agreement that alone, or in the aggregate, results in collected monetary sanctions exceeding $1,000,000.

While the Agency typically posts consent orders or settlement agreements over $1,000,000 to its website shortly after the agreement has been executed, the Agency is not proposing that this be the ''Notice.'' Rather the Agency is planning on posting the Notice, titled ''Notice of Covered Action'' once an amount over $1,000,000 has been collected. In some instances, the Agency has allowed a manufacturer to pay civil penalties in installments over time, or may require the payment of deferred penalties under certain circumstances. Posting the Notice after the money is collected would ensure that there would be a pot of money from which to pay the whistleblower claim. In the event that a deferred civil penalty becomes due, which results in additional collected monetary sanctions exceeding $1,000,000, the Agency plans on posting another Notice on its website. In that case, the deferred penalties may come due as a result of a violation related to information provided by a whistleblower unconnected with the initial enforcement action. Prospective claimants should monitor the Agency's website for such Notices. In addition, the Agency will endeavor to notify a whistleblower of a Notice applicable to information provided by that whistleblower.

The Agency proposes that a claimant will have ninety (90) days from the date of the Notice of Covered Action to file a claim, including any attachments, for an award based on that action, or the claim will be barred. The Agency requests comment on whether this is sufficient time and requests comment on what other time frames for submission would be appropriate.

The Agency proposes that the claim is deemed filed on the date that it is received by the Agency. If the claim is not received by the Agency on or before the ninetieth calendar day from the date the Notice of Covered Action is posted, the claim will be barred. The Agency requests comment on whether there should be exceptions to the proposed bar. The Agency believes imposing a deadline to file claims is appropriate. NHTSA requires certainty regarding the claims it needs to evaluate in order to stay within the statutory requirements of the award program. The program allows one or more whistleblowers to receive an award relating to the same covered action. Since these whistleblowers would be required to share the ''pot'' of money in accordance with the range specified by statute, the Agency needs to know all the potential claimants before it can make award determinations.

Paragraph (b) of proposed rule § 513.9 describes the procedure for making a claim for an award. Specifically, a claimant would be required to submit a WB–AWARD form. The whistleblower must sign this form as the claimant and submit it to the Agency by email to NHTSA's Office of the Chief Counsel at *NHTSAWhistleblower@dot.gov*, or by other such means as the Agency may expressly designate on its website.

Paragraph (b) further emphasizes that all claim forms, including any attachments, must be received by the Agency no later than ninety (90) calendar days from the date of the Notice of Covered Action to be considered for an award. The Agency interprets the date of the Notice of Covered Action to be the date that the Notice is posted on the Agency's website, which the Agency will identify in the Notice, along with the submission deadline.

Paragraph (c) includes award application procedures for a claimant who submitted original information anonymously. Claimants who had previously submitted information anonymously, but who are now making a claim for a whistleblower award, are required to disclose their identities on the WB–AWARD form. The claimant's identity must be verified in a form and manner that is acceptable to the Agency prior to the payment of any award to such claimant. One reason for not permitting anonymous claimants is that requiring identification would help the Agency ensure that the claimant meets the award eligibility requirements.

Nothing in this proposal is intended to prevent claimants from making a claim for a whistleblower award prior to the effective date of any final rule on this section. Therefore, the Agency has proposed rule § 513.9(d) to provide that if a claimant filed a claim for a whistleblower award after December 4, 2015 (the date of the enactment of the FAST Act) but before the effective date of these rules, the claim submission will be deemed to meet the requirements of § 513.9. However, the Agency will only post a Notice of Covered Action for covered actions that arise after the effective date of the rule.

The Agency also examined whether foreign nationals could be eligible for a whistleblower award. It is the Agency's view that 49 U.S.C. 30172 is not unlawfully extraterritorial and that it is authorized to provide whistleblower awards and protection of identity for foreign national whistleblowers.

In the Agency's view, the purpose underlying the statutory award program is to incentivize employees and contractors of motor vehicle

manufacturers, parts suppliers and dealerships to provide information about defects, noncompliances and motor vehicle safety reporting violations to improve automobile safety and to protect the confidentiality of the whistleblowers, when appropriate. This is evident through the text and plain meaning of the statute. The automotive industry is a global industry, and we believe that the intent of the Whistleblower Act is to help prevent deaths and serious bodily injury on U.S. roadways as a result of defects, noncompliances or violations of notification or reporting requirement of 49 U.S.C. chapter 301 regardless of whether the whistleblower is a U.S. citizen, legal permanent resident or foreign national.

Furthermore, the legislative history indicates that the statute was, at least in part, modeled after the SEC whistleblower award statute.[76] The Agency notes that in 2014, the SEC awarded a whistleblower payment to a foreign resident, and described why the foreign resident was eligible for an award ''notwithstanding the existence of certain extraterritorial aspects of Claimant's application.'' [77] The SEC stated that in its view, ''there is a sufficient U.S. territorial nexus whenever a claimant's information leads to the successful enforcement of a covered action brought in the United States, concerning violations of the U.S. securities laws, by the Commission, the U.S. regulatory agency with enforcement authority for such violations.'' [78]

The SEC has discussed the global scope of its whistleblower program.[79] The Commission has continued to make awards to foreign nationals, including to those whistleblowers living or residing outside of the United States.[80] The Agency also notes that the CFTC has granted awards to whistleblowers located outside the United States.[81]

It appears that in the experience of the SEC, information from individuals outside the United States could be a rich source. The SEC stated, ''Since the beginning of the whistleblower program, the Commission has received whistleblower tips from individuals in approximately 130 countries outside the United States.'' The Agency anticipates receiving submissions from foreign nationals and that such submissions may be valuable to protecting automobile safety of the American motoring public, given the global nature of the automotive industry. In fact, NHTSA has recognized the importance of information provided by whistleblowers from non-U.S. companies by granting a whistleblower award to an employee of a motor vehicle manufacturer in a foreign country.[82]

With respect to the global nature of the automotive industry, in calendar year (CY) 2019, there were approximately 7.8 million motor vehicle equipment items and motor vehicles declared in the Customs and Border Patrol (CBP) Automated Commercial Environment (ACE) database. ACE ''is the system through which the trade community reports imports and exports and the government determines admissibility.'' [83] Furthermore, Congress was well aware of the many foreign manufacturers and suppliers that provide motor vehicles and items of motor vehicle equipment for the U.S. market. In fact, the situation with exploding Takata air bags, which were manufactured by a Japanese supplier, was a major motivation for Section 30172.[84]

*J. Proposed Rule § 513.10—Award Determinations*

Proposed rule § 513.10 describes the award determination process. Under the proposed process described in proposed rule § 513.10(a), once the time for filing any appeals of the covered action (and all related actions) has expired, or where an appeal has been filed, after all appeals in the covered action and related actions have concluded, and over $1,000,000 in monetary sanctions have been collected, the Agency will evaluate all timely whistleblower award claims submitted on a WB–AWARD form in accordance with the criteria set forth in this part. In connection with this process, the Agency may require the claimant to provide additional information relating to the claimant's eligibility for an award or satisfaction of any of the conditions for an award, as set forth in part 513.

Proposed rule § 513.10(b) implements 49 U.S.C. 30172(c), as delegated to the NHTSA Administrator.[85] It provides that the determination of whether, to whom, or in what amount to make an award shall be in the discretion of the Administrator. We request comment regarding whether the Agency should limit its discretion and, if so, in what way.

We understand the question of the Agency's discretion to be of high interest to stakeholders. While we are cognizant that the Agency's ability to exercise discretion to not grant an award to an otherwise eligible whistleblower could deter some potential whistleblowers, we tentatively believe that retaining this discretion could be important in rare and unusual circumstances. For example, it could be contrary to the public interest for NHTSA to issue a whistleblower award to an employee of a company that blows the whistle on violations of law by a competitor company if that employee is engaged in similar violations of law at his or her own employer. In that case, the disqualifier in 49 U.S.C. 30172(c)(2)(B) would not directly apply (as the ''alleged violation of a requirement of this chapter'' concerns the competitor). Likewise, it could be contrary to the public interest for NHTSA to award money to a whistleblower that commits a crime involving the Federal government (for example, threatening to assassinate the President), though that is not a disqualifying crime under 49 U.S.C. 30172(c)(2)(A) (since it is not ''related to the covered action''). We emphasize that we would not expect to utilize the

[76] *Commerce Committee Approves Bipartisan Motor Vehicle Safety Whistleblower Act,* Feb. 26, 2015, *available at http://www.thune.senate.gov/public/index.cfm/2015/2/commerce-committee-approves-bipartisan-motor-vehicle-safety-whistleblower-act?*

[77] *Order Determining Whistleblower Award Claim, Whistleblower Award Proceeding,* File No 2014–10, *available at https://www.sec.gov/rules/other/2014/34-73174.pdf.*

[78] *Id.*

[79] U.S. Securities and Exchange Commission, 2021 Annual Report to Congress, p. 31 *available at https://www.sec.gov/files/2021_OW_AR_508.pdf* (''In FY 2021 alone, the Commission received whistleblower submissions from individuals in 99 foreign countries.'').

[80] U.S. Securities and Exchange Commission, 2015 Annual Report to Congress on the Dodd-Frank Whistleblower Program, p. 12, *available at https://www.sec.gov/files/owb-annual-report-2015.pdf. See also* U.S. Securities and Exchange Commission, 2020 Annual Report to Congress, p. 25, *available at https://www.sec.gov/files/2020%20Annual%20Report_0.pdf* (stating ''Past whistleblower award recipients hail from several different parts of the United States, and 19 recipients were foreign nationals or residents of foreign countries at the time they submitted their tips to the Commission.'').

[81] Commodity Futures Trading Commission, Whistleblower Program and Customer Education Initiatives, 2020 Annual Report, p. 2 (Oct. 2020), *available at https://whistleblower.gov/sites/whistleblower/files/2020-11/FY20%20Report%20to%20Congress.pdf. See also* CFTC Announces First Whistleblower Award to a Foreign Whistleblower, July 16, 2018, *available at https://www.cftc.gov/PressRoom/PressReleases/7755-18.*

[82] *https://www.nhtsa.gov/sites/nhtsa.gov/files/2022-02/whistleblower-decision-letter-RQ17-003-Kia-RQ17-004-Hyundai_web.pdf.*

[83] *https://www.cbp.gov/trade/automated.*

[84] *See, e.g., Thune Opening Statement at Commerce Hearing on Takata Air Bag Defects, available at https://www.commerce.senate.gov/public/index.cfm/2014/11/thune-opening-statement-at-commerce-hearing-on-takata-air-bag-defects.*

[85] 49 CFR 1.95(a).

discretion to not grant an award; however, we tentatively believe that the Agency should retain that authority afforded by Congress. We also note that the Agency's exercise of discretion would not be unbounded and would still be subject to judicial review.

The Agency anticipates that the determination of how much to award, pursuant to proposed rule § 513.10, will involve a highly individualized review of the circumstances regarding each claim. The Agency preliminarily believes that the criteria below afford the Administrator broad discretion to weigh a multitude of considerations in making the determination. Depending on the facts and circumstances of each case, some considerations may not be applicable or may deserve greater weight than others.

Under proposed rule § 513.10(b), in determining whether to grant an award to a whistleblower and the amount of an award, the Administrator shall take into consideration, as appropriate: whether a whistleblower reported or attempted to report the information internally to an applicable motor vehicle manufacturer, part supplier, or dealership; the significance of the original information provided by the whistleblower to the successful resolution of the covered action; the degree of assistance provided by the whistleblower and any legal representative of the whistleblower in the covered action; [86] the statutory purpose of incentivizing whistleblowers; and the public interest or such additional factors as the Administrator considers relevant.

Proposed rule § 513.10(c) implements 49 U.S.C. 30172(b)(1). It provides that if the Administrator determines that an award is warranted, the Administrator shall determine the amount of such award or awards to one or more whistleblowers. Whistleblower awards shall be in an aggregate amount equal to—(1) not less than 10 percent, in total, of monetary sanctions collected in the covered action; and (2) not more than 30 percent, in total, of monetary sanctions collected in the covered action.

As an example, if the Agency has collected $100 million in civil penalties in a covered action, and the Administrator decides that a whistleblower award is warranted, the total award money that can be paid out to whistleblowers with respect to that covered action will have a range of $10 million (10 percent of $100 million) to $30 million (30 percent of $100 million). If there are two or more whistleblowers that the Administrator has decided should receive an award in connection with that covered action, the total range does not change. The amount awarded to each whistleblower with respect to a covered action will be decided by the Administrator. In the case where there are two or more claimants for an award in connection with a specific covered action, the Agency anticipates that the Administrator will issue a decision on each claim on or around the same date.

As set forth in proposed rule § 513.10(d), following the Administrator's determination, the Agency would send each claimant an Order setting forth whether the claim is allowed or denied, and if allowed, setting forth the award amount. The proposal provides that in no event will the total amount awarded to all whistleblowers in the aggregate be less than 10 percent or greater than 30 percent of the amount of monetary sanctions collected in the covered action.

Other Agencies, such as the SEC [87] and the CFTC,[88] post redacted Final Orders with respect to whistleblower award applications. NHTSA also has done so and plans to continue doing so.[89] We request comment on the extent of the redactions to appropriately balance the interests in whistleblower confidentiality and transparency.[90]

Finally, proposed rule § 513.10(e) follows 49 U.S.C. 30172(e), except that it replaces Secretary with Agency. It provides that no contract with the Agency is necessary for a whistleblower to receive an award.

In making a determination of a whistleblower award, the Agency anticipates reviewing relevant material. This could include the claimant's WB–INFO form, including any attachments and other related material provided by the potential whistleblower to assist the Agency in its investigation or action; the claimant's WB–AWARD form, including any other filings or submissions from the potential whistleblower in support of the award application; materials from Agency staff, including sworn declarations, regarding any matters relevant to the award determination; any other documents or materials that are received or obtained by the Agency to assist the Agency to resolve the claimant's award application, including information related to the claimant's eligibility; and any other materials that may be relevant to the determination.

The Agency may request that a claimant enter into a confidentiality agreement to review the record. To be clear, the Agency does not intend to provide claimants or their counsel any privileged materials or other material that may not be disclosed by law, such as pre-decisional, attorney-client privilege, attorney work product privilege, or internal deliberative process materials related to the Agency's determination to file or settle the covered action, and/or any other privileged material relating to whether, to whom, and in what amount to make a whistleblower award.

The Agency requests comment on whether it should review information from outside persons, such as the company that was liable for the civil penalties. It is the Agency's tentative view that outside parties should not be able to insert themselves into the award process. In accordance with the confidentiality provisions in the statute, NHTSA does not comment on individual whistleblower matters. Furthermore, to the extent there was a whistleblower in a particular matter, the outside party would not know the degree of assistance that a whistleblower provided. Additionally, if the Agency considers confidential submissions from outside parties, the Agency may be prohibited from sharing the information with the claimant, which seems to undercut fairness if the claimant does not have an opportunity to review and comment on the information provided. Furthermore, the Agency believes the intent of the statute was to incentivize potential whistleblowers to come forward with their information. If the company, or another third party, was allowed to interject in the award proceedings, that may undermine a whistleblower's willingness to come forward or pursue a claim.

[86] The degree of assistance provided by the whistleblower and any legal representative of the whistleblower may include, but is not limited to, providing explanations and other assistance in order that the staff may evaluate and use the information the potential whistleblower submitted and providing an English translation or explanation of the documents, if the original information is not in English, to the extent of the whistleblower's capability.

[87] *See* Final Orders of the Commission, *available at https://www.sec.gov/whistleblower/final-orders-of-the-commission.*

[88] *See* Final Orders/Award Determinations, *available at https://www.whistleblower.gov/orders/.*

[89] *See* Whistleblower Award Decisions, *available at https://www.nhtsa.gov/laws-regulations/whistleblower-program.*

[90] NHTSA notes that other award decisions, such as those of the SEC are largely redacted. NHTSA has reviewed differences between the SEC's and NHTSA's statutory provisions regarding confidentiality. NHTSA's statute, 49 U.S.C. 30172(f)(1)(B) provides that the whistleblower can provide prior written consent for information to be disclosed. Even in cases where there is a prior written waiver, NHTSA anticipates redacting the whistleblower's name consistent with the purpose of 49 U.S.C. 30172(f)(2).

*K. Proposed Rule § 513.11—Appeals of Award Determinations*

49 U.S.C. 30172(h)(2) provides appellate rights for any determination made by the Secretary under section 30172 in the appropriate court of appeals of the United States not later than 30 days after the determination is issued by the Secretary. This provision allows a claimant to appeal the Administrator's award eligibility determinations, including the award amount (if any), which are contained in the Agency's Order.

Proposed rule § 513.11(a) follows the statutory language by stating that a claimant may appeal any determination made by the Administrator under § 513.10 to an appropriate court of appeals of the United States not later than 30 days after the Order is issued by the Administrator. Proposed rule § 513.11(a)(1) provides that if no claimant files an appeal within 30 days after the Order is issued by the Administrator, no appeals are permitted with respect to the claim that is the subject of the Order. In the case where there are two or more claimants for an award in connection with a specific covered action, the Agency anticipates that the Administrator will issue his or her decision on each claim at or near the same time, to prevent unnecessary complications.

Proposed rule § 513.11(a)(2) provides that if any claimant appeals within 30 days after the Order is issued by the Administrator, no payments with respect to the covered action will be made to any whistleblower in the action until the appealed award determination action is concluded. This measure is appropriate because the Agency is constrained by the statute as to what percentage of the collected monetary sanctions in a covered action it may award to all whistleblowers. For example, if the applicable United States court of appeals finds that the Agency improperly denied a whistleblower an award, this whistleblower's share in the ''pot'' of money may affect the amount of money that could be awarded to other whistleblowers who are sharing in that same ''pot.'' Similarly, if the Court of Appeals finds that one whistleblower's share of the ''pot'' should be increased, that decision has the potential to affect another whistleblower's share of the same ''pot.'' However, the Agency is also aware that this could deter a whistleblower from exercising legal rights afforded by statute. We request comment on this issue.

The Agency believes that if there is more than one claimant for a covered action, an appeal of an award determination by one may make any other claimant a necessary party to that appeal as, depending on how the appeals court rules, other claimants may have their award amount reduced. However, the Agency is charged with protecting that claimant's identity. The Agency requests comment on how best to resolve this potential issue and other potential issues involving two or more claimants.

Proposed rule § 513.11(b) explicitly provides that these rules do not entitle claimants to obtain from the Agency any privileged materials such as pre-decisional, attorney-client privilege, attorney work product privilege, or internal deliberative process materials related to the Administrator's Order, and/or any privileged material relating to whether, to whom, and in what amount, to make a whistleblower award.

Proposed rule § 513.11(c) makes it clear that the record may contain redactions as necessary, including but not limited to redactions necessary to comply with statutory restrictions, the Agency's enforcement and regulatory functions or regulations, and to comply with requests for confidential treatment from law enforcement, regulatory authorities, or persons submitting information to the Agency pursuant to 49 CFR part 512.

Finally, as specified in 49 U.S.C. 30172(h)(3), proposed rule § 513.11(d) provides that the court shall review the determination made by the Administrator in accordance with the Administrative Procedure Act, 5 U.S.C. 706.

*L. Proposed Rule § 513.12—Procedures Applicable to the Payment of Awards*

Proposed rule § 513.12 details procedures applicable to the payment of awards. Proposed rule § 513.12(a) makes it clear that a recipient of a whistleblower award is entitled to payment on the award only to the extent that a monetary sanction upon which the award is based is collected in the covered action. The Agency's interpretation is consistent with 49 U.S.C. 30172(b)(1), which refers to paying awards in a range of ten percent to thirty percent of ''collected monetary sanctions'' and 30172(b)(2), which states that any amount payable under 30172(b)(1) ''shall be paid from the monetary sanctions collected, and any monetary sanctions so collected shall be available for such payment.''

As discussed above, in prior consent orders, the Agency has allowed for deferred penalties and monetary amounts to be expended in connection with compliance and outreach by the company (*i.e.,* compliance amounts or performance amounts). Under the proposed rule, these compliance amounts would generally not be counted toward monetary sanctions, unless there was an actual payment to the United States under the terms of the consent order or other agreement. The Agency is also of the view that any ''deferred'' or abeyance amounts should not be counted toward monetary sanctions unless and until they are actually paid and collected.

Proposed rule § 513.12(b) addresses the timing for payment of an award made to a whistleblower. It states that payment of a whistleblower award for a monetary sanction collected in connection with a covered action shall be made within a reasonable time following the later of the date on which the monetary sanction totaling over $1,000,000 is collected or after completion of the appeals process for all award determinations claims arising from the Administrator's Order relating to the covered action. The Agency requests comment on whether a different time frame for payment is appropriate.

In some instances, the Agency has allowed a manufacturer to pay civil penalties in installments. The Agency is specifically requesting comment on whether the Agency should or must wait until all monetary sanctions are collected, or whether it should provide whistleblowers portions of the award, as the monetary sanctions are collected. For example, if a company agrees to pay a civil penalty of $3,000,000 in two annual installments of $1,500,000, a whistleblower who was awarded 10% of the recovery may receive a payment of $150,000 in the first year, and another payment of $150,000 in the second year. Alternatively, the Agency could wait until the entire $3,000,000 is collected before making the $300,000 award payment to the whistleblower.

It is the Agency's tentative view that it need not wait until all monetary sanctions are collected to authorize a payment to a whistleblower, but that it must wait until over $1,000,000 is collected in connection with a covered action before the Agency authorizes any disbursement of awards. The Agency believes that this proposal would balance the Agency's need for efficiency and manageability while providing the whistleblower awardees their award dollars in an expedient manner.

With respect to civil penalties that may become due as a result of collection of deferred penalties or abeyance amounts, the Agency has tentatively concluded that those actions should be treated as new Covered Actions. This means that a whistleblower must follow

these regulations to request an award, and that any award will only be authorized for disbursement after the amount collected under the deferred amount or abeyance amount exceeds one million dollars ($1,000,000).

With respect to the provision relating to completion of the appeals process for all award determination claims arising from the Administrator's Order relating to the covered action, it is intended to address those situations where a single action results in multiple award claims. Under this scenario, if one or more claimants appeals any award determination, including whether an award claim was denied or the amount of the award determination, the Agency would not pay any awards in the action until those appeals have been concluded, because disposition of the appeal could affect other awards in connection with that action. With respect to making payments to whistleblowers, the Agency will follow all applicable Federal laws and regulations.

*M. Proposed Appendix A—Form WB–INFO*

The Agency proposes to include form WB–INFO in appendix A to part 513. The use of a standardized form will be an efficient way for the Agency to review the whistleblower information it receives and will better allow the Agency to manage and track such information. The Agency requests comment on whether the form WB–INFO should be prescribed by regulation, whether it would be better to specify the content of the form (and not the form itself), or whether the Agency should take a different approach.

The proposed form WB–INFO and the instructions thereto are designed to capture basic information about a potential whistleblower, the potential whistleblower's legal representative (if applicable), the motor vehicle manufacturer, part supplier or dealership about whom the concern is raised, and the individual's current employer and address, and the potential whistleblower's relationship to the company about whom the concern is raised.

It is designed to elicit sufficient information to determine whether the information is original information and whether the information has been previously provided to NHTSA. It is also designed to elicit whether the information may relate to any potential defect, potential noncompliance, or any violation or alleged violation of any notification or reporting requirement of chapter 301 or a regulation thereunder, and if so, asks the potential whistleblower to provide detailed descriptions related to the allegations and supporting materials. The form is also designed to elicit whether the information was obtained in a means or manner that was determined by a United States Federal court or State court to violate applicable Federal or State criminal law and whether the information was obtained through a communication that was subject to the attorney-client privilege or work product doctrine.

The WB–INFO form also contains a declaration made under the penalty of perjury, as well as a legal representative certification (if applicable). The purpose of these sections is to help deter the submission of false or misleading information, and the resulting inefficient use of the Agency's resources. The requirement would also mitigate the potential harm to motor vehicle manufacturers, part suppliers, and dealerships resulting from false or misleading information.

Specifically, the proposed form WB–INFO would require the potential whistleblower to declare under penalty of perjury under the laws of the United States that the information contained in the WB–INFO form is true and correct to the best of the potential whistleblower's knowledge, information and belief. Moreover, the statement would acknowledge the potential whistleblower's understanding that he or she may be subject to prosecution and ineligible for an award if, in the potential whistleblower's submission of information, other dealings with NHTSA, or dealings with another authority in connection with a related action, the potential whistleblower knowingly and willfully makes any false, fictitious, or fraudulent statements or representations, or uses any false writing or document knowing that the writing or document contains any false, fictitious, or fraudulent statement or entry. Finally, if the potential whistleblower wanted to submit the WB–INFO form anonymously and is represented by a legal representative, the WB–INFO form contains a section for the potential whistleblower's legal representative's certification that he or she has reviewed the form for accuracy and that the information contained in the WB–INFO form is true and correct to the best of the legal representative's knowledge, information and belief. The legal representative also certifies that he or she has verified the identity of the potential whistleblower on whose behalf the form is being submitted by viewing the potential whistleblower's valid, unexpired government issued identification and will retain an original signed copy of the form, with Section F signed by the potential whistleblower. Finally, the legal representative certifies that he or she has obtained the potential whistleblower's non-waivable consent to provide NHTSA with his or her original signed WB–INFO form in the event that NHTSA requests it.

*N. Proposed Appendix B—Form WB–RELEASE*

The Agency is proposing form WB–RELEASE in appendix B for those whistleblowers who wish to provide prior written consent for the Agency to disclose information that could reasonably be expected to reveal the whistleblower's identity. The Agency requests comment on whether the form WB–RELEASE should be prescribed by regulation, whether it would be better to specify the content of the form (and not the form itself), or whether the Agency should take a different approach.

Due to the way NHTSA investigates, in the course of an inquiry or analysis surrounding a whistleblower's allegations, it may become necessary for NHTSA to reveal information that reasonably could be expected to reveal the whistleblower's identity to persons or their counsel or agents at the organization or institution against whom such allegations are made or other entities in order to gather needed information on the alleged safety issue or misconduct that the whistleblower has brought to NHTSA's attention. The WB–RELEASE form provides whistleblowers a way to provide such consent. Consent is voluntary. The Agency may request that a whistleblower provide such consent, as such consent may facilitate NHTSA's review of the claim.

*O. Proposed Appendix C—Form WB–AWARD*

The Agency proposes to include form WB–AWARD in appendix C to part 513. Use of a standardized form will be an efficient way for the Agency to review whistleblower award claims. The Agency requests comment on whether the form WB–AWARD should be prescribed by regulation, whether it would be better to specify the content of the form (and not the form itself), or whether the Agency should take a different approach.

Proposed form WB–AWARD, and the instructions thereto, would request basic information about a claimant and his or her legal representative (if applicable). The form would also request information on the issue/information submitted by the claimant, information regarding the Notice of Covered Action, information on how the

claimant acquired the original information, as well as other information relevant to the claimant's eligibility for an award.

The WB–AWARD form also provides an opportunity for the claimant to explain why they should receive an award, and any other information that may be relevant in light of the criteria for determining the amount of an award.

The WB–AWARD form also would require the claimant to declare under the penalty of perjury under the laws of the United States that the information contained in the WB–AWARD form is true and correct to the best of the claimant's knowledge, information and belief. Moreover, the statement would acknowledge the claimant's understanding that he or she may be subject to prosecution and ineligible for an award if, in the claimant's submission of information, other dealings with NHTSA, or dealings with another authority in connection with a related action, the claimant knowingly and willfully makes any false, fictitious, or fraudulent statements or representations, or uses any false writing or document knowing that the writing or document contains any false, fictitious or fraudulent statement or entry.

## III. Public Participation

This section describes how you can participate in the commenting process.

*(1) How do I prepare and submit comments?*

Your comments must be written. To ensure that your comments are correctly filed in the docket, please include the docket number NHTSA–2022–0098 in your comments. If you are submitting comments electronically as a PDF (Adobe) file, we ask that the documents submitted be scanned using the Optical Character Recognition (OCR) process, thus allowing NHTSA to search and copy certain portions of your submissions. Please note that pursuant to the Data Quality Act, in order for the substantive data to be relied upon and used by NHTSA, it must meet the information quality standards set forth in the Office of Management and Budget (OMB) and Department of Transportation (DOT) Data Quality Act guidelines. Accordingly, we encourage you to consult the guidelines in preparing your comments. OMB's guidelines may be accessed at *https://www.whitehouse.gov/omb/information-regulatory-affairs/information-policy/*. DOT's guidelines may be accessed at *https://www.transportation.gov/dotinformation-dissemination-quality-guidelines*.

*(2) Tips for Preparing Your Comments*

When submitting comments, please remember to:

- Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).
- Explain why you agree or disagree, suggest alternatives, and substitute language for your requested changes.
- Describe any assumptions and provide any technical information and/or data that you used.
- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
- Provide specific examples to illustrate your concerns, and suggest alternatives.
- Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
- Make sure to submit your comments by the comment period deadline identified in the **DATES** section above.

*(3) How can I be sure that my comments were received?*

If you submit your comments by mail and wish Docket Management to notify you upon its receipt of your comments, enclose a self-addressed, stamped postcard in the envelope containing your comments. Upon receiving your comments, Docket Management will return the postcard by mail. If you submit information through email under a claim of confidentiality, as discussed below, you may request a delivery receipt.

*(4) How do I submit confidential business information?*

If you wish to submit any information under a claim of confidentiality, you should submit your complete submission, including the information you claim to be confidential business information (CBI), to NHTSA's Office of the Chief Counsel. When you send a comment containing CBI, you should include a cover letter setting forth the information specified in our CBI regulation.[91] In addition, you should submit a copy from which you have deleted the claimed CBI to the docket by one of the methods set forth above.

NHTSA is currently treating electronic submission as an acceptable method for submitting CBI to NHTSA under 49 CFR part 512. Any CBI submissions sent via email should be sent to an attorney in the Office of the Chief Counsel at the address given above under **FOR FURTHER INFORMATION CONTACT**. Likewise, for CBI submissions via a secure file transfer application, an attorney in the Office of the Chief Counsel must be set to receive a notification when files are submitted and have access to retrieve the submitted files. At this time, regulated entities should not send a duplicate hardcopy of their electronic CBI submissions to DOT headquarters. If you have any questions about CBI or the procedures for claiming CBI, please consult the person identified in the **FOR FURTHER INFORMATION CONTACT** section.

*(5) Will the Agency consider late comments?*

We will consider all comments that Docket Management receives before the close of business on the comment closing date indicated above under **DATES**. To the extent possible, we will also consider comments that Docket Management receives after that date. If Docket Management receives a comment too late for us to consider in developing a final rule, we will consider that comment as an informal suggestion for future rulemaking action.

*(6) How can I read the comments submitted by other people?*

You may read the materials placed in the docket for this document (*e.g.,* the comments submitted in response to this document by other interested persons) at any time by going to *https://www.regulations.gov*. Follow the online instructions for accessing the dockets. You may also read the comments received by Docket Management at the address given above under **ADDRESSES**. The hours of the Docket are indicated above in the same location.

Please note that, even after the comment closing date, we will continue to file relevant information in the Docket as it becomes available. Further, some people may submit late comments. Accordingly, we recommend that you periodically check the Docket for new material.

## IV. Regulatory Analyses and Notices

### Privacy Act Statement

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78).

[91] See 49 CFR part 512.

**Executive Order 12866, Executive Order 13563, and DOT Regulatory Policies and Procedures**

NHTSA has considered the impact of this rulemaking action under Executive Order 12866, Executive Order 13563, and the Department of Transportation's regulatory policies and procedures. This rulemaking document was not reviewed under Executive Order 12866 or Executive Order 13563.

This action would add part 513 to implement the whistleblower program. It has been determined that this rulemaking is not a significant regulatory action as defined in Executive Order 12866, as supplemented by Executive Order 13563. Therefore, a regulatory assessment is not required.

**Regulatory Flexibility Act**

Section 603(a) of the Regulatory Flexibility Act[92] requires the Agency to undertake an initial regulatory flexibility analysis of the proposed rule on small entities, unless the Agency certifies that the rule, if adopted, would not have a significant economic impact on a substantial number of small entities.[93]

I certify that this rule is not expected to have a significant economic impact on a substantial number of small entities. The proposed rules apply only to those employees and contractors of motor vehicle manufacturers, part suppliers, or dealerships who provide information to the Agency relating a potential motor vehicle defect, potential noncompliance, or any violation or alleged violation of any notification or reporting requirement of 49 U.S.C. chapter 301 (or regulation thereunder), which is likely to cause unreasonable risk of death or serious physical injury. Companies and other entities are not eligible to participate in the program as whistleblowers. Consequently, the persons that would be subject to the proposed rule are not ''small entities'' for the purposes to the Regulatory Flexibility Act. Therefore, a regulatory flexibility analysis is not required for this proposed action.

**National Environmental Policy Act**

NHTSA has analyzed this proposed rule for the purposes of the National Environmental Policy Act and determined that it will not have any significant impact on the quality of the human environment.

**Executive Order 13132 (Federalism)**

NHTSA has examined this proposed rule pursuant to Executive Order 13132 (64 FR 43255, August 10, 1999) and concluded that no additional consultation with States, local governments or their representatives is mandated beyond the rulemaking process. The Agency has concluded that this action would not have ''federalism implications'' because it would not have ''substantial direct effects on States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government,'' as specified in section 1 of the Executive order. This proposed rule generally would apply to employees and contractors of motor vehicle manufacturers, part suppliers, or dealerships. Thus, Executive Order 13132 is not implicated and consultation with State and local officials is not required.

**Unfunded Mandates Reform Act**

The Unfunded Mandates Reform Act of 1995 requires agencies to prepare a written assessment of the costs, benefits and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local or tribal governments, in the aggregate, or by the private sector, of more than $100 million annually (adjusted for inflation with base year of 1995). This proposal would not result in the expenditure by State, local or tribal governments, in the aggregate, or by the private sector, of more than $100 million annually.

**Executive Order 12988 (Civil Justice Reform)**

With respect to the review of the promulgation of a new regulation, section 3(b) of Executive Order 12988, ''Civil Justice Reform'' (61 FR 4729, February 7, 1996), requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General.

Pursuant to this Order, NHTSA notes as follows: This proposed rule would implement the whistleblower program, including outlining the procedures for submitting original information, applying for awards, the Agency's procedures for making decisions on the claims, appeals of such decisions, and payment of the award. It discusses communications with individuals reporting safety information and protections afforded related to the whistleblowers' identity. The statute was effective upon enactment.

The rule would not have retroactive effect. Under the rule of construction contained in section 24352(b) of the FAST Act, information submitted by a whistleblower in accordance with the requirements at 49 U.S.C. 30172 does not lose its status as original information solely because the whistleblower submitted the information prior to the effective date of these regulations if that information was submitted after the date of enactment of the FAST Act. Thus, information submitted prior to the enactment of the FAST Act would not qualify as original information, and therefore cannot form the basis of an award.

**Paperwork Reduction Act**

Under the procedures established by the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501, *et seq.*), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct, sponsor, or require through regulations. A person is not required to respond to a collection of information by a Federal agency unless the collection displays a valid OMB control number. The Information Collection Request (ICR) for a proposed new information collection described below has been forwarded to OMB for review and comment. In compliance with these requirements, NHTSA asks for public comments on the following proposed collection of information for which the agency is seeking approval from OMB.

The titles for the collection of information are forms: (1) WB–INFO, (2) WB–RELEASE, and (3) WB–AWARD. Under proposed rules §§ 513.4 and 513.9, these proposed forms would be necessary to implement section 30172 of the Safety Act.

The WB–INFO form allows a whistleblower to provide information to the Agency and its staff relating to general information about the whistleblower, information about the motor vehicle manufacturer, part supplier, or dealership about whom the concern is raised, the type and source of information being reported, the individual's legal representative (if applicable), the information about any

[92] 5 U.S.C. 601 *et seq.*

[93] 5 U.S.C. 605(b).

potential motor vehicle defect, potential noncompliance, or violation or alleged violation of any notification or reporting requirement of chapter 301 or regulation thereunder, which is likely to cause unreasonable risk of death or serious physical injury, and additional information.

Form WB–RELEASE provides a means for a whistleblower to provide prior written consent for the Agency to disclose information which could reasonably be expected to reveal the whistleblower's identity.

The WB–AWARD form allows the claimant to provide information related to the claimant's eligibility for an award.

In compliance with the PRA, we announce that NHTSA is seeking comment on a new collection.

*Agency:* National Highway Traffic Safety Administration (NHTSA).

*Title:* 49 CFR part 513, Whistleblower Program.

*OMB Control Number:* New.

*Form Number(s):* WB–INFO, WB–RELEASE, and WB–AWARD.

*Type of Request:* Approval of a new collection.

*Type of Review Requested:* Regular.

*Requested Expiration Date of Approval:* Three years from the date of approval.

*Summary of the Collection of Information:*

Proposed form WB–INFO, which would be submitted pursuant to proposed rule § 513.4 would request the following information:

(1) Background information regarding the person submitting the form, including the person's name, contact information and occupation and the person's relationship to the company about whom the concern is raised;

(2) Information about the motor vehicle manufacturer, part supplier or dealership about whom the concern is raised;

(3) If the person is represented by a legal representative, the name and contact information for the person's legal representative (in cases of anonymous submissions the person must be represented by a legal representative);

(4) Information regarding the issue involving a motor vehicle manufacturer, part supplier, or dealership, including the date of the alleged issue, whether the conduct is on-going, and whether the person or their counsel had any prior communication with NHTSA;

(5) Whether the allegation is related to a potential safety-related defect or noncompliance with an applicable FMVSS, and if so a detailed description of the allegation and how the allegation affects vehicle/system/component performance and/or compliance, and the make, model, model year, part number, component number, etc. if known;

(6) Whether the allegation is related to any violation or alleged violation of any notification or reporting requirement of the Safety Act, and if so, a description of the notification or reporting issue, including all facts pertinent to the alleged violation;

(7) A description of supporting materials in the whistleblower's possession and the availability and location of other additional supporting materials;

(8) A description of how the person learned about or obtained the information submitted, and, if any information was obtained from a public source, a description of that source;

(9) Identification of documents or other information in the submission that the person believes could reasonably be expected to reveal the person's identity and the basis for that belief;

(10) Whether the person or his or her legal representative has taken any other action regarding the issue, and if so, a description;

(11) Whether the person acquired the information through a means or manner that has been determined by a United States Federal court or a State court to violate applicable Federal or State criminal law, and if so, details regarding that determination;

(12) Whether the person acquired the information that he or she is submitting to NHTSA solely through a communication that was subject to a privilege, such as the attorney-client privilege or attorney work product doctrine;

(13) Any other relevant information;

(14) A declaration, signed under penalty of perjury under the laws of the United States that the information provided to NHTSA is true and correct to the best of the person's knowledge, information and belief and acknowledgement from the person that they may be subject to prosecution and ineligible for a whistleblower award if, in their submission of information, their other dealings with the National Highway Traffic Safety Administration, or their dealings with another authority in connection with a related action, they knowingly and willfully make any false, fictitious or fraudulent statements or representations, or use any false writing or document knowing that the writing or document contains any false, fictitious or fraudulent statement or entry; and

(15) If represented by a legal representative, the legal representative's certification certifying that the legal representative has verified the identity of the individual who completed form WB–INFO by viewing that individual's valid, unexpired government issued identification, reviewed the individual's WB–INFO form for accuracy, and that the information contained therein is true and correct to the best of the legal representative's knowledge, information and belief; the legal representative will retain an original, signed copy of the form with section F filled out by their client in their file; and that the legal representative has obtained the whistleblower's non-waivable consent to provide the National Highway Traffic Safety Administration with the whistleblower's original signed WB–INFO form in the event that NHTSA requests it.

Proposed form WB–RELEASE would request the following information:

(1) Background information regarding the whistleblower submitting the WB–RELEASE form, including the person's name and address;

(2) The name of the motor vehicle manufacturer, part supplier and/or dealership to which the whistleblower's issue or information relates;

(3) An acknowledgment that the person consents to disclosure of information that could reasonably be expected to reveal the person's identity; and

(4) Signature of the whistleblower and date.

Proposed form WB–AWARD, which would be submitted pursuant to proposed rule § 513.9 would require the following information:

(1) The claimant's name, address and contact information;

(2) If the person is represented by a legal representative, the name and contact information for the legal representative;

(3) Details concerning the issue, including the manner in which the information was submitted to NHTSA, the date when the information was submitted, the form in which it was submitted, and the name of the motor vehicle manufacturer, part supplier and/or dealership to which the issue or information relates.

(4) Information concerning the Notice of Covered Action to which the claim relates, including the date of the Notice, the Notice Number, and the Case name and number; and information regarding related actions, if applicable;

(5) Information relating to the claimant's eligibility for an award, including whether the person acquired the information solely through a communication that was subject to the attorney-client privilege or attorney work product doctrine; whether the

person acquired the original information by a means or manner that was determined by a United States Federal court or State court to violate applicable Federal or State criminal law; and whether the person is currently a subject or target of a criminal investigation or convicted of a criminal violation in connection with the allegations or conduct the person submitted to NHTSA. If any of the circumstances noted above were applicable, the person is requested to provide an explanation.

(6) An explanation of the reasons that the person believes that he or she should receive an award in connection with the person's submission of information to NHTSA, including any information that might be relevant in light of the criteria for determining the amount of an award set forth in 49 U.S.C. 30172 and proposed 49 CFR part 513; and

(7) A declaration by the claimant under penalty of perjury under the laws of the United States that the information provided in the WB–AWARD form is true and correct to the best of the person's knowledge, information and belief and acknowledgement from the person that they may be subject to prosecution and ineligible for a whistleblower award if, in their submission of information, their other dealings with the National Highway Traffic Safety Administration, or their dealings with another authority in connection with a related action, they knowingly and willfully make any false, fictitious or fraudulent statements or representations, or use any false writing or document knowing that the writing or document contains any false, fictitious or fraudulent statement or entry.

*Description of the Need for the Information and Use of the Information:*

The collection of information on proposed form WB–INFO would be used to permit the Agency and its staff to collect information from whistleblowers regarding any potential motor vehicle defect, potential noncompliance, or any violation or alleged violation of any notification or reporting requirement of the Safety Act or regulation thereunder for which NHTSA has enforcement authority. NHTSA investigators consider information provided by whistleblowers, which may lead to formal actions like an investigation, recall, or civil penalty enforcement action. If this information leads to a successful resolution of a covered action resulting in monetary sanctions collected by the United States in excess of $1,000,000, a whistleblower would be eligible for an award.

The WB–RELEASE form would provide a means for the whistleblower to provide consent for the Agency to disclose information which could reasonably be expected to reveal the identity of the whistleblower. Being able to disclose this information may allow the Agency to open a public investigation or proceed more efficiently with an investigation into the whistleblower's allegations.

The WB–AWARD form would permit the Agency to collect information relating to a claimant's eligibility for an award, the claimant's position on why they should receive an award, and the claimant's view on the criteria for determining the amount of an award. This would allow the Administrator to determine claims for whistleblower awards.

*Affected Public:*

The likely respondents to proposed form WB–INFO would be those employees or contractors of motor vehicle manufacturers, part suppliers, and dealerships who wish to provide the Agency staff with information relating to any potential motor vehicle defect, potential noncompliance, or any violation or alleged violation of any notification or reporting requirement of the Safety Act or regulation thereunder, which is likely to cause unreasonable risk of death or serious physical injury.

The likely respondents to proposed form WB–RELEASE would be those individuals who wish to provide prior written consent to NHTSA for disclosure of information that could reasonably be expected to reveal that individual's identity.

The likely respondents to proposed form WB–AWARD would be those individuals who have provided the Agency with original information by filing a WB–INFO form, and who believe they are eligible for an award under 49 CFR part 513.

*Estimated Number of Respondents for Proposed Form WB–INFO:*

In the time since the enactment of the FAST Act in 2015, NHTSA has received over 150 submissions that it has considered potential whistleblower submissions.[94] The Agency estimates that there will be approximately 50 individuals per fiscal year who may wish to file such form. The Agency estimated the number of individuals based on the current number of whistleblower submissions and the Agency's view that submissions will increase once the whistleblower reward program is more widely known, after the rules are promulgated and additional whistleblower awards are made.

*Frequency for Proposed Form WB–INFO:*

The Agency expects that the individual will complete one form detailing all potential issues they are aware of.

*Number of Responses for Proposed Form WB–INFO:* The Agency anticipates there will be approximately 50 individuals per fiscal year who may wish to file such form. NHTSA assumes half of this number will have a legal representative.

*Estimated Total Annual Burden Hours for Proposed Form WB–INFO:*

The proposed collection is estimated to involve approximately an average of 10 burden hours per individual who completes the WB–INFO form, and 20 hours per individual who has a legal representative complete the WB–INFO form. The completion time will depend largely on the complexity of the alleged violation and the amount of information the whistleblower possesses in support of the allegations. The Agency estimates that the total annual PRA burden of form WB–INFO is 750 hours per year (25 respondents who use a legal representative × 20 hours) plus (25 respondents who fill out their own form × 10 hours). The Agency invites public comment on the accuracy of its estimates.

*Estimated Total Annual Burden Cost for Proposed Form WB–INFO:*

We estimate the total annual burden cost for the Proposed Form WB–INFO to be $266,000. We base the estimate on the following:

*Costs for Legal Representatives to Fill out the Proposed Form WB–INFO:*

Under the proposed rules, a potential whistleblower who discloses their identity may elect to retain a legal representative to represent them, while an anonymous potential whistleblower is required to retain a legal representative to represent them. The Agency expects that in most of those instances where a legal representative is retained, the whistleblower's/claimant's legal representative will complete or assist in the completion of some or all of the required forms on the client's behalf. The Agency also expects that in the vast majority of cases in which a

[94] Because there is no required method or form of submission, NHTSA has taken a broad view of what is considered whistleblower information. Such information comes from a variety of sources, such as Vehicle Owner Questionnaires (''VOQ''), information provided by telephone, and information submitted by letter or email to the Agency. We have taken this broad view not only to review and track the information submitted, but also to better protect the confidentiality of those who have provided whistleblower information to the Agency.

whistleblower/claimant is represented by a legal representative, such person will enter into a contingency fee arrangement with such legal representative, providing that the legal representative will provide representation in exchange for a fixed percentage of any recovery under the whistleblower award program. Therefore, the Agency believes that most persons will not incur any direct expenses for attorneys' fees for the completion of required forms. The Agency also anticipates that a very small number of people will enter into hourly fee arrangements with counsel. However, the Agency does believe that approximately half of potential whistleblowers will have a legal representative submit the forms. The Agency requests comment on this estimate. The Agency has estimated the cost of using a legal representative regardless of whether the fee is contingent or hourly.

To estimate those expenses, the Agency makes the following assumptions:

(i) The Agency will receive approximately 50 WB–INFO forms;

(ii) Of these approximate 50 WB–INFO forms, potential whistleblowers will have a legal representative submit approximately 25 WB–INFO forms;

(iii) Legal representative cost will be on average $532 [95] per hour; and

(iv) Legal representatives will bill on average 20 hours to review materials and complete form WB–INFO.[96]

Based on those assumptions, the Agency estimates that each year the cost of legal representative time for completion of the forms will be $266,000 for the completion of form WB–INFO (($532 × 20 hours) × 25 respondents). The Agency invites public comment on the accuracy of its estimate requirements that would result from the proposed regulations.

*Costs of Submission*

The Agency anticipates that the vast majority of whistleblowers/claimants will submit the forms using electronic means rather than mail. Therefore, the expected cost of submission of the forms is $0.00. The Agency invites public comment on the accuracy of its estimate requirements that would result from the proposed regulations.

*Estimated Number of Respondents for Proposed Form WB–RELEASE:*

The Agency estimates that it would receive 45 WB–RELEASE forms per year.

*Frequency for Proposed Form WB–RELEASE:*

The Agency expects that the individual will complete one form per year.

*Number of Responses for Proposed Form WB–RELEASE:* The Agency anticipates there will be approximately 45 individuals per fiscal year who may wish to file a form WB–RELEASE.

*Estimated Total Annual Burden Hours for Proposed Form WB–RELEASE:*

The Agency estimates that it will take 15 minutes per individual to complete the form, and the Agency estimates that it would receive 45 WB–RELEASE forms per year. The Agency anticipates that potential whistleblowers will complete and submit for themselves 20 WB–RELEASE forms annually and that legal representatives will submit on their client's behalf 25 WB–RELEASE forms annually. Thus, the Agency estimates that that estimated annual PRA burden of form WB–RELEASE is 11.25 hours per fiscal year (45 respondents × 15 minutes/60).

*Estimated Total Annual Burden Cost for Proposed Form WB–RELEASE:*

We estimate the total annual burden cost for the Proposed Form WB–RELEASE to be $3,325. We base the estimate on the following:

*Involvement and Cost of Legal representatives:*

Under the proposed rules, a potential whistleblower who discloses their identity may elect to retain a legal representative to represent them, while an anonymous potential whistleblower is required to retain a legal representative to represent them. The Agency expects that in most of those instances where a legal representative is retained, the potential whistleblower's legal representative will complete or assist in the completion of some or all of the required forms on the client's behalf. The Agency also expects that in the vast majority of cases in which a potential whistleblower is represented by a legal representative, such person will enter into a contingency fee arrangement with such legal representative, providing that the legal representative will provide representation in exchange for a fixed percentage of any recovery under the whistleblower award program. Therefore, the Agency believes that most persons will not incur any direct expenses for attorneys' fees for the completion of required forms. The Agency also anticipates that a very small number of people will enter into hourly fee arrangements with counsel. The Agency requests comment on this estimate. The Agency has estimated the cost of using a legal representative regardless of whether the fee is contingent or hourly.

To estimate those expenses, the Agency makes the following assumptions:

(i) The Agency will receive 45 WB–RELEASE forms annually;

(v) Potential whistleblowers will have a legal representative submit approximately 25 WB–RELEASE forms annually;

(vi) Attorney cost will be on average $532 [97] per hour; and

(vii) Attorneys will bill on average 15 minutes to complete form WB–RELEASE.

Based on those assumptions, the Agency estimates that each year the cost of attorney time for completion of the forms will be $3,325 for the completion of form WB–RELEASE (($532 × 15 minutes/60) × 25 respondents). The Agency invites public comment on the accuracy of its estimate requirements that would result from the proposed regulations.

*Costs of Submission*

The Agency anticipates that the vast majority of potential whistleblowers will submit the forms using electronic means rather than mail. Therefore, the expected cost of submission of the forms is $0.00. The Agency invites public comment on the accuracy of its estimate requirements that would result from the proposed regulations.

*Estimated Number of Respondents for Proposed Form WB–AWARD:*

Each individual who has submitted a form WB–INFO and wishes to be considered for an award under the program would be required to provide a WB–AWARD form to the Agency. A claimant could only submit a WB–AWARD form after there has been a ''Notice of Covered Action'' published on the Agency's website pursuant to proposed rule § 513.9. The Agency estimates that it will post approximately 1–2 such Notices each year. The Agency bases this estimate by looking at the enforcement actions resulting in civil penalties exceeding $1,000,000 over the last several years, not including deferred penalties not collected or performance amounts. In some years, the Agency had

[95] This amount is based on the U.S. Attorney's Office for the District of Columbia Fees Matrix for 2015–2021, assuming that an attorney with 11–15 years of experience assists the whistleblower. *See https://www.justice.gov/file/1461316/download.*

[96] The Agency expects that counsel will need to expend additional time to gather information from the whistleblower or review sources of information needed to complete the forms, which is why this estimate is higher than the estimate to just complete the form.

[97] This amount is based on the U.S. Attorney's Office for the District of Columbia Fees Matrix for 2015–2021, assuming that an attorney with 11–15 years of experience assists the whistleblower. *See https://www.justice.gov/file/1461316/download.*

not collected any civil penalties exceeding $1,000,000. In another year, the Agency had several instances where it collected more than $1,000,000 in civil penalties in connection with an enforcement action. The Agency believes that as this whistleblower program grows, more actionable submissions will be made and, as a consequence, the Agency will have more actions resulting in collected monetary sanctions exceeding $1,000,000.

Considering the estimate of the anticipated yearly covered actions, and the Agency's experience to date, the Agency estimates that it would receive approximately 2 WB–AWARD forms each year.[98]

*Frequency for Proposed Form WB–AWARD:*

The Agency expects that the individual will complete one form.

*Number of Responses for Proposed Form WB–AWARD:* The Agency anticipates there will be approximately 2 individuals per fiscal year who may wish to file such.

*Estimated Total Annual Burden Hours for Proposed Form WB–AWARD:*

The proposed collection is estimated to involve approximately 10 burden hours per individual seeking to be considered for an award under the Agency's whistleblower program. The Agency estimates that the estimated annual PRA burden of form WB–AWARD is 20 hours per fiscal year (2 respondents × 10 hours). The Agency invites public comment on the accuracy of its estimates.

*Estimated Total Annual Burden Cost for Proposed Form WB–AWARD:*

We estimate the total annual burden cost for the Proposed Form WB–AWARD to be $10,640. We base the estimate on the following:

*Involvement and Cost of Legal Representatives*

Under the proposed rules, a potential whistleblower who discloses their identity may elect to retain a legal representative to represent them, while an anonymous potential whistleblower is required to retain a legal representative to represent them. The Agency expects that in most of those instances where a legal representative is retained, the potential whistleblower's/claimant's legal representative will complete or assist in the completion of some or all of the required forms on the client's behalf. The Agency also expects that in the vast majority of cases in which a potential whistleblower/claimant is represented by a legal representative, such person will enter into a contingency fee arrangement with such legal representative, providing that the legal representative will provide representation in exchange for a fixed percentage of any recovery under the whistleblower award program. Therefore, the Agency believes that most persons will not incur any direct expenses for legal representatives' fees for the completion of required forms. The Agency also anticipates that a very small number of people will enter into hourly fee arrangements with counsel. However, the Agency does believe that all individuals submitting a WB–AWARD form will use a legal representative. The Agency requests comment on this estimate. The Agency has estimated the cost of using a legal representative regardless of whether the fee is contingent or hourly.

To estimate those expenses, the Agency makes the following assumptions:

(i) The Agency will receive approximately 2 WB–AWARD forms annually;

(ii) Claimants will have a legal representative submit 2 WB–AWARD forms annually;

(iii) Legal representative cost will be on average $532 [99] per hour; and

(iv) Legal representatives will bill on average 10 hours to complete a form WB–AWARD.

Based on those assumptions, the Agency estimates that each year the cost of legal representatives' time for completion of the forms will be $10,640 for the completion of form WB–AWARD (($532 × 10 hours) × 2 respondents). The Agency invites public comment on the accuracy of its estimate requirements that would result from the proposed regulations.

*Costs of Submission*

The Agency anticipates that the vast majority of claimants will submit the forms using electronic means rather than mail. Therefore, the expected cost of submission of the forms is $0.00. The Agency invites public comment on the accuracy of its estimate requirements that would result from the proposed regulations.

Mandatory Collection of Information

A person would be required to complete and submit a WB–INFO form and to submit a WB–AWARD form in order to qualify for a whistleblower award.

*Public Comments Invited:*

Pursuant to 44 U.S.C. 3506(c)(2)(B), the Agency requests comments in order 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 burden of the proposed collections of information;
- Determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and
- Evaluate whether there are ways to minimize the burden of the collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

The Agency requests comment and supporting empirical data on the burden and cost estimates for the proposed rule, including the costs that whistleblowers/claimants may incur.

A comment to OMB is most effective if OMB receives it within 30 days of publication. Comments on the proposed information requirements should be submitted to: Office of Management and Budget at *www.reginfo.gov/public/do/PRAMain*. To find this particular information collection, select ''Current under Review—Open for Public Comment'' or use the search function. PRA comments are due within 30 days following publication of this document in the **Federal Register**.

The Agency recognizes that the collection of information contained in today's proposed rule may be subject to revision in response to public comments.

**Regulation Identifier Number (RIN)**

The Department of Transportation assigns a regulation identifier number (RIN) to each regulatory action listed in the Unified Agenda of Federal Regulations. You may use the RIN contained in the heading at the beginning of this document to find this action in the Unified Agenda.

**Plain Language**

Executive Order 12866 requires each agency to write all rules in plain language. Application of the principles of plain language includes consideration of the following questions:

- Have we organized the material to suit the public's needs?
- Are the requirements in the rule clearly stated?

[98] While it is unlikely that there will be whistleblower information provided in connection with every Notice of Covered Action posted by the Agency, this estimate calculates burden hours as if there were one claim for each Covered Action.

[99] This amount is based on the U.S. Attorney's Office for the District of Columbia Fees Matrix for 2015–2021, assuming that an attorney with 11–15 years of experience assists the whistleblower. *See https://www.justice.gov/file/1461316/download.*

• Does the rule contain technical language or jargon that isn't clear?
• Would a different format (grouping and order of sections, use of headings, paragraphing) make the rule easier to understand?
• Would more (but shorter) sections be better?
• Could we improve clarity by adding tables, lists, or diagrams?
• What else could we do to make the rule easier to understand?

If you have any responses to these questions, please include them in your comments on this proposal.

**List of Subjects in 49 CFR Part 513**

Administrative procedure and practice, Claims, Freedom of information, Imports, Investigations, Lawyers, Motor vehicle safety, Privacy, Reporting and record keeping requirements, Tires, Whistleblowing.

**Proposed Regulatory Text**

■ For the reasons stated in the preamble, the National Highway Traffic Safety Administration proposes to add 49 CFR part 513 to read as follows:

## PART 513—WHISTLEBLOWER PROGRAM

Sec.
513.1 General.
513.2 Definitions.
513.3 Representation.
513.4 Procedures for submitting original information.
513.5 Confidentiality.
513.6 Prerequisites to the consideration of an award.
513.7 Whistleblowers ineligible for an award.
513.8 Provision of false information.
513.9 Procedures for making a claim for a whistleblower award.
513.10 Award determinations.
513.11 Appeals of award determinations.
513.12 Procedures applicable to the payment of awards.
Appendix A—Form WB–INFO
Appendix B—Form WB–RELEASE
Appendix C—Form WB–AWARD

**Authority:** 49 U.S.C. 322, 49 U.S.C. 30172; 44 U.S.C. chapter 35, as amended; 49 CFR 1.49; and DOT Order 1351.29.

### § 513.1 General.

This part describes the whistleblower program established by the Agency to implement the Motor Vehicle Safety Whistleblower Act, 49 U.S.C. 30172, explains procedures that a potential whistleblower must follow to be eligible for an award, and the circumstances under which information that may reasonably be expected to reveal the identity of a whistleblower may be disclosed by National Highway Traffic Safety Administration (NHTSA). Potential whistleblowers should read these procedures carefully because failure to take required steps in a timely fashion in conformance with these rules may result in disqualification from receiving an award. Questions about the whistleblower program or these rules should be directed to the NHTSA Office of the Chief Counsel at *NHTSAWhistleblower@dot.gov*. Unless expressly provided for in this part, no person is authorized to make any offer or promise, or otherwise bind the Agency with respect to the payment of any award or the amount thereof, and any such offer or promise will not be honored.

### § 513.2 Definitions.

(a) *Statutory definitions.* All terms used in this part have the same meaning as in 49 U.S.C. 30102(a) or (b), unless otherwise defined in this part.

(b) *Other terms.* As used in this part:

*Administrative action.* The term ''administrative action'' means all or a portion of an action, other than a judicial action, brought by NHTSA or the U.S. Department of Transportation under 49 U.S.C. chapter 301 that may result in civil penalties or other monetary payment paid to and collected by the United States government. It specifically includes settlement agreements and consent orders that are entered into by the Agency.

*Agency.* The term ''Agency'' refers to the National Highway Traffic Safety Administration (NHTSA).

*Collected monetary sanctions.* The term ''collected monetary sanctions'' means monies, including penalties and interest, ordered or agreed to be paid and that have been collected by the United States, pursuant to the authority in 49 U.S.C. 30165 or under the authority of 49 U.S.C. 30170.

*Contractor.* The term ''contractor'' means an individual presently or formerly providing goods or services to a motor vehicle manufacturer, part supplier, or dealership pursuant to a contract.

*Covered action.* The term ''covered action'' means any administrative or judicial action, including any related administrative or judicial action brought by the Secretary, NHTSA, or the Attorney General under 49 U.S.C. chapter 301, or the regulations in this chapter that in the aggregate results in monetary sanctions exceeding $1,000,000. The over $1,000,000 threshold can be satisfied if the total amount of monetary sanctions paid by multiple defendants or parties and collected by the United States totals more than $1,000,000 in the covered action.

*Dealership.* The term ''dealership'' means a person selling and distributing motor vehicles or motor vehicle equipment primarily to purchasers that in good faith purchase the vehicles or equipment other than for resale.

*Employee.* The term ''employee'' means an individual presently or formerly employed by a motor vehicle manufacturer, part supplier, or dealership.

*Independent knowledge or analysis.* The term ''knowledge'' as used in this part means factual information in the potential whistleblower's possession that is not generally known or available to the public and is not already known to NHTSA. The potential whistleblower may gain independent knowledge from the potential whistleblower's experiences, communications, and observations in the potential whistleblower's business or social interactions. As used in this part, ''analysis'' means the potential whistleblower's examination and evaluation of information that may be generally or publicly available, but which reveals information that is not generally known or available to the public. This analysis must be the potential whistleblower's own analysis, whether done alone or in combination with others.

(i) NHTSA will not consider the potential whistleblower's information to be derived from the potential whistleblower's independent knowledge or analysis if the potential whistleblower obtained the information:

(A) Solely through a communication that was subject to the attorney-client privilege or work product doctrine; or

(B) By a means or in a manner that has been determined by a United States Federal court or State court to violate applicable Federal or State criminal law.

(ii) [Reserved]

*Motor vehicle defect.* The term ''motor vehicle defect'' means a defect in a motor vehicle or item of motor vehicle equipment.

*Noncompliance.* A ''noncompliance'' occurs when a motor vehicle or item of motor vehicle equipment does not comply with an applicable Federal motor vehicle safety standard.

*Original information.* The term ''original information'' means information that:

(i) Is derived from the independent knowledge or analysis of an individual;

(ii) Is not known to the Secretary or Agency from any other source, unless the individual is the original source of the information;

(iii) Is not exclusively derived from an allegation made in a judicial or an administrative action, in a governmental

report, a hearing, an audit, or an investigation, or from the news media, unless the individual is a source of the information; and

(iv) Is provided to the Agency for the first time after December 4, 2015.

*Original Information that leads to a successful resolution.* The Agency will consider that the potential whistleblower provided original information that ''leads to'' a successful resolution of a covered action in the following circumstances:

(i) The potential whistleblower gave the Agency original information that was sufficiently specific, credible and timely to cause the Agency to open an investigation, reopen an investigation that the Agency had closed, continue an investigation the Agency would not have continued but for the information, or to inquire concerning a different potential violation of chapter 301, or the regulations in this chapter as part of a current investigation, and the U.S. Department of Transportation, Agency, or U.S Department of Justice brought a successful judicial or administrative action based in whole or in part on conduct that was the subject of the potential whistleblower's original information; or

(ii) The potential whistleblower gave the Agency original information about conduct that was already under investigation by the Agency and the potential whistleblower's information significantly contributed to the success of the covered action and the U.S. Department of Transportation, Agency, or U.S. Department of Justice brought a successful judicial or administrative action based in whole or in part on conduct that was the subject of the potential whistleblower's original information.

*Part supplier.* The term ''part supplier'' means a manufacturer of motor vehicle equipment.

*Potential whistleblower.* The term ''potential whistleblower'' refers to an employee or contractor of a motor vehicle manufacturer, part supplier, or dealership submitting information to the Agency in accordance with and pursuant to this part.

*Related administrative or judicial action.* The term ''related administrative or judicial action'' means an action that was brought under 49 U.S.C. chapter 301 by the U.S. Department of Justice, the U.S Department of Transportation, or the Agency and is based on the original information provided by the whistleblower.

*Secretary.* The term ''Secretary'' means the Secretary of Transportation.

*Successful resolution.* A successful resolution, when referring to any administrative or judicial action brought by the Secretary, Agency, or the Attorney General relating to any potential motor vehicle defect, potential noncompliance, or any violation or alleged violation of any notification or reporting requirement under 49 U.S.C. chapter 301, or the regulations in this chapter, which is likely to cause unreasonable risk of death or serious physical injury, includes any settlement of the action by the U.S. Department of Transportation, Agency or the U.S. Department of Justice or final decision or judgment in whole or in partial favor of the Agency, the U.S. Department of Transportation, or the U.S. Department of Justice.

*Whistleblower.* The term ''whistleblower'' means any employee or contractor of a motor vehicle manufacturer, part supplier, or dealership who voluntarily provides to the Agency original information relating to any motor vehicle defect, noncompliance, or any violation or alleged violation of any notification or reporting requirement of 49 U.S.C. chapter 301, or the regulations in this chapter, which is likely to cause unreasonable risk of death or serious physical injury.

### § 513.3 Representation.

A whistleblower or potential whistleblower may be represented by a legal representative.

### § 513.4 Procedures for submitting original information.

(a) A potential whistleblower's submission must be made by completing a WB–INFO form and submitting it to the Office of the Chief Counsel, National Highway Traffic Safety Administration, by email to *NHTSAWhistleblower@dot.gov* or other submission method expressly designated on NHTSA's website for such submissions.

(b) By completing the WB–INFO form, the potential whistleblower must declare under penalty of perjury at the time the whistleblower submits information pursuant to paragraph (a) of this section that the information is true and correct to the best of the potential whistleblower's knowledge and belief.

(c) A potential whistleblower may provide original information to the Agency anonymously through use of a legal representative. The legal representative must submit the information on behalf of the potential whistleblower pursuant to the procedures specified in paragraph (a) of this section. Prior to the legal representative's submission, the potential whistleblower must provide the legal representative with a completed WB–INFO form that the potential whistleblower has signed under the penalty of perjury. When the legal representative makes the submission on behalf of the potential whistleblower, the legal representative must certify that the legal representative:

(1) Has verified the potential whistleblower's identity;

(2) Has verified that the potential whistleblower is an employee or contractor of a motor vehicle manufacturer, part supplier, or dealership; Has reviewed the potential whistleblower's signed WB–INFO form for accuracy and that the information contained therein is true and correct to the best of the legal representative's knowledge, information and belief; and

(3) Has obtained the potential whistleblower's non-waivable consent to provide the Agency with the original WB–INFO form for the potential whistleblower in the event that the Agency requests it.

(d) If a potential whistleblower submitted original information to the Agency after December 4, 2015, but before [effective date of final rule], the submission will be deemed to satisfy the requirements set forth in paragraphs (a) and (b) of this section.

### § 513.5 Confidentiality.

(a) *In general.* Notwithstanding 49 U.S.C. 30167, the Secretary and any officer or employee of the U.S. Department of Transportation shall not disclose any information, including information provided by a whistleblower to the Secretary, that could reasonably be expected to reveal the identity of a whistleblower, except in accordance with the provisions of 5 U.S.C. 552a, unless:

(1) Disclosure is required to a defendant or respondent in connection with a public proceeding instituted by the Secretary, the Agency, or any entity described in paragraph (c) of this section;

(2) The whistleblower provides prior written consent for the information to be disclosed; or

(3) The Secretary, or other officer or employee of the U.S. Department of Transportation, receives the information through another source, such as during an inspection or investigation under 49 U.S.C. 30166, and has the authority under other law to release the information.

(b) *Use by Attorney General.* Notwithstanding paragraph (a) of this section, nothing in this section is intended to limit the ability of the Attorney General to present such

evidence to a grand jury or to share such evidence with potential witnesses or defendants in the course of an ongoing criminal investigation.

(c) *Availability to Federal Government agencies.* Notwithstanding paragraph (a) of this section, without the loss of its status as confidential in the hands of the Administrator, all information referred to in paragraph (a) of this section may, in the discretion of the Administrator, when determined by the Administrator to be necessary or appropriate to accomplish the purposes of 49 U.S.C. chapter 301, be made available to the U.S. Department of Justice or an appropriate department or agency of the Federal Government, acting within the scope of its jurisdiction, provided that each entity shall maintain information as confidential in accordance with the requirements of paragraph (a) of this section.

(d) *Redaction.* When disclosing any information under paragraph (a) of this section, the Secretary and any officer or employee of the U.S. Department of Transportation shall take reasonable measures not to reveal the identity of the whistleblower by taking measures not to reveal the whistleblower's name, and redacting the whistleblower's name when information is disclosed under paragraph (a) of this section.

(e) *Section 552(b)(3)(B).* The identity of the whistleblower and the information provided to Secretary by the whistleblower shall be considered exempt from disclosure under the provisions of 5 U.S.C. 552 to the fullest extent permitted by law.

(f) *The whistleblower.* The person should self-identify as a whistleblower at the time the person first submits original information relating to any potential motor vehicle defect, potential noncompliance, or any violation or alleged violation of any notification or reporting requirements under 49 U.S.C. chapter 301, or the regulations in this chapter, by submitting a WB–INFO form. If the person is represented by a legal representative, that legal representative should identify the client as a whistleblower at the time the legal representative first submits original information relating to any potential motor vehicle defect, potential noncompliance, or any violation or alleged violation of any notification or reporting requirements under 49 U.S.C. chapter 301, or the regulations in this chapter, on behalf of the legal representative's client in the WB–INFO form.

**§ 513.6 Prerequisites to the consideration of an award.**

(a) Subject to the eligibility requirements described in this part, NHTSA may, but is not required to, authorize payment of an award to one or more persons who:

(1) Provide a voluntary submission to the Agency;

(2) Provides in that submission original information relating to any potential motor vehicle defect, potential noncompliance, or any violation or alleged violation of any notification or reporting requirement of 49 U.S.C. chapter 301, or the regulations in this chapter, which is likely to cause unreasonable risk of death or serious physical injury; and

(3) The original information provided in that submission leads to the successful resolution of a covered action.

(b) To be eligible, the person must have given the Agency original information in the form and manner that the Agency requires in § 513.4. The Agency may, for good cause, waive this requirement in this paragraph (b).

**§ 513.7 Whistleblowers ineligible for an award.**

No award under § 513.10 shall be made:

(a) If the amount of monetary sanctions collected in a covered action does not exceed $1,000,000;

(b) To any whistleblower who is convicted of a criminal violation related to the covered action for which the whistleblower otherwise could receive an award under this part;

(c) To any whistleblower who, acting without direction from an applicable motor vehicle manufacturer, part supplier, or dealership, or agent thereof, deliberately causes or substantially contributes to the alleged violation of a requirement of 49 U.S.C. chapter 301, or the regulations in this chapter;

(d) To any whistleblower who submits information to the Agency that is based on the facts underlying the covered action submitted previously by another whistleblower;

(e) To any whistleblower who fails to provide the original information to the Agency in the form required by § 513.4 without good cause shown;

(f) To any whistleblower who knowingly and intentionally makes any false, fictitious, or fraudulent statement or representation, or who makes or uses any false writing or document knowing the same to contain any false, fictitious, or fraudulent statement or entry; or

(g) If the applicable motor vehicle manufacturer, parts supplier, or dealership has an internal reporting mechanism in place to protect employees from retaliation to any whistleblower who fails to report or attempt to report the information through such mechanism, unless:

(1) The whistleblower reasonably believed that such an internal report would have resulted in retaliation, notwithstanding 49 U.S.C. 30171(a);

(2) The whistleblower reasonably believed that the information:

(i) Was already internally reported;

(ii) Was already subject to or part of an internal inquiry or investigation; or

(iii) Was otherwise already known to the motor vehicle manufacturer, part supplier, or dealership; or

(3) The Agency has good cause to waive this requirement in this paragraph (g).

**§ 513.8 Provision of false information.**

A person who knowingly and intentionally makes any false, fictitious, or fraudulent statement or representation, or who makes or uses any false writing or document knowing the same to contain any false, fictitious, or fraudulent statement or entry, shall not be entitled to an award under this section and shall be subject to prosecution under 18 U.S.C. 1001.

**§ 513.9 Procedures for making a claim for a whistleblower award.**

Whenever any administrative or judicial action, including any related administrative or judicial action, brought by the U.S. Department of Transportation, Agency, or U.S. Department of Justice under 49 U.S.C. chapter 301 in the aggregate results in collected monetary sanctions exceeding $1,000,000, the Agency will publish on the Agency's website a ''Notice of Covered Action.'' Such Notice will be published subsequent to a final judgment, order, or agreement that alone, or in the aggregate, results in collected monetary sanctions exceeding $1,000,000. A claimant will have ninety (90) days from the date of the Notice of Covered Action to file a claim, including any attachments, for an award based on that action, or the claim will be barred. The claim is deemed filed on the date that it is received by the Agency.

(a) To file a claim for a whistleblower award, the claimant must complete the WB–AWARD form and submit it no later than ninety (90) calendar days from the date of the Notice of Covered Action to NHTSA's Office of the Chief Counsel by email to *NHTSAWhistleblower@dot.gov* or another method expressly designated on NHTSA's website.

(b) If the claimant provided original information anonymously pursuant to

§ 513.4, the claimant must disclose the claimant's identity on the WB–AWARD form and the claimant's identity must be verified in a form and manner that is acceptable to the Agency prior to the authorization of payment of any award to such claimant.

(c) If a claimant filed a claim for a whistleblower award after December 4, 2015 (the date of the enactment of the Fixing America's Surface Transportation (FAST) Act, but before [effective date of final rule], the claim submission will be deemed to meet the requirements of § 513.9.

**§ 513.10 Award determinations.**

Once the time for filing any appeals of the covered action (and all related actions) has expired, or where an appeal has been filed, after all appeals in the covered action and related actions have concluded, and over $1,000,000 in monetary sanctions have been collected, the Agency will evaluate all timely whistleblower award claims submitted on a WB–AWARD form in accordance with the criteria set forth in this part. The Agency may require the claimant to provide additional information relating to the claimant's eligibility for an award or satisfaction of any of the conditions for an award.

(a) The determination of whether, to whom, or in what amount to make an award shall be in the discretion of the Administrator. In determining whether to grant an award to a whistleblower eligible for an award and the amount of an award, the Administrator shall take into consideration, as appropriate:

(1) Whether a whistleblower reported or attempted to report the information internally to an applicable motor vehicle manufacturer, part supplier, or dealership;

(2) The significance of the original information provided by the whistleblower to the successful resolution of the covered action;

(3) The degree of assistance provided by the whistleblower and any legal representative of the whistleblower in the covered action;

(4) The statutory purpose of incentivizing whistleblowers; and

(5) The public interest or such additional factors as the Administrator considers relevant.

(b) If the Administrator determines that an award is warranted, the Administrator shall determine the amount of such award or awards to one or more whistleblowers. Whistleblower awards shall be in an aggregate amount equal to:

(1) Not less than 10 percent, in total, of monetary sanctions collected in the covered action; and

(2) Not more than 30 percent, in total, of monetary sanctions collected in the covered action.

(c) Following the Administrator's determination, the Agency will send each whistleblower claimant an Order setting forth whether the claim is granted or denied, and if granted, setting forth the award amount. If the Administrator determines that an award is warranted, in no event will the total amount awarded to all whistleblowers in the aggregate be less than 10 percent or greater than 30 percent of the amount of monetary sanctions collected in the covered action.

(d) No contract with the Agency is necessary for a whistleblower to receive an award.

**§ 513.11 Appeals of award determinations.**

(a) A claimant may appeal any determination made by the Administrator under § 513.10 to an appropriate court of appeals of the United States not later than 30 days after the Order is issued by the Administrator.

(1) If no claimant files an appeal within 30 days after the Order is issued by the Administrator, no appeals are permitted with respect to the claim that is the subject of the Order.

(2) If any claimant appeals within 30 days after the Order is issued by the Administrator, no payments with respect to the covered action will be made until the appealed award determination action is concluded.

(3) The rules in paragraph (a)(1) and (2) of this section do not entitle claimants to obtain from the Agency any privileged materials such as pre-decisional, attorney-client privilege, attorney work product privilege, or internal deliberative process materials related to the Administrator's Order and/or any privileged material relating to whether, to whom, and in what amount to make a whistleblower award.

(b) The Agency may make redactions to the materials constituting the record as necessary, including but not limited to making redactions to comply with statutory restrictions, the Agency's enforcement and regulatory functions and regulations, and to comply with requests for confidential treatment from law enforcement, regulatory authorities, or persons submitting information to the Agency pursuant to part 512 of this chapter.

(c) Pursuant to 49 U.S.C. 30172(h)(3), the court shall review the determination made by the Administrator in accordance with 5 U.S.C. 706.

**§ 513.12 Procedures applicable to the payment of awards.**

(a) A recipient of a whistleblower award is entitled to payment on the award only to the extent that a monetary sanction upon which the award is based is collected in the covered action.

(b) Payment of a whistleblower award for a monetary sanction collected in connection with a covered action shall be made within a reasonable time following the later of:

(1) The date on which the monetary sanction totaling over $1,000,000 is collected; or

(2) The completion of the appeals process for all award determination claims arising from the Administrator's Order relating to the covered action.

## Appendix A to Part 513—Form WB–INFO

BILLING CODE 4910–59–P

**UNITED STATES DEPARTMENT OF TRANSPORTATION**

**NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION ("NHTSA")**

OMB APPROVAL
OMB Number:
NHTSA Form 1684

**FORM WB-INFO**

**WHISTLEBLOWER SUBMISSION**

See attached Privacy Act Statement, Submission Procedures and Completion Instructions below.

## A. INFORMATION ABOUT YOURSELF

| | | | |
|---|---|---|---|
| 1. Last Name | | 2. First Name | 3. M.I. |
| 4. Street Address | | | 5. Apartment/Unit # |
| 6. City | 7. State/Province | 8. ZIP/Postal Code | 9. Country |
| 10. Telephone | 11. Alt. Phone | 12. Email Address | 13. Preferred Method of Communication |
| 14. Occupation | | | |
| 15. Current Employer Name | | | |
| 16. Current Employer Address | | | |
| 17. Your relationship to the company about whom the concern is raised: | | | |

## B. INFORMATION ABOUT THE MOTOR VEHICLE MANUFACTURER, PART SUPPLIER, OR DEALERSHIP ABOUT WHOM THE CONCERN IS RAISED:

| |
|---|
| 1. Company Name |
| 2. Street Address |

| 3. City | 4. State/Province | 5. ZIP/Postal Code | 6. Country |
|---|---|---|---|
| 7. Do you or did you work for the motor vehicle manufacturer, part supplier or dealership about whom the concern is raised?<br><br>[] Yes [] No<br><br>If yes, please provide dates | | | |
| 8. Does this motor vehicle manufacturer, part supplier or dealership have an internal reporting mechanism? | | | |
| 9. If the answer to number 8 above is yes, did you report this issue to the internal reporting mechanism?<br><br>[] Yes. Date Reported: _____ | | | |

| **C. LEGAL REPRESENTATIVE INFORMATION (If Applicable – See Instructions)** | | | |
|---|---|---|---|
| 1. Legal representative's Name | | | |
| 2. Firm Name | | | |
| 3. Street Address | | | |
| 4. City | 5. State/Province | 6. ZIP/Postal Code | 7. Country |
| 8. Telephone | 9. Email address | | |

| **D. TELL US ABOUT THE ISSUE INVOLVING THE MOTOR VEHICLE MANUFACTURER, PART SUPPLIER OR DEALERSHIP:** | |
|---|---|
| 1. Date(s) of alleged conduct: | 2. Is the conduct ongoing?<br><br>[] Yes [] No [] I Don't Know |
| 3a. Have you or your legal representative had any prior communication with the NHTSA concerning this matter? [] Yes [] No<br><br>3b. If yes, provide the name of the NHTSA staff member(s) with whom you or your legal representative communicated and date of such communication: | |

| |
|---|
| 4a. Is your allegation related to a potential safety-related defect or a noncompliance with an applicable Federal Motor Vehicle Safety Standard? [] Yes [] No<br><br>4b. If yes, please provide a detailed description of allegation and a detailed description of how the allegation affects vehicle/system/component performance and/or compliance. Please include the make, model, model year, part number, component number, etc. if known |
| 5a. Is your allegation related to any violation or alleged violation of any notification or reporting requirement of the Safety Act? [] Yes [] No<br><br>5b. Provide a description of the notification or reporting issue. State in detail all facts pertinent to the alleged violation. |
| 6. Describe all supporting materials in your possession and the availability and location of any additional supporting materials not in your possession. If necessary, please use additional sheets. |

| **E. ADDITIONAL INFORMATION- USE ADDITIONAL SHEETS IF NECESSARY** |
|---|
| 1. Describe how you learned about or obtained the information that supports your allegations. In addition, if any information was obtained from a public source, identify the source with as much particularity as possible. |
| 2. Identify with particularity any documents or other information in your submission that you believe could reasonably be expected to reveal your identity and explain the basis for your belief that your identity could be reasonably expected to be revealed if the documents or information were disclosed to a third party. |
| 3a. Have you or your legal representative taken any other action regarding the issue or your allegations? [] Yes [] No<br>3b. If "Yes," please provide details. Use additional sheets, if necessary. |

| |
|---|
| 4. Did you acquire the information through a means or manner that has been determined by a United States Federal court or a State court to violate applicable Federal or State criminal law? [] Yes [] No<br><br>**If the answer to this question is yes, please contact NHTSA's Office of the Chief Counsel before you submit this form.** |
| 5. Did you acquire the original information that you are submitting to NHTSA solely through a communication that was subject to a privilege, such as the attorney-client privilege or attorney work product doctrine? [] Yes [] No<br><br>**If the answer to this question is yes, please contact NHTSA's Office of the Chief Counsel before you submit this form.** |
| 6. Provide any additional information that you think may be relevant. Attach additional sheets if necessary. |

| **F. PROSPECTIVE WHISTLEBLOWER'S DECLARATION** | |
|---|---|
| I declare under penalty of perjury under the laws of the United States that the information contained herein is true and correct to the best of my knowledge, information and belief. I fully understand that I may be subject to prosecution and ineligible for a whistleblower award if, in my submission of information, my other dealings with the National Highway Traffic Safety Administration, or my dealings with another authority in connection with a related action, I knowingly and willfully make any false, | |
| Print Name | |
| Signature | Date |

| **G. LEGAL REPRESENTATIVE CERTIFICATION (IF APPLICABLE)** |
|---|

| |
|---|
| I certify that I have reviewed this form for accuracy and that the information contained herein is true and correct to the best of my knowledge, information and belief.<br><br>I further certify that I have verified the identity of the person on whose behalf this form is being submitted by viewing the person's valid, unexpired government issued identification (*e.g.*, driver's license, passport) and will retain an original, signed copy of this form, with Section F signed by the person, in my records. |
| Print Name of Legal representative and Law Firm, if Applicable |

| | |
|---|---|
| Signature | Date |

Please be advised that pursuant to 5 C.F.R. § 1320.5(b)(2)(i), you are not required to respond to this collection of information unless it displays a currently valid OMB control number.

**Privacy Act Statement**

The Privacy Act of 1974 requires that the National Highway Traffic Safety Administration (NHTSA) inform individuals of the following when asking for information. This form may be used by an employee or contractor of a motor vehicle manufacturer, part supplier, or dealership, or a legal representative acting on such person's behalf, who wishes to provide NHTSA with information relating to any potential motor vehicle defect, potential noncompliance, or any violation or alleged violation of any notification or reporting requirements of 49 U.S.C. Chapter 301 or regulation thereunder, which is likely to cause unreasonable risk of death or serious physical injury. The information provided will allow the Agency to evaluate the claim and elicit information relevant to whistleblower eligibility requirements. This information may be disclosed to the U.S. Department of Justice or an appropriate department or agency of the Federal Government, acting within the scope of its jurisdiction, consistent with the confidentiality requirements set forth in 49 U.S.C. 30172(f). NHTSA may also disclose information that could reasonably be expected to reveal the identity of a whistleblower in certain limited situations, including when the whistleblower provides prior written consent. *Id.*

Furnishing the information contained in this form is voluntary but a decision not to do so will result in you not being eligible for award consideration.

Questions concerning this form may be directed to the National Highway Traffic Safety Administration, Office of the Chief Counsel by email to *NHTSAWhistleblower@dot.gov*.

**Notice of Whistleblower Rights and Protections**

This brief description will provide you with an overview of the whistleblower rights and protections.

Whistleblowers, as that term is defined in 49 U.S.C. 30172(a)(6), have a right to keep their identity confidential in most situations. 49 U.S.C. 30172(f). Generally speaking, any information which reasonably could be expected to reveal the identity of a whistleblower can be disclosed only under limited circumstances. One circumstance where NHTSA could reveal such information is if the whistleblower gives prior written consent. 49 U.S.C. 30172(f)(1)(B).

The Freedom of Information Act (FOIA), 5 U.S.C. 552, gives the public access to records of the Federal Government. Individuals can obtain information from many categories of records of the Government—not just materials that apply to them personally. NHTSA must honor requests under the FOIA, with some exceptions. Information that could reasonably be expected to reveal the identity of a whistleblower is exempted from FOIA disclosure by statute. *See* 49 U.S.C. 30172(f)(3); 5 U.S.C. 552(b)(3)(B).

NHTSA may disclose information that could reasonably be expected to reveal the identity of a whistleblower if it follows the provisions of 5 U.S.C. 552a (the Privacy Act of 1974). 49 U.S.C. 30172(f)(1). The Privacy Act prohibits the disclosure of information from a system of records (where information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual) absent the written consent of the subject individual, unless the disclosure is pursuant to one of the twelve statutory conditions.

Furthermore, under 49 U.S.C. 30171, employees providing certain motor vehicle safety information have protections from discrimination. Under 49 U.S.C. 30171(a)(1), a motor vehicle manufacturer, parts supplier or dealership may not discharge an employee or otherwise discriminate against the employee because the employee provided, caused to be provided, or is about to provide (with knowledge of the employer) or cause to be provided to the employer or the Secretary of Transportation information relating to any motor vehicle defect, noncompliance, or any violation or alleged violation of any notification or reporting requirement of the Safety Act (49 U.S.C. Chapter 301).

**OMB Statement**

A federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a current valid OMB Control Number. NHTSA estimates that completing and submitting this form will take approximately 10 hours. The OMB Control Number for this information collection is 2127–XXXX. Please send comments to the Agency regarding the accuracy of this estimate and any suggestions for reducing this burden.

The information requested on the WB–INFO form is voluntary; however, under 49 CFR part 513 potential whistleblower is required to submit a WB–INFO form [1] and to submit a WB–AWARD form in order to qualify for a whistleblower award.[2]

The data on the WB–INFO would be used to permit the Agency and its staff to collect information from potential whistleblowers regarding any potential motor vehicle defect, potential noncompliance, or any violation or alleged violation of any notification or reporting requirement of the Safety Act or regulation thereunder, which is likely to cause unreasonable risk of death or serious physical injury. The Agency anticipates that this information will be submitted to a dedicated email address or other method specifically designated on NHTSA's website. NHTSA intends to treat the information as

[1] 49 U.S.C. 30172(c)(2)(D).

[2] *See* 49 CFR 513.4 and 513.9(b).

confidential under the provisions of 49 U.S.C. 30172(f).

**General Information**

- To be eligible for an award under NHTSA's whistleblower program, you must first provide us with your information through one of two ways. After completing this WB–INFO form, send it to NHTSA electronically to *NHTSAWhistleblower@dot.gov*, or submit it by any such method that the Agency may expressly designate on its website *(https://www.nhtsa.gov/laws-regulations/whistleblower-program).*
- Submitting your information is the first step. If the information you submit leads to the successful resolution of a covered action that in the aggregate results in collected monetary sanctions exceeding $1,000,000, you will have an opportunity at a later date to submit a claim for an award. That is a separate process and is described in our whistleblower rules at 49 CFR part 513.
- You have the right to submit information anonymously. If you are submitting information anonymously, you must be represented by a legal representative in this matter and Sections C and G of this form must be completed. Otherwise, you may, but are not required to have a legal representative. If you are submitting information anonymously, please skip Part I of these instructions and proceed directly to Part II. Otherwise, please begin by following the instructions in Part I.

**Part I: Instructions for Filers Who Are Disclosing Their Identity to NHTSA**

- You are required to complete Sections A, B, D, E, and F of this form. If you are represented by a legal representative in this matter, you must also complete section C. Specific instructions for answering these questions can be found in Part IV below.
- If you are represented, your legal representative does not need to complete Section G.
- You will need to submit the WB–INFO form in accordance with the Submission Procedures in 49 CFR part 513.

**Part II: Instructions for Anonymous Filers**

- If you are submitting information anonymously, you must be represented by a legal representative on this matter.
- You are required to complete Sections A, B, C, D, E, and F of this form and give the signed original to your legal representative. Specific instructions for answering these questions can be found in Part IV below.
- Your legal representative must retain your signed original WB–INFO form.

**Part III: Instructions for Legal Representatives Representing Anonymous Filers**

- Obtain a completed and signed original WB–INFO form, filled out in accordance with the Part II above. You must retain this signed original in your records.
- You must prepare a WB–INFO form, completing Sections B, C, D, and E with your client's information. You must also sign the declaration in Section G.
- You will need to submit the WB–INFO form you completed in accordance with submission procedures in 49 CFR part 513.

**Part IV: Instructions for Completing Form WB–INFO**

*Section A: Information About Yourself*

*Questions 1–16:* Please provide the following information about yourself:

- Last Name, First Name, and Middle Initial;
- Complete Address, including city, state/province, zip/postal code, and country;
- Your telephone number, and if available, an alternate number where you can be reached;
- Your email address (to facilitate communications, we strongly encourage you to provide your email address);
- Your preferred method of communication;
- Your occupation;
- Your current employer,
- Your current employer's address, and
- Your relationship to the company about whom the concern is raised.

*Section B: Information About the Motor Vehicle Manufacturer, Part Supplier, or Dealership About Whom the Concern Is Raised*

*Questions 1–7:* Please provide the following information about the motor vehicle manufacturer, part supplier, or dealership about whom the concern is raised:

- Company name of the motor vehicle manufacturer, part supplier or dealership;
- Complete address of the motor vehicle manufacturer, part supplier, or dealership, including city, state/province, zip/postal code, and country; and
- Complete whether you work or worked for the motor vehicle manufacturer, part supplier, or dealership about whom the concern is raised. If yes, please provide dates that you work or worked for the company. If no, provide the name of the motor vehicle manufacturer, part supplier, or dealership you work or worked for.

*Question 8:* Please check the correct box stating whether the motor vehicle manufacturer, part supplier, or dealership about whom the concern was raised has or had an internal reporting mechanism. The choices are yes, no, and I don't know.

*Question 9:* If you checked the ''yes'' box in response to the question of whether the motor vehicle manufacturer, part supplier or dealership had an internal reporting mechanism, please provide the following information:

- If you reported the issue to your company's internal reporting mechanism, check the box ''yes'' and provide the date that you reported to the internal reporting mechanism.
- If you did not report the issue to your company's internal reporting mechanism, check the box ''no'' and provide your reason for not reporting to the internal reporting mechanism.

*Section C: Legal Representative Information*

Complete this section only if you are represented by a legal representative in this matter. You must be represented by a legal representative, and this section must be completed, if you are submitting your information anonymously and you want to be considered for an award under NHTSA's whistleblower program.

*Questions 1–9:* Provide the following information about the legal representative representing you in this matter:

- Legal representative's name;
- The firm name;
- The firm's complete address, including city, state, and zip code;
- Your legal representative's telephone number; and
- Your legal representative's email address.

*Section D: Tell Us About the Issue Involving the Motor Vehicle Manufacturer, Part Supplier, or Dealership*

*Question 1:* Please provide the date that the alleged conduct began.

*Question 2:* Check the option that best describes whether the alleged conduct is ongoing.

*Question 3a:* Indicate whether you or your legal representative had any prior communication with the National Highway Traffic Safety Administration (''NHTSA'') concerning this matter.

*Question 3b:* If you answered ''yes'' to Question 3a, provide the name of the NHTSA staff member(s) with whom you or your counsel communicated and date of such communication.

*Question 4a:* Check the option that best describes whether your allegation is related to a potential safety-related defect or noncompliance with an applicable Federal Motor Vehicle Safety Standard (FMVSS).

*Question 4b:* If you answered ''yes'' to Question 4a, provide a detailed description of the allegation and a detailed description of how the allegation affects vehicle/system/component performance and/or compliance. Please include the make, model, model year, part number, component number, etc. if known.

*Question 5a:* Check the option that best describes whether your allegation is related to any violation or alleged violation of any notification or reporting requirement of the Safety Act?

*Question 5b:* If you answered ''yes'' to Question 5a, provide a description of the notification or reporting issue. State in detail all facts pertinent to the alleged violation.

*Question 6:* Describe all supporting materials in your possession and the availability and location of additional supporting materials not in your possession. Attach additional sheets if necessary.

*Section E: Additional Information*

*Question 1:* Describe how you learned about or obtained the information that supports your allegations. In addition, if any information was obtained from a public source, identify the source with as much particularity as possible. Attach additional sheets if necessary.

*Question 2:* Identify with particularity any documents or information in your submission that you believe could reasonably be expected to reveal your identity, and explain the basis for your belief that your identity could be reasonably expected to be revealed if the documents or information were disclosed to a third party.

*Question 3a:* Check the option that best describes whether you or your legal representative have taken any other action regarding the issue or your allegations.

*Question 3b:* If your answer to Question 3a was ''Yes,'' provide details. Use additional sheets if necessary.

*Question 4:* Check the option that best describes whether you acquired information through a means or manner that has been determined by a United States Federal court or a State court to violate applicable Federal or State criminal law. The question also contains a statement that if the answer to this question is yes, to please contact NHTSA's Office of the Chief Counsel before you submit this form.

*Question 5:* Check the option that best describes whether you acquired the original information that you are submitting to NHTSA solely through a communication that was subject to a privilege, such as the attorney-client privilege or attorney work product doctrine. The question also contains a statement that if the answer to this question is yes, to please contact NHTSA's Office of the Chief Counsel before you submit this form.

*Question 6:* Provide any additional information that you think may be relevant. Attach additional sheets if necessary.

*Section F: Prospective Whistleblower's Declaration*

This is to be completed and signed by the person submitting the information.

*Section G: Legal Representative Certification*

This is to be completed and signed by an legal representative for an anonymous person submitting information. If you have a legal representative and are not submitting this form anonymously, this section does not need to be completed.

BILLING CODE 4910–59–P

## Appendix B to Part 513—Form WB–RELEASE

**UNITED STATES DEPARTMENT OF TRANSPORTATION**

**NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION ("NHTSA")**

OMB APPROVAL
OMB Number:
NHTSA Form 1685

**FORM WB-RELEASE**

**WHISTLEBLOWER RELEASE FORM**

See attached Notice of Whistleblower Rights and Protections, Privacy Act Statement, Submission Procedures and Completion Instructions below.

| **A. Information** | | | |
|---|---|---|---|
| 1. Last Name | 2. First Name | | 3. M.I. |
| 4. Street Address | | | 5. Apartment/Unit # |
| 6. City | 7. State/Province | 8. ZIP/Postal Code | 9. Country |
| 10. Name of the motor vehicle manufacturer, part supplier and/or dealership to which this issue relates: | | | |

| **B. Release** |
|---|

I understand that in the course of an inquiry or analysis surrounding my allegations, it may become necessary for NHTSA to reveal information that reasonably could be expected to reveal my identity to persons or their counsel or agents at the organization or institution against whom such allegations are made or other entities.

☐ **CONSENT** - I have read and understand the above information and authorize NHTSA to reveal any information that could reasonably be expected to reveal my identity to persons at the organization or institution against whom my allegations are made, or their agents or counsel, to governmental entities outside the United States and to other

| **C. Prospective Whistleblower's Signature** | |
|---|---|
| Signature | Date |

Please be advised that pursuant to 5 C.F.R. § 1320.5(b)(2)(i), you are not required to respond to this collection of information unless it displays a currently valid OMB control number.

**Notice of Whistleblower Rights and Protections**

This brief description will provide you with an overview of the whistleblower rights and protections.

Whistleblowers, as that term is defined in 49 U.S.C. 30172(a)(6), have a right to keep their identity confidential in most situations. 49 U.S.C. 30172(f). Generally speaking, any information which reasonably could be expected to reveal the identity of a whistleblower can be disclosed only under limited circumstances. One circumstance where NHTSA could reveal such information is if the whistleblower gives prior written consent. 49 U.S.C. 30172(f)(1)(B).

The Freedom of Information Act (FOIA), 5 U.S.C. 552, gives the public access to records of the Federal Government. Individuals can obtain information from many categories of records of the Government—not just materials that apply to them personally. NHTSA must honor requests under the FOIA, with some exceptions. Information that could reasonably be expected to reveal the identity of a whistleblower is exempted from FOIA disclosure by statute. *See* 49 U.S.C. 30172(f)(3); 5 U.S.C. 552(b)(3)(B).

NHTSA may disclose information that could reasonably be expected to reveal the identity of a whistleblower if it follows the provisions of 5 U.S.C. 552a (the Privacy Act of 1974). 49 U.S.C. 30172(f)(1). The Privacy Act prohibits the disclosure of information from a system of records (where information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual) absent the written consent of the subject individual, unless the disclosure is pursuant to one of the twelve statutory conditions.

Furthermore, under 49 U.S.C. 30171, employees providing certain motor vehicle safety information have protections from discrimination. Under 49 U.S.C. 30171(a)(1), a motor vehicle manufacturer, parts supplier or dealership may not discharge an employee or otherwise discriminate against the employee because the employee provided, caused to be provided, or is about to provide (with knowledge of the employer) or cause to be provided to the employer or the Secretary of Transportation information relating to any motor vehicle defect, noncompliance, or any violation or alleged violation of any notification or reporting requirement of the Safety Act (49 U.S.C. 30101 et. seq.).

**Privacy Act Statement**

The Privacy Act of 1974 requires that the National Highway Traffic Safety Administration (''NHTSA'') inform individuals of the following when asking for information. This form may be used by an employee or contractor of a motor vehicle manufacturer, part supplier, or dealership who wishes to provide prior written consent for the Agency to disclose information which could reasonably be expected to reveal their identity. Furnishing this form is voluntary.

Questions concerning this form may be directed to the National Highway Traffic Safety Administration, Office of the Chief Counsel by email at *NHTSAWhistleblower@dot.gov*, or a NHTSA attorney with whom you have previously been in contact.

**OMB Statement**

A federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a current valid OMB Control Number. NHTSA estimates that completing and submitting this form will take approximately 15 minutes. The OMB Control Number for this information collection is 2127–XXXX. Please send comments to the Agency regarding the accuracy of this estimate and any suggestions for reducing this burden.

The information requested on the WB–RELEASE form is voluntary. The WB–RELEASE form is for those potential whistleblowers who wish to provide prior written consent for the Agency to disclose information which could reasonably be expected to reveal the potential whistleblower's identity.

The Agency anticipates that this form will be submitted to a dedicated email address or other method specifically designated on NHTSA's website. NHTSA intends to treat the information as confidential under the provisions of 49 U.S.C. 30172(f).

**General Information and Submission Procedures**

- This form should be used by persons that want to provide prior written consent to the Agency to disclose information which could reasonably be expected to reveal their identity.

- You must sign the WB–RELEASE form as the prospective whistleblower.
- You must submit your form to NHTSA in one of the following ways: by emailing it to *NHTSAWhistleblower@dot.gov* or by any such method that the Agency may expressly designate on its website (*https://www.nhtsa.gov/laws-regulations/whistleblower-program*).

**Instructions for Completing Form WB–RELEASE**

*Section A: Information*

*Questions 1–9:* Please provide the following information about yourself:

- Last Name, First Name, and Middle Initial;
- Complete address, including city, state/province, zip/postal code, and country

*Question 10:* Please provide the name of motor vehicle manufacturer, part supplier and/or dealership to which the issue relates.

*Section B: Release*

Check the box before the word ''CONSENT'' to indicate your consent to allow the Agency to reveal any information that could reasonably be expected to reveal your identity to persons at the organization or institution against whom your allegations are made, or their agents or counsel, to governmental entities outside the United States and to other persons or entities that NHTSA determines should have access to this information to assist in NHTSA's analysis, inquiry or investigation.

This section also informs you that you are not required to consent to this release and that you do so voluntarily.

*Section C: Prospective Whistleblower's Signature*

This section must be signed and dated by the prospective whistleblower.

## Appendix C to Part 513—Form WB–AWARD

**UNITED STATES DEPARTMENT OF TRANSPORTATION**

**NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION ("NHTSA")**

| OMB APPROVAL |
|---|
| OMB Number: |
| NHTSA Form 1686 |

# FORM WB-AWARD

# WHISTLEBLOWER AWARD APPLICATION

See attached Privacy Act Statement, Submission Procedures and Completion Instructions below.

| **A. CLAIMANT'S INFORMATION (REQUIRED FOR ALL SUBMISSIONS)** | | | |
|---|---|---|---|
| 1. Last Name | 2. First Name | 3. M.I. | |
| 4. Street Address | | 5. Apartment/Unit # | |
| 6. City | 7. State/Province | 8. ZIP/Postal Code | 9. Country |
| 10. Telephone | 11. Alt. Phone | 12. Email Address | 13. Preferred Method of Communication |

| **B. LEGAL REPRESENTATIVE INFORMATION (If Applicable – See Instructions)** |
|---|
| 1. Legal Representative's Name |
| 2. Firm Name |
| 3. Street Address |

| 4. City | 5. State/Province | 6. ZIP/Postal Code | 7. Country |
|---|---|---|---|
| 8. Telephone | 9. Email Address | | |

Please be advised that pursuant to 5 C.F.R. § 1320.5(b)(2)(i), you are not required to respond to this collection of information unless it displays a currently valid OMB control number.

| **C. ELIGIBILITY REQUIREMENTS AND OTHER INFORMATION** |
|---|
| 1. Did you acquire the original information that you submitted to NHTSA solely through a communication that was subject to the attorney-client privilege or attorney work product doctrine? |
| 2. Did you acquire the original information that you submitted to NHTSA by a means or manner that was determined by a United States Federal court or State court to violate applicable Federal or State criminal law? |
| 3. Are you currently a subject or target of a criminal investigation, or have you been convicted of a criminal violation, in connection with the allegations or conduct that you submitted to the NHTSA? |
| 4. Indicate whether any of the factors in 49 CFR 513.7 apply, which could make you ineligible for an award.<br><br>[] Yes [] No |
| 5. If you answered "Yes" to any of Questions above, provide details. Use additional sheets, if necessary. |

| **D. ISSUE DETAILS** |
|---|
| 1. How did you submit original information to NHTSA<br><br>[] By email to NHTSAWhistleblower@dot.gov<br><br>[] Other: |
| 2. Date that you submitted the information: |
| 3. Name of motor vehicle manufacturer, part supplier and/or dealership to which this issue relates |

| **E. NOTICE OF COVERED ACTION AND RELATED ACTION** |
|---|
| 1. Date of relevant Notice of Covered Action |
| 2. Notice Number |
| 3. Case Name |
| 4. Case Number |
| 5. Date of relevant Notice of Covered Action for any related action |
| 6. Notice Number of Related Action |
| 7. Case Name of Related Action |
| 8. Case Number of Related Action |

| **F. AWARD JUSTIFICATION** |
|---|

| Explain the basis for your belief that you should receive an award in connection with your submission of information to NHTSA. Specifically address how you believe you voluntarily provided NHTSA with original information that led to the successful resolution of a covered action. Provide any information that you think may be relevant in light of the criteria for determining the amount of an award set forth in 49 U.S.C. § 30172 and 49 C.F.R. Part 513. Use additional sheets, if necessary. |
|---|

| G. CLAIMANT'S DECLARATION | |
|---|---|
| I declare under penalty of perjury under the laws of the United States that the information contained herein is true and correct to the best of my knowledge, information and belief. I fully understand that I may be subject to prosecution and ineligible for a whistleblower award if, in my submission of information or other interactions with the National Highway Traffic Safety Administration, or my dealings with another authority in connection with a related action, I knowingly and | |
| Print Name | |
| Signature | Date |

Please be advised that pursuant to 5 C.F.R. § 1320.5(b)(2)(i), you are not required to respond to this collection of information unless it displays a currently valid OMB control number.

**Privacy Act Statement**

The Privacy Act of 1974 requires that the National Highway Traffic Safety Administration ("NHTSA") inform individuals of the following when asking for information. This form may be used by an employee or contractor of a motor vehicle manufacturer, part supplier, or dealership, or a legal representative acting on such person's behalf, who wishes to apply for a whistleblower award for providing original information that led to the successful resolution of a covered action. The information provided will allow the Agency to evaluate the claim and elicit information relevant to whistleblower eligibility requirements. Furnishing the information is voluntary but a decision not to do so will result in you not being eligible for award consideration. Questions concerning this form may be directed to the National Highway Traffic Safety Administration, Office of the Chief Counsel by email to *NHTSAWhistleblower@dot.gov* or the NHTSA attorney with whom you have previously been in contact.

**OMB Statement**

A federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a current valid OMB Control Number. NHTSA estimates that completing and submitting this form will take approximately 10 hours. The OMB Control Number for this information collection is 2127–XXXX. Please send comments to the Agency regarding the accuracy of this estimate and any suggestions for reducing this burden.

The information requested on the WB–AWARD form is voluntary. However, under § 513.9(b), a WB–AWARD form must be submitted by the claimant in order for the

claimant to be eligible for a whistleblower award.

The Agency anticipates that this form will be submitted to a dedicated email address or other method specifically designated on NHTSA's website. NHTSA intends to treat the information as confidential under the provisions of 49 U.S.C. 30172(f).

**General Information**

- This form should be used by persons making a claim for a whistleblower award in connection with information provided to NHTSA. In order to be eligible for an award, you must meet all the requirements set forth in 49 U.S.C. 30172 and the rules thereunder, as contained in 49 CFR part 513.
- You must sign the WB–AWARD form as the claimant. If you provided your information to NHTSA anonymously, you must now disclose your identity on this form and your identity must be verified in a form and a manner that is acceptable to the Agency prior to the payment of any award.
- Your WB–AWARD form, and any attachments thereto, must be received by NHTSA within ninety (90) days of the date the Notice of Covered Action to which the claim relates.
- You must submit your form to NHTSA in one of following two ways: emailing it to *NHTSAWhistleblower@dot.gov* or by any such method that the Agency may expressly designate on its website (*https://www.nhtsa.gov/laws-regulations/whistleblower-program*).

**Instructions for Completing Form WB–AWARD**

*Section A: Claimant's Information*

*Questions 1–13:* Please provide the following information about yourself:

- Last Name, First Name, and Middle Initial;
- Your complete Address, including city, state/province, zip/postal code, and country;
- Your telephone number, and if available, an alternate number where you can be reached;
- Your email address (to facilitate communications, we strongly encourage you to provide your email address); and
- Your preferred method of communication.

*Section B: Legal Representative Information*

Complete this section only if you are represented by a legal representative in this matter. If you are not represented by a legal representative in this matter, leave this Section blank.

*Questions 1–9:* Provide the following information about the legal representative representing you in this matter:

- Your legal representative's name;
- The firm name;
- Your legal representative's complete address, including city, state, and zip code;
- Your legal representative's telephone number; and
- Your legal representative's email address.

*Section C: Eligibility Requirements and Other Information*

*Question 1:* Indicate whether you acquired the original information that you submitted to NHTSA solely through a communication that was subject to the attorney-client privilege or attorney work product doctrine.

*Question 2:* Indicate whether you acquired the original information that you submitted to NHTSA by a means or manner that was determined by a United States Federal court or State court to violate applicable Federal or State criminal law.

*Question 3:* Indicate whether you are currently a subject or target of a criminal investigation or whether you have been convicted of a criminal violation in connection with the allegations or conduct that you submitted to NHTSA.

*Question 4:* Indicate whether any of the factors in 49 CFR 513.7 apply, which could make you ineligible for an award.

*Question 5:* If you answered ''yes'' to Questions 1, 2, 3, or 4 above, provide details. Use additional sheets if necessary.

*Section D: Whistleblower Information Details*

*Questions 1–3:* Provide the following information about the whistleblower information that you submitted to NHTSA:

- Select the method by which you submitted original information to NHTSA. If you selected ''Other'' describe how you submitted the information;
- Provide the date that you submitted the original information to NHTSA;
- Provide the name of the motor vehicle manufacturer, part supplier, and/or dealership to which the issue relates.

*Section E: Notice of Covered Action*

The process for making a claim for a whistleblower award begins with the publication of a ''Notice of Covered Action'' on NHTSA's website. This notice is published whenever a judicial or administrative action brought under 49 U.S.C. Chapter 301 by NHTSA, the U.S. Department of Transportation or the U.S. Department of Justice results in collected monetary sanctions exceeding $1,000,000.

A Notice of Covered Action is published on NHTSA's website subsequent to the entry of a final judgment, order or agreement that by itself, or collectively with other judgments, orders or agreements previously entered in the action, results in collected monetary sanctions exceeding the $1,000,000 threshold.

*Question 1:* Provide the date of the Notice of Covered action to which this claim relates.

*Question 2:* Provide the notice number of the Notice of Covered Action.

*Question 3:* Provide the case name referenced in the Notice of Covered Action.

*Question 4:* Provide the case number referenced in the Notice of Covered Action.

*Question 5:* Provide the date of the relevant Notice of Covered Action for any related action.

*Question 6:* Provide the notice number of the related action.

*Question 7:* Provide the case name of the related action.

*Question 8:* Provide the case number of the related action.

*Section F: Award Justification*

Use this section to explain the basis for your belief that you should be granted an award in connection with your submission of information to NHTSA. Specifically address how you believe you voluntarily provided NHTSA with original information that led to the successful resolution of a covered action. Provide any information that you think may be relevant in light of the criteria for determining the amount of an award set forth in 49 U.S.C. 30172 and 49 CFR part 513.

49 U.S.C. 30172(c) provides that in determining an award made under 49 U.S.C. 30172(b), the Secretary shall take into consideration: (i) if appropriate, whether a whistleblower reported or attempted to report the information internally to an applicable motor vehicle manufacturer, part supplier, or dealership; (ii) the significance of the original information provided by the whistleblower to the successful resolution of the covered action; (iii) the degree of assistance provided by the whistleblower and any legal representative of the whistleblower in the covered action; and (iv) such additional factors as the Secretary considers relevant.

*Section G: Claimant's Declaration*

This section must be completed and signed by claimant.

Issued in Washington, DC, under authority delegated in 49 CFR 1.95.

**Ann Carlson,**

*Chief Counsel.*

[FR Doc. 2023–06894 Filed 4–13–23; 8:45 am]

**BILLING CODE 4910–59–C**

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